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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9117; Directorate Identifier 2016–NM–095–AD; Amendment 39–18775; AD 2017–01–08]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Airbus Model A330–200 Freighter, –200 and –300 series airplanes; and Airbus Model A340–200, –300, –500, and –600 series airplanes. This AD was prompted by reports of certain hydraulic reservoirs (HRs) becoming depressurized due to air leakage from the HR pressure relief valve (PRV). This AD requires repetitive inspections of the hydraulic fluid levels and nitrogen gas pressure in the HR for each hydraulic circuit, and if necessary, adjustment of the fluid level(s) and nitrogen pressure in affected HRs. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 10, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 10, 2017.

ADDRESSES: For service information identified in this final rule, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 45 80; email: *airworthiness.A330-A340@airbus.com;* Internet: *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9117.

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–2016–9117; 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 (telephone 800–647–5527) is Docket 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: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1138; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain A330–200 Freighter, –200 and –300 series airplanes; and Airbus Model A340–200, –300, –500, and –600 series airplanes. The NPRM published in the **Federal Register** on October 3, 2016 (81 FR 67937) (''the NPRM''). The NPRM was prompted by reports of certain HRs becoming depressurized due to air leakage from the HR PRV. The NPRM proposed to require repetitive inspections of the hydraulic fluid levels and nitrogen gas pressure in the HR for each hydraulic circuit, and if necessary, adjustment of the fluid level(s) and nitrogen pressure in affected HRs. We are issuing this AD to detect and correct air leakage from an HR PRV, which could lead to the loss of one or more hydraulic systems, with the possible result of loss of control of the airplane.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2016–0107, dated June 7, 2016, to correct an unsafe condition for certain Airbus Model A330–200 Freighter, –200 and –300 series airplanes; and Airbus Model A340–200, –300, –500, and –600 series airplanes. The MCAI states:

> Some events of depressurisation of hydraulic reservoirs have been reported, due to air leakage from the HR PRV [hydraulic reservoir pressure relief valve]. The results of the investigations revealed that the air leakage was due to the extrusion of the O-ring seal from the HR PRV. This may have happened during HR maintenance, testing or during flight, if HR over-filling was performed, as a result of which hydraulic fluid could pass through the PRV, causing [the] PRV seal to migrate from its nominal position, leading to loss of HR pressurisation.
>
> This condition, if not detected and corrected, could lead to the loss of one or more hydraulic systems, possibly resulting in loss of control of the aeroplane.
>
> Prompted by these findings, Airbus issued Alert Operators Transmission (AOT) A29L005–16 [dated January 28, 2016] to provide inspection instructions.
>
> For the reasons described above, this [EASA] AD requires repetitive inspections of the HR fluid level of each hydraulic circuit and, depending on findings, accomplishment of applicable corrective action(s). This [EASA] AD also requires actions when maintenance action is accomplished on hydraulic reservoirs.
>
> This [EASA] AD is considered as interim action and further [EASA] AD action may follow.

Required actions include repetitive inspection of the hydraulic fluid levels and nitrogen gas pressure in the HR for each hydraulic circuit, and if necessary, adjustment of the fluid level(s) and nitrogen pressure in affected HRs. 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–2016–9117.

Comments

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

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

We reviewed Airbus Alert Operators Transmission (AOT) A29L005–16, Revision 01, dated June 28, 2016. This service information describes procedures for inspecting hydraulic fluid levels and nitrogen gas pressure in certain HRs, and adjustment of the fluid level(s) and nitrogen pressure in affected HRs. 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 101 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	1 work-hour × $85 per hour = $85 per inspection cycle.	$0	$85 per inspection cycle	$8,585 per inspection cycle.

We estimate the following costs to do any necessary servicing that will be required based on the results of the required inspection. We have no way of determining the number of airplanes that might need this servicing:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Adding or removing hydraulic fluid or nitrogen gas	1 work-hour × $85 per hour = $85	$0	$85

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 that 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; 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):

2017–01–08 Airbus: Amendment 39–18775; Docket No. FAA–2016–9117; Directorate Identifier 2016–NM–095–AD.

(a) Effective Date

This AD is effective February 10, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342 and –343 airplanes; and Model A340–211, –212, –213, –311, –312, –313, –541, and –642 airplanes; certificated in any category, fitted with a hydraulic reservoir (HR) pressure relief valve (PRV) part number (P/N) 42F0026 installed on TECHSPACE HR having P/N 42F1005, 42F1203, 42F1304, 42F1412, 42F1512, or 42F1607.

(d) Subject

Air Transport Association (ATA) of America Code 29, Hydraulic power.

(e) Reason

This AD was prompted by reports of certain hydraulic reservoirs (HRs) becoming depressurized due to air leakage from the HR PRV. We are issuing this AD to detect and correct air leakage from the HR PRV, which could lead to the loss of one or more hydraulic systems, with the possible result of loss of control of the airplane.

(f) Compliance

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

(g) Inspection of Fluid Level and Nitrogen Pressure in HR

Within the compliance time defined in table 1 to paragraph (g) of this AD, as applicable, inspect the HR fluid level and nitrogen pressure of each hydraulic circuit, in accordance with the instructions of paragraph 4.2.2.1 of Airbus Alert Operators Transmission (AOT) A29L005–16, Revision 01, dated June 28, 2016. Repeat the inspection thereafter at intervals not to exceed 1,600 flight hours.

TABLE 1 TO PARAGRAPH (g) OF THIS AD—INITIAL INSPECTION COMPLIANCE TIME

Compliance Time (A or B, whichever occurs later)	
A	Before accumulating 1,600 flight hours since first flight of the airplane.
B	Within 1,000 flight hours or 3 months, whichever occurs first after the effective date of this AD.

(h) Corrective Action

If, during any inspection required by paragraph (g) of this AD, any unacceptable pressure or fluid level is identified, before further flight, do the actions in paragraphs (h)(1) and (h)(2) of this AD, as applicable, for each unacceptable pressure or fluid level that is discovered. Accomplishment of these actions on an airplane does not constitute terminating action for the repetitive inspections as required by paragraph (g) of this AD for that airplane.

(1) Add or remove hydraulic fluid, as applicable, in accordance with the instructions of paragraph 4.2.2.2 of Airbus Alert Operators Transmission (AOT) A29L005–16, Revision 01, dated June 28, 2016.

(2) Add or remove nitrogen gas, as applicable, in accordance with the instructions of paragraph 4.2.2.2 of Airbus AOT A29L005–16, Revision 01, dated June 28, 2016.

(i) Servicing Hydraulic Reservoir

Concurrent with the initial inspection specified in paragraph (g) of this AD, revise the maintenance or inspection program, as applicable, to incorporate the hydraulic reservoir servicing actions specified in paragraph 4.2.2.2 of Airbus AOT A29L005–16, Revision 01, dated June 28, 2016.

(j) No Alternative Actions and Intervals

After accomplishing the revision required by paragraph (i) of this AD, no alternative actions (*e.g.,* inspections) and intervals may be used unless the actions and intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (l)(1) of this AD.

(k) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using Airbus AOTA29L005–16, dated January 28, 2016.

(l) 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: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1138; fax 425–227–1149. Information may be emailed to: *9–ANM–116–AMOC–REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(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 European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2016–0107, dated June 7, 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–2016–9117.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (n)(3) and (n)(4) of this AD.

(n) 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 this AD specifies otherwise.

(i) Airbus Alert Operators Transmission (AOT) A29L005–16, Revision 01, dated June 28, 2016.

(ii) Reserved.

(3) For service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 45 80; email: *airworthiness.A330–A340@airbus.com;* Internet: *http://www.airbus.com.*

(4) 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.

(5) You may view this service information that is incorporated by reference 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 Renton, Washington, on December 23, 2016.

Thomas Groves,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–31868 Filed 1–5–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–7420; Directorate Identifier 2015–NM–017–AD; Amendment 39–18774; AD 2017–01–07]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Dassault Aviation Model FAN JET FALCON airplanes; Model FAN JET FALCON SERIES C, D, E, F, and G airplanes; Model MYSTERE-FALCON 200 airplanes; Model MYSTERE-FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes; and MYSTERE-FALCON 50 airplanes. This AD was prompted by a report that, during approach for landing, the main entry door detached from an airplane. This AD requires a functional test or check of the main entry door closure and warning system, and applicable door closing inspections, adjustments, operational tests, and corrective actions if necessary. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 10, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of February 10, 2017.

ADDRESSES: For service information identified in this final rule, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; Internet *http://*

www.dassaultfalcon.com. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425 227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–7420.

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–2016–7420; 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 (telephone 800–647–5527) is Docket 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: 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:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Dassault Aviation Model FAN JET FALCON airplanes; Model FAN JET FALCON SERIES C, D, E, F, and G airplanes; Model MYSTERE-FALCON 200 airplanes; Model MYSTERE-FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes; and MYSTERE–FALCON 50 airplanes. The NPRM published in the **Federal Register** on July 1, 2016 (81 FR 43120).

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2015–0007, dated January 15, 2015 (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; Model FAN JET FALCON SERIES C, D, E, F, and G airplanes; Model MYSTERE-FALCON 200 airplanes; Model MYSTERE-FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes; and MYSTERE-FALCON 50 airplanes. The MCAI states:

> During approach for landing, a Mystère-Falcon 20–X5 lost the main entrance door [MED] at an altitude of 7,000 feet. The flight crew maintained control of the aeroplane to land uneventfully. The results of the preliminary technical investigations concluded that the cause of this event could be either a broken cable, or an unlocked safety catch, associated with one or two deficient micro switches.
>
> This condition, if not detected and corrected, could lead to in-flight opening and/or detachment of the Crew/Passenger door, possibly resulting in loss of control of the aeroplane, and/or injury to persons on the ground.
>
> To address this potential unsafe condition, Dassault Aviation issued Service Bulletins (SB) F20–789, F200–133 and MF50–531, providing instructions for inspection/adjustment, as well as an operational test of the Crew/Passenger door closure.
>
> For the reasons described above, this [EASA] AD requires a one-time accomplishment of a functional test/check of the MED closure/warning system. It also requires [a general visual] inspection and operational test of the Crew/Passenger door [including the control and latching mechanisms] and, depending on findings, applicable corrective actions.

Corrective actions include adjusting the telescopic rod bolts on the door until the clearance between the lower part of the door and the fuselage is within the specified tolerances. The corrective actions for the control and latching mechanisms include adjusting components and replacing damaged components (including pull latches, microswitches, pulleys, and cables). Signs of damage include cracks, corrosion, wear, and distortion. 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–2016–7420.

Comments

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

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

Dassault Aviation issued the following service information.

- Dassault Service Bulletin F20–789, also referred to as 789, dated December 9, 2014.
- Dassault Service Bulletin F50–531, also referred to as 531, dated December 9, 2014.
- Dassault Service Bulletin F200–133, also referred to as 133, dated December 9, 2014.

The service information describes procedures for inspections, adjustments, and operational tests of certain doors and corrective actions. These documents are distinct since they apply to different airplane models. 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 392 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspections/adjustments/operational tests.	4 work-hours × $85 per hour = $340	$0	$340	$133,280

We have received no definitive data that will enable us to provide cost estimates for the on-condition actions specified in this 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 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 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.

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):

2017–01–07 Dassault Aviation: Amendment 39–18774; Docket No. FAA–2016–7420; Directorate Identifier 2015–NM–017–AD.

(a) Effective Date

This AD is effective February 10, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Dassault Aviation airplanes, certificated in any category, identified in paragraphs (c)(1) through (c)(5) of this AD, all airplanes.

(1) Model FAN JET FALCON airplanes.

(2) Model FAN JET FALCON SERIES C, D, E, F, and G airplanes.

(3) Model MYSTERE–FALCON 200 airplanes.

(4) Model MYSTERE–FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes.

(5) Model MYSTERE–FALCON 50 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 52, Doors.

(e) Reason

This AD was prompted by a report that, during approach for landing, the main entry door detached from an airplane. We are issuing this AD to detect and correct defective crew/passenger doors. Such a condition could result in the in-flight opening or detachment of the crew/passenger door, which could result in loss of control of the airplane and injury to persons on the ground.

(f) Compliance

Comply with this AD within the compliance times specified.

(g) Main Entry/Passenger/Crew Door Check or Functional Test

Within 65 days after the effective date of this AD, unless done within 6 months before the effective date of this AD, do the applicable functional test or door lock check specified in paragraph (g)(1), (g)(2), or (g)(3) of this AD, and do all applicable corrective actions, 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). Do all applicable corrective actions before further flight.

(1) For Model FAN JET FALCON airplanes; Model FAN JET FALCON SERIES C, D, E, F, and G airplanes; and Model MYSTERE-FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes: A functional test of the passenger/crew door warning system.

(2) For Model MYSTERE-FALCON 200 airplanes: A check of the door locking indicator system.

(3) For Model MYSTERE-FALCON 50 airplanes: A check of the door lock indication.

(h) Main Entry/Passenger/Crew Door Closing Inspections, Adjustments, and Operational Tests and Corrective Actions

Within 330 flight hours or 13 months, whichever occurs first after the effective date of this AD, unless already done: Do the applicable door closing inspections, adjustments, and operational tests, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of the applicable service information identified in paragraph (h)(1), (h)(2), or (h)(3) of this AD. Do all applicable corrective actions before further flight.

(1) For Model FAN JET FALCON airplanes; Model FAN JET FALCON SERIES C, D, E, F, and G airplanes; and Model MYSTERE-FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes: Dassault Service Bulletin F20–789, also referred to as 789, dated December 9, 2014.

(2) For Model MYSTERE-FALCON 200 airplanes: Dassault Service Bulletin F200–133, also referred to as 133, dated December 9, 2014.

(3) For Model MYSTERE-FALCON 50 airplanes: Dassault Service Bulletin F50–531, also referred to as 531, dated December 9, 2014.

(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 2015–0007, dated January 15, 2015, 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–2016–7420.

(k) 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 this AD specifies otherwise.

(i) Dassault Service Bulletin F20–789, also referred to as 789, dated December 9, 2014.

(ii) Dassault Service Bulletin F50–531, also referred to as 531, dated December 9, 2014.

(iii) Dassault Service Bulletin F200–133, also referred to as 133, dated December 9, 2014.

(3) For service information identified in this AD, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.com.*

(4) 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.

(5) You may view this service information that is incorporated by reference 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 Renton, Washington, on December 23, 2016.

Thomas Groves,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–31871 Filed 1–5–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 884

[Docket No. FDA–2014–N–0297]

Obstetrical and Gynecological Devices; Reclassification of Surgical Instrumentation for Use With Urogynecologic Surgical Mesh

AGENCY: Food and Drug Administration, HHS.

ACTION: Final order.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is reclassifying surgical instrumentation for use with urogynecologic surgical mesh from class I (general controls) exempt from premarket notification to class II (special controls) and subject to premarket notification, and identifying them as ''specialized surgical instrumentation for use with urogynecologic surgical mesh.'' FDA is designating special controls that are necessary to provide a reasonable assurance of safety and effectiveness of the device. FDA is reclassifying this device on its own initiative based on new information.

DATES: This order is effective January 6, 2017. See further discussion in section V, ''Implementation Strategy.''

FOR FURTHER INFORMATION CONTACT: Sharon Andrews, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Bldg. 66, Rm. G110, Silver Spring, MD 20993, 301–796–6529, *Sharon.Andrews@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background—Regulatory Authorities

The Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 301 *et seq.*), as amended, established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the FD&C Act (21 U.S.C. 360c) established three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Devices that were in commercial distribution before the enactment of the 1976 amendments on May 28, 1976, are generally referred to as preamendments devices. Under section 513(d) of the FD&C Act, preamendments devices are classified after FDA has: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution prior to May 28, 1976, are generally referred to as postamendments devices. Postamendments devices are automatically classified into class III without any FDA rulemaking process (section 513(f) of the FD&C Act). Postamendments devices remain in class III and require premarket approval unless, and until, the device is reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, under section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and 21 CFR part 807.

On July 9, 2012, the Food and Drug Administration Safety and Innovation Act (FDASIA) (Pub. L. 112–144) was enacted. Section 608(a) of FDASIA amended section 513(e) of the FD&C Act, changing the mechanism for reclassifying a device from rulemaking to an administrative order.

Section 513(e) of the FD&C Act provides that FDA may, by administrative order, reclassify a device based upon ''new information.'' FDA can initiate a reclassification under section 513(e) of the FD&C Act or an interested person may petition FDA to reclassify a device. The term ''new information,'' as used in section 513(e) of the FD&C Act, includes information developed as a result of a reevaluation of the data before the Agency when the device was originally classified, as well as information not presented, not available, or not developed at that time. (See, *e.g., Holland-Rantos Co.* v. *United States Department of Health, Education, and Welfare,* 587 F.2d 1173, 1174 n.1 (D.C. Cir. 1978); *Upjohn* v. *Finch,* 422 F.2d 944 (6th Cir. 1970); *Bell* v. *Goddard,* 366 F.2d 177 (7th Cir. 1966).)

Reevaluation of the data previously before the Agency is an appropriate basis for subsequent action where the reevaluation is made in light of newly available authority (see *Bell,* 366 F.2d at 181; *Ethicon, Inc.* v. *FDA,* 762 F.Supp. 382, 388–391 (D.D.C. 1991)), or in light of changes in ''medical science'' (*Upjohn,* 422 F.2d at 951). Whether data before the Agency are old or new data, the ''new information'' to support reclassification under section 513(e) must be ''valid scientific evidence,'' as defined in section 513(a)(3) of the FD&C Act and § 860.7(c)(2) (21 CFR 860.7(c)(2)). (See, *e.g., Gen. Medical Co.* v. *FDA,* 770 F.2d 214 (D.C. Cir. 1985); *Contact Lens Mfrs. Assoc.* v. *FDA,* 766 F.2d 592 (D.C. Cir. 1985), cert. denied, 474 U.S. 1062 (1986).) To be considered in the reclassification process, the ''valid scientific evidence'' upon which the Agency relies must be publicly available. Publicly available information excludes trade secret and/or confidential commercial information, *e.g.,* the contents of a pending premarket approval application (PMA). (See section 520(c) of the FD&C Act (21 U.S.C. 360j(c)).)

The process for issuing a final reclassification order is specified in section 513(e)(1) of the FD&C Act. Prior to the issuance of a final order reclassifying a device, the following must occur: (1) Publication of a proposed order in the **Federal Register**;

(2) a meeting of a device classification panel described in section 513(b) of the FD&C Act; and (3) consideration of comments to a public docket.

In the **Federal Register** of May 1, 2014, FDA published a proposed order to reclassify surgical mesh for transvaginal pelvic organ prolapse (POP) repair from class II to class III (79 FR 24634). In the same order, FDA also proposed to reclassify specialized surgical instrumentation for use with urogynecologic surgical mesh (hereafter referred to as urogynecologic surgical mesh instrumentation) from class I—regulated under § 876.4730 (21 CFR 876.4730) (manual gastroenterology-urology surgical instrument and accessories) and § 878.4800 (21 CFR 878.4800) (manual surgical instrument for general use)—to class II and subject to premarket notification. In the **Federal Register** of January 5, 2016, FDA published two final orders that: (1) Reclassified surgical mesh for transvaginal POP repair from class II to class III (81 FR 354) and (2) required the filing of a PMA or notice of completion of a product development protocol for surgical mesh for transvaginal POP repair (81 FR 364).

In the May 1, 2014 proposed order, FDA stated that it would convene a panel specifically to discuss reclassification of urogynecologic surgical mesh instrumentation before finalizing reclassification of those devices. FDA held a meeting on February 26, 2016 (81 FR 938, January 8, 2016), of the Gastroenterology-Urology Devices Panel of the Medical Devices Advisory Committee (''the Panel''), a device classification panel described in section 513(b) of the FD&C Act. Prior to the meeting, all panel members were provided a comprehensive Executive Summary regarding the reclassification of urogynecologic surgical mesh instrumentation, which included information contained in the May 1, 2014, proposed order, a summary of comments submitted to the public docket on the proposed reclassification of urogynecologic surgical mesh instrumentation, and information regarding FDA's risk-based classification and regulation of medical devices (Ref. 1).

The Executive Summary also included a new FDA analysis of perioperative adverse events related to urogynecologic surgical mesh procedures. FDA conducted a new analysis to supplement the adverse event information discussed in the May 1, 2014, proposed order, which included adverse events related to POP procedures that were: (1) Reported in clinical studies and systematic literature reviews in the published literature or (2) submitted to the Manufacturer and User Facility Device Experience (MAUDE) database between January 1, 2011, and December 31, 2013. FDA's new analysis was a more comprehensive analysis of perioperative adverse events associated with stress urinary incontinence (SUI) procedures (retropubic, transobturator, mini-sling) and POP procedures (transvaginal repair and transabdominal repair (transabdominal POP repair is referred to as sacrocolpopexy)).

Adverse events related to a urogynecologic surgical mesh procedure, and that might be attributable to the specialized instrumentation used during the procedure, are typically submitted to FDA or described in published literature with reference to the surgical mesh and not the instrumentation. Therefore, it can be difficult to distinguish adverse events related to the urogynecologic surgical mesh instrumentation from those related to the surgical mesh. As noted in the proposed order, FDA believes it is reasonable to assume that perioperative adverse events—*i.e.,* those observed during the procedure or shortly thereafter (*e.g.,* organ perforation, hemorrhage and bleeding, nerve injury and pain)—are caused by or related to the use of specialized surgical instrumentation to insert, place, fix, or anchor the surgical mesh during the urogynecologic procedure. Hereafter, the term ''perioperative adverse events'' will be used in this document to refer to adverse events that FDA believes are caused by or related to the specialized instrumentation that is the subject of this reclassification.

In its new, more comprehensive analysis, FDA conducted a search of the relevant, scientific literature published between January 1, 1997, and December 8, 2015, to identify perioperative adverse events associated with urogynecologic surgical mesh procedures (see the 207 studies included as references in the Executive Summary provided to the Panel (Ref. 1). The search criteria consisted of a combination of terms related to adverse events (type, timing with respect to surgery), type of urogynecologic condition, type of surgical instrumentation, study design, device name, and manufacturer name. FDA then filtered the results to identify those studies that describe perioperative adverse events during one of the following urogynecologic surgical mesh procedures: SUI-retropubic, SUI-transobturator, SUI-mini-sling, POP-transvaginal, and POP-sacrocolpopexy. All perioperative adverse events were classified into one of the following categories: ''organ perforation and injury,'' ''vascular injury and bleeding,'' or ''nerve injury and pain.'' FDA then computed an adverse event rate for each study by dividing the number of patients that experienced one of these types of events by the total number of patients included in the study.

FDA also conducted a search of the Medical Device Reporting (MDR) database for relevant adverse events reported between January 1, 2008, and December 2, 2015. There are no FDA product codes specifically assigned to urogynecologic surgical mesh instrumentation; therefore, FDA first identified reports that were associated with a product code assigned to urogynecologic surgical mesh. FDA filtered the resulting injury and death reports to identify and analyze those that described perioperative adverse events. By stratifying its analysis by product code for the urogynecologic surgical mesh, which depends, in part, on the procedure type (*e.g.,* OTP is assigned to mesh used during POP-transvaginal procedures, OTN for mesh used during SUI-retropubic or transobturator procedures), FDA characterized the perioperative adverse events associated with the different kinds of urogynecologic surgical mesh instrumentation used during SUI and POP procedures.

After completing its review of the published literature and MDR database, and aggregating its findings, FDA determined that perioperative adverse events occur during all types of urogynecologic surgical mesh procedures to treat female SUI and POP. Moreover, and as discussed in the Executive Summary (Ref. 1, Attachments 6–8), FDA made the following findings from its review of the published literature:

- The rate of ''vascular injury and bleeding'' varied between 0.4–29.4 percent in studies describing retropubic SUI procedures; 0.2–11.9 percent in studies describing transobturator SUI procedures; 1–20.5 percent in studies describing mini-sling SUI procedures; 0.7–7.7 percent in studies describing transvaginal POP repair procedures; and 2.8 percent for one study describing sacrocolpoplexy procedures;
- the rate of ''organ perforation and injury'' varied between 0.3–23.8 percent for retropubic SUI procedures; 0.2–5.8 percent for transobturator SUI procedures, 0.2–2.6 percent for mini-sling SUI procedures; 0.7–13.1 percent for transvaginal POP repair procedures; and 3.6 percent for one study describing sacrocolpoplexy procedures; and

• the rate of ''nerve injury and pain'' varied between 0.1–5.3 percent for retropubic SUI procedures; 0.8–30.8 percent for transobturator SUI procedures, 1.1–4.1 percent for mini-sling SUI procedures; 6.0–39.1 percent for transvaginal POP repair procedures; and 14.9 percent for one study describing sacrocolpoplexy procedures.

FDA presented a summary of the information contained in the Executive Summary during the February 26, 2016, panel meeting (Ref. 2). The Panel then discussed whether urogynecologic surgical mesh instrumentation should be reclassified, and if so, whether it should be reclassified from class I (general controls) to class II (special controls) or class III (premarket approval) (Ref. 3). The Panel discussed a variety of potential causes for the perioperative adverse events identified by FDA (*e.g.,* instrumentation design, surgeon error, and surgeon experience). The Panel consensus was that the risks to health of urogynecologic surgical mesh instrumentation that FDA identified in the proposed order and Executive Summary (*i.e.,* perioperative risks; damage to blood vessels, nerves, connective tissue, and other structures; adverse tissue reaction; and infection) was a complete and accurate list.

The Panel agreed with FDA that the device is not purported or represented for a use in supporting or sustaining human life, or for a use which is of substantial importance in preventing impairment of human health, or presents a potential unreasonable risk of illness or injury. In light of this assessment, the Panel consensus was that urogynecologic surgical mesh instrumentation did not meet the definition of a class III device. The Panel also agreed with FDA that general controls alone are not sufficient to provide reasonable assurance of safety and effectiveness for the device, and that there is sufficient information to establish special controls to provide such assurance. When considering the specific special controls proposed by FDA, two Panel members requested that an additional special control be the submission of clinical data. However, after additional discussion, the Panel unanimously agreed that the special controls proposed by FDA, which did not include the submission of clinical data, would appropriately mitigate the risks to health of this device. As such, the Panel recommended that urogynecologic surgical mesh instrumentation be reclassified from class I (general controls) exempt from premarket notification to class II (special controls).

II. Key Changes From Proposed Order

In the final order, FDA is modifying two of the special controls included in the proposed order. First, FDA is revising § 884.4910(b)(2) (21 CFR 884.4910(b)(2)) to require a demonstration that the device, if reusable, can be adequately reprocessed. Reprocessing validation will help to ensure that reusable urogynecologic surgical mesh instrumentation is fit for subsequent use after being previously used or contaminated. The validated processes are designed to remove soil and contaminants by cleaning and to inactivate microorganisms by disinfection or sterilization. Although FDA recognized in the proposed order that ''the risk of infection due to inadequate sterilization and/or reprocessing instructions/procedures can be mitigated through sterilization validation testing and the inclusion of validated reprocessing instructions in the device labeling,'' proposed § 884.4910(b)(2) addressed sterilization only. FDA believes this revised special control will help to mitigate the risks posed by infection from reusable urogynecologic surgical mesh instrumentation.

Second, FDA is revising § 884.4910(b)(4) to require that non-clinical performance testing demonstrate that the device: (1) Meets all design specifications and performance requirements and (2) performs as intended under anticipated conditions of use. In the proposed order, FDA specified that ''[b]ench and/or cadaver testing must demonstrate safety and effectiveness in expected-use conditions.'' FDA has revised the reference to ''bench and/or cadaver testing'' to ''non-clinical performance testing'' to allow for additional types of non-clinical testing that will also mitigate the corresponding risks to health. FDA is making other revisions to this provision as noted previously to provide further clarity.

III. Public Comments in Response to the Proposed Order

FDA received comments regarding the proposed reclassification of urogynecologic surgical mesh instrumentation from class I to class II. A summary of the comments and FDA's responses are provided in this section. Certain comments are grouped together under a single number because the subject matter is similar. The number assigned to each one is purely for organizational purposes and does not signify the comment's value, importance, or the order in which it was received.

(Comment 1) Several comments supported reclassification of urogynecologic surgical mesh instrumentation, with some comments supporting reclassification into class II and others supporting reclassification into class III.

(Response 1) FDA agrees with comments supporting reclassification of urogynecologic surgical mesh instrumentation into class II and disagrees with comments that support reclassification into class III. Based on information set forth in the proposed order (79 FR 24634), FDA tentatively concluded in that order that certain specified special controls, in addition to general controls, were necessary to mitigate the risks to health for urogynecologic surgical mesh instrumentation, and as such, proposed to reclassify the device from class I to class II (79 FR 24634 at 24640). FDA continues to believe that there is sufficient information to establish special controls to provide a reasonable assurance of safety and effectiveness for this device, and thus does not believe this device should be reclassified into class III.

FDA's new, more comprehensive, adverse event analysis provides further support for the risks to health of this device that FDA identified in the proposed order (see section I; Ref. 1), and the special controls established by FDA are specifically intended to mitigate those risks. For example, FDA's new MDR analysis revealed that failures of urogynecologic surgical mesh instrumentation (*e.g.,* needle detachments, breaks, or bends; covering sheath breaks or tears) occur during both SUI and POP procedures, and these failures are associated with perioperative adverse events. The special control established at § 884.4910(b)(4) addresses these failures and the risk of perioperative injuries by requiring a demonstration that the device meets all design specifications and performance requirements.

Based on all of this information, the Panel consensus was that urogynecologic surgical mesh instrumentation meets the statutory definition of a class II device and does not meet the statutory definition of a class III device (see section I; Ref. 3).

Because FDA has determined that general controls alone are not sufficient to provide a reasonable assurance of safety and effectiveness for this device, and there is sufficient information to establish special controls to provide such an assurance, FDA is reclassifying the device into class II.

(Comment 2) One comment requested that urogynecologic surgical mesh

instrumentation have the same classification as the surgical mesh with which it is indicated to be used.

(Response 2) Surgical mesh indicated for urogynecologic procedures is a class III device when it is indicated for transvaginal POP repair (see 81 FR 354; § 884.5980) and a class II device when it is indicated for all other urogynecologic procedures, such as sacrocolpopexy and treatment of female SUI (see § 878.3300). FDA characterized the risk profile of different kinds of urogynecologic surgical mesh instrumentation by analyzing adverse events associated with the use of this specialized instrumentation and stratifying them by the type of urogynecologic procedure for which they were used. The results indicate that the risk profile of urogynecologic surgical mesh instrumentation used with class III surgical mesh during transvaginal POP repair is comparable to that of urogynecologic surgical mesh instrumentation used with class II surgical mesh during other kinds of urogynecologic procedures (see section I; Ref. 1). Urogynecologic surgical mesh instrumentation used in all types of urogynecologic surgical mesh procedures appears to have a similar risk-benefit profile, and therefore FDA believes these devices should have the same classification.

Moreover, as previously discussed, based on information included in the proposed order (79 FR 24634), FDA's comprehensive adverse event analysis (see Ref. 1), and the Panel's deliberations and determinations, FDA has determined that urogynecologic surgical mesh instrumentation is a class II device because general controls alone cannot provide a reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls to provide such assurance. As such, FDA is reclassifying these devices from class I to class II.

(Comment 3) One comment stated that the scope of the urogynecologic surgical mesh instrumentation reclassification was unclear, and it could be interpreted that the reclassification applies only to instrumentation used for transvaginal POP repair rather than for instrumentation used for any urogynecologic surgical mesh procedure.

(Response 3) FDA disagrees that the scope of the instrumentation reclassification was unclear in the May 1, 2014, proposed order. FDA included the description in the identification of urogynecologic surgical mesh instrumentation in proposed § 884.4910(a) stating that surgical instrumentation for use with surgical mesh for urogynecological procedures is a prescription device used to aid in insertion, placement, fixation, or anchoring of surgical mesh for procedures including transvaginal POP repair, sacrocolpopexy (transabdominal POP repair), and treatment of female SUI. This description, which is not substantively changing in the final order, makes clear that all urogynecologic surgical mesh instrumentation—whether used for transvaginal POP repair or other urogynecologic surgical mesh procedures—falls under this reclassification.

(Comment 4) One comment stated that data provided in the proposed order to support the instrumentation reclassification was based only on POP procedures, that valid scientific evidence had not been provided to support the instrumentation reclassification, and that no evidence was provided to support the risks that were identified in the proposed order.

(Response 4) First, FDA acknowledges that the data provided to support the instrumentation reclassification in the May 1, 2014, proposed order derived only from surgical mesh procedures indicated for POP. FDA subsequently conducted a new, more comprehensive analysis of perioperative adverse events associated with a variety of SUI procedures (retropubic, transobturator, mini-sling) and POP procedures (transvaginal repair and sacrocolpoplexy) by reviewing adverse events included in the relevant, scientific, published literature and adverse events submitted to the MDR database. Based on this analysis, FDA determined that perioperative adverse events occur during all types of SUI and POP procedures (see section I; Ref. 1). FDA also discovered that in the published literature, the highest reported rates of ''organ perforation and injury,'' ''vascular injury and bleeding,'' and ''nerve injury and pain'' were distributed across different types of urogynecologic surgical mesh procedures rather than only occurring during one specific type, such as transvaginal POP repair. FDA believes these results provide further support for the reclassification of these devices into class II, and also supports the scope of this reclassification, which encompasses specialized instrumentation used during all types of urogynecologic surgical mesh procedures. After presenting the proposed order and this new information to the Panel at the February 26, 2016, meeting, the Panel recommended that urogynecologic surgical mesh instrumentation be reclassified from class I (general controls) exempt from premarket notification to class II (special controls) (Ref. 3). FDA agrees with the Panel's recommendations and is reclassifying these devices from class I to class II.

Second, FDA disagrees that valid scientific evidence was not provided in the May 1, 2014, proposed order to support reclassification of urogynecologic surgical mesh instrumentation. Valid scientific evidence is defined in § 860.7(c)(2) as evidence from well-controlled investigations, other types of studies and case histories conducted by qualified experts, and reports of significant human experience with a marketed device, from which it can fairly and responsibly be concluded by qualified experts that there is reasonable assurance of the safety and effectiveness of a device under its conditions of use. (See also section 513 of the FD&C Act). In the proposed order, FDA reviewed perioperative adverse events included in published studies of surgical mesh used during POP procedures. These publications constitute ''valid scientific evidence'' because they are controlled studies (Refs. 7–10, 12, 14) and collections of well-documented case histories conducted by qualified experts (Refs. 4–6, 11, 13).

Finally, FDA disagrees that no evidence was provided to support the risks of urogynecologic surgical mesh instrumentation identified in the proposed order. In the proposed order, FDA specifically referenced clinical studies and systematic literature reviews in the published literature that included reports of perioperative adverse events (*e.g.,* bleeding, hematoma, and blood loss; organ perforation; and neuromuscular problems) to support the proposed reclassification. Moreover, the risks of ''perioperative injury'' and ''pelvic pain and neuromuscular problems'' were also identified during FDA's search of the MAUDE database. As discussed in the proposed order, 843 reports in the MAUDE database analysis related to bleeding, hematoma, and blood loss; 42 reports related to organ perforation; and 196 reports of neuromuscular problems. FDA acknowledges that no data were provided to support the identified risks of ''infection'' and ''adverse tissue reaction.'' Although there are many possible causes for ''infection'' and ''adverse tissue reaction'' during a urogynecologic surgical mesh procedure, as FDA noted in the proposed order (see 79 FR 24634 at 24639), FDA believes ''infection'' and ''adverse tissue reaction'' are general risks that apply to all devices that

contact the patient and need to be used sterile.

As discussed throughout this document, FDA subsequently conducted a more comprehensive search of the relevant, scientific, published literature and MDR database to evaluate the risks of urogynecologic surgical mesh instrumentation. A summary of the findings from these reviews is in the Executive Summary (Ref. 1) and was provided in our presentation to the Panel on February 26, 2016 (Ref. 2). The findings from the literature review—which were confirmed by the MDR database review—provide further support for the risks identified and discussed in the proposed order.

Based on this information, the Panel consensus was that the four risks to health of urogynecologic surgical mesh instrumentation that FDA identified in the proposed order is a complete and accurate list (Ref. 3).

(Comment 5) One comment, which was submitted after the proposed order issued and before the Panel meeting was held, stated that the proposed order should be withdrawn until Panel input was obtained.

(Response 5) FDA disagrees. The process followed by FDA in reclassifying this device is in accordance with section 513(e)(1) of the FD&C Act. This provision requires, in relevant part, that issuance of a final administrative order reclassifying a device be preceded by a proposed order and a meeting of a device classification panel. There is no requirement that a proposed order be ''withdrawn'' after its issuance but before the Panel meeting, and the rationale for doing so is not clear to FDA.

IV. The Final Order

Under section 513(e) of the FD&C Act, FDA is adopting its findings as published in the proposed order for urogynecologic surgical mesh instrumentation, with the modifications discussed in section II of this document. For the reasons set forth in the proposed order and in this document, FDA concludes that general controls are insufficient to provide a reasonable assurance of safety and effectiveness for urogynecologic surgical mesh instrumentation, and there is sufficient information to establish special controls to provide such assurance.

FDA is issuing this final order to reclassify urogynecologic surgical mesh instrumentation from class I (general controls) exempt from premarket notification to class II (special controls) and subject to premarket notification, and identifying them as ''specialized surgical instrumentation for use with urogynecologic surgical mesh.'' FDA is also establishing special controls, which are set forth in § 884.4910(b)(1) through (5).

Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the FD&C Act if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. FDA has determined that premarket notification is necessary to provide reasonable assurance of safety and effectiveness of urogynecologic surgical mesh instrumentation, and therefore, this device is not exempt from premarket notification requirements.

V. Implementation Strategy

The order is effective January 6, 2017.

Manufacturers of urogynecologic surgical mesh instrumentation that have not been legally marketed prior to January 6, 2017, must obtain 510(k) clearance and demonstrate compliance with the special controls included in this final order before marketing the device.

Manufacturers of urogynecologic surgical mesh instrumentation that have been legally marketed prior to January 6, 2017, must obtain 510(k) clearance and demonstrate compliance with the special controls included in this final order by January 8, 2018, for those devices if they wish to continue offering them for sale.

VI. Analysis of Environmental Impact

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

VII. Paperwork Reduction Act of 1995

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

VIII. Codification of Orders

Prior to the amendments by FDASIA, section 513(e) of the FD&C Act provided for FDA to issue regulations to reclassify devices. Although section 513(e) of the FD&C Act as amended requires FDA to issue final orders rather than regulations, FDASIA also provides for FDA to revoke previously issued regulations by order. FDA will continue to codify classifications and reclassifications in the Code of Federal Regulations (CFR). Changes resulting from final orders will appear in the CFR as changes to codified classification determinations or as newly codified orders. Therefore, under section 513(e)(1)(A)(i) of the FD&C Act, as amended by FDASIA, in this final order, we are codifying the reclassification of specialized surgical instrumentation for use with urogynecologic surgical mesh into class II in § 884.4910.

IX. References

The following references are on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *https://www.regulations.gov.* FDA has verified the Web site addresses, as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.

1. Executive Summary of the February 26, 2016, meeting of the Gastroenterology-Urology Devices Panel (available at *http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/MedicalDevices/MedicalDevicesAdvisoryCommittee/Gastroenterology-UrologyDevicesPanel/UCM487224.pdf*).

2. FDA presentation to Panel members at the February 26, 2016, meeting of the Gastroenterology-Urology Devices Panel (available at *http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/MedicalDevices/MedicalDevicesAdvisoryCommittee/Gastroenterology-UrologyDevicesPanel/UCM490205.pdf*).

3. Transcript of the February 26, 2016, meeting of the Gastroenterology-Urology Devices Panel (available at *http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/MedicalDevices/MedicalDevicesAdvisoryCommittee/Gastroenterology-UrologyDevicesPanel/UCM491862.pdf*).

4. Caquant, F., et al., ''Safety of Trans Vaginal Mesh Procedure: Retrospective Study

of 684 Patients,'' *Journal of Obstetrics and Gynecology Research,* 34(4):449–456, 2008.

5. Maher, C.F., et al., ''Surgical Management of Pelvic Organ Prolapse in Women,'' *Cochrane Database of Systematic Review,* 4: CD004014, 2010.

6. Diwadkar, G.B., et al., ''Complication and Reoperation Rates After Apical Vaginal Prolapse Surgical Repair: A Systematic Review,'' *Obstetrics & Gynecology,* 113(2 Pt. 1):67–73, 2009.

7. Maher, C.F., et al., ''Laparoscopic Sacral Colpopexy Versus Total Vaginal Mesh for Vaginal Vault Prolapse: A Randomized Trial,'' *American Journal of Obstetrics & Gynecology,* 204(4):360.e1–360.e7, 2011.

8. Altman, D., et al., ''Anterior Colporrhaphy Versus Transvaginal Mesh for Pelvic-Organ Prolapse,'' *New England Journal of Medicine,* 364:1826–1836, 2011.

9. Iglesia, C.B., et al., ''Vaginal Mesh for Prolapse: A Randomized Controlled Trial,'' *Obstetrics & Gynecology,* 116(2 Pt. 1):293–303, 2010.

10. Withagen, M.I., et al., ''Trocar-Guided Mesh Compared With Conventional Vaginal Repair in Recurrent Prolapse: A Randomized Controlled Trial,'' *Obstetrics & Gynecology,* 117(2 Pt. 1):242–250, 2011.

11. Sung, V.W., et al., Society of Gynecologic Surgeons Systematic Review Group. ''Graft Use in Transvaginal Pelvic Organ Prolapse and Urinary Incontinence,'' *Obstetrics & Gynecology,* 112(5):1131–1142, 2008.

12. Hiltunen, R., et al., ''Low-Weight Polypropylene Mesh for Anterior Vaginal Wall Prolapse: A Randomized Controlled Trial,'' *Obstetrics & Gynecology,* 110(2 Pt. 2):455–462, 2007.

13. Jia, X., et al., ''Efficacy and Safety of Using Mesh or Grafts in Surgery for Anterior and/or Posterior Vaginal Wall Prolapse: Systematic Review and Meta-Analysis,'' *British Journal of Obstetrics and Gynecology,* 115:1350–1361, 2008.

14. Sivaslioglu, A.A., E. Unlubilgin, and I. Dolen, ''A Randomized Comparison of Polypropylene Mesh Surgery With Site-Specific Surgery in the Treatment of Cystocoele,'' *International Urogynecology Journal and Pelvic Floor Dysfunction,* 19(4):467–471, 2008.

List of Subjects in 21 CFR Part 884

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 884 is amended as follows:

PART 884—OBSTETRICAL AND GYNECOLOGICAL DEVICES

■ 1. The authority citation for part 884 continues to read as follows:

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

■ 2. Add § 884.4910 to subpart E to read as follows:

§ 884.4910 Specialized surgical instrumentation for use with urogynecologic surgical mesh.

(a) *Identification.* Specialized surgical instrumentation for use with urogynecologic surgical mesh is a prescription device specifically intended for use as an aid in the insertion, placement, fixation, or anchoring of surgical mesh during urogynecologic procedures. These procedures include transvaginal pelvic organ prolapse repair, sacrocolpopexy (transabdominal pelvic organ prolapse repair), and treatment of female stress urinary incontinence. Examples of specialized surgical instrumentation include needle passers and trocars, needle guides, fixation tools, and tissue anchors. This device is not a manual gastroenterology-urology surgical instrument and accessories (§ 876.4730) or a manual surgical instrument for general use (§ 878.4800).

(b) *Classification.* Class II (special controls). The special controls for specialized surgical instrumentation for use with urogynecologic surgical mesh are:

(1) The device must be demonstrated to be biocompatible;

(2) The device must be demonstrated to be sterile and, if reusable, it must be demonstrated that the device can be adequately reprocessed;

(3) Performance data must support the shelf life of the device by demonstrating package integrity and device functionality over the requested shelf life;

(4) Non-clinical performance testing must demonstrate that the device meets all design specifications and performance requirements, and that the device performs as intended under anticipated conditions of use; and

(5) Labeling must include:

(i) Information regarding the mesh design that may be used with the device;

(ii) Detailed summary of the clinical evaluations pertinent to use of the device;

(iii) Expiration date; and

(iv) Where components are intended to be sterilized by the user prior to initial use and/or are reusable, validated methods and instructions for sterilization and/or reprocessing of any reusable components.

Dated: December 28, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31862 Filed 1–5–17; 8:45 am]

BILLING CODE 4164–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2016–0396; FRL–9957–80–Region 5]

Air Plan Approval; Ohio; Redesignation of the Cleveland, Ohio Area to Attainment of the 2008 Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) finds that the Cleveland-Akron-Lorain, Ohio area (Cleveland area) is attaining the 2008 ozone National Ambient Air Quality Standard (NAAQS or standard) and is redesignating the area to attainment for the 2008 ozone NAAQS, because the area meets the statutory requirements for redesignation under the Clean Air Act (CAA). The Cleveland area includes Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, Portage, and Summit counties. EPA is also approving, as a revision to the Ohio State Implementation Plan (SIP), the state's plan for maintaining the 2008 ozone standard through 2030 in the Cleveland area. Finally, EPA finds adequate and is approving the state's 2020 and 2030 volatile organic compound (VOC) and oxides of nitrogen (NO_X) Motor Vehicle Emission Budgets (MVEBs) for the Cleveland area. The Ohio Environmental Protection Agency (Ohio EPA) submitted the SIP revision and redesignation request on July 6, 2016.

DATES: This final rule is effective January 6, 2017.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2016–0396. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Jenny Liljegren, Physical Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J),

Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6832, *Liljegren.Jennifer@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. What is being addressed in this document?

This rule takes action on the July 6, 2016 submission from Ohio EPA requesting redesignation of the Cleveland area to attainment for the 2008 ozone standard. The background for today's action is discussed in detail in EPA's proposal, dated October 17, 2016 (81 FR 71444). In that rulemaking, we noted that, under EPA regulations at 40 CFR part 50, the 2008 ozone NAAQS is attained in an area when the 3-year average of the annual fourth highest daily maximum 8-hour average concentration is equal to or less than 0.075 ppm, when truncated after the thousandth decimal place, at all of the ozone monitoring sites in the area. (*See* 40 CFR 50.15 and appendix P to 40 CFR part 50.) Under the CAA, EPA may redesignate nonattainment areas to attainment if sufficient complete, quality-assured data are available to determine that the area has attained the standard and if it meets the other CAA redesignation requirements in section 107(d)(3)(E). The proposed rule, dated October 17, 2016, provides a detailed discussion of how Ohio has met these CAA requirements.

As discussed in the proposed rule, quality-assured and certified monitoring data for 2013–2015 and preliminary data for 2016 show that the Cleveland area has attained and continues to attain the 2008 ozone standard. In the maintenance plan submitted for the area, Ohio has demonstrated that the ozone standard will be maintained in the area through 2030. Finally, Ohio has adopted 2020 and 2030 VOC and NO_X MVEBs for the Cleveland area that are supported by Ohio's maintenance demonstration.

II. What comments did we receive on the proposed rule?

EPA provided a 30-day review and comment period for the October 17, 2016, proposed rule. The comment period ended on November 16, 2016. During the comment period, comments in support of the action were submitted on behalf of the Ohio Utility Group and its member companies. We received no adverse comments on the proposed rule.

III. What action is EPA taking?

EPA finds that the Cleveland nonattainment area is attaining the 2008 ozone standard, based on quality-assured and certified monitoring data for 2013–2015 and that the Ohio portion of this area has met the requirements for redesignation under section 107(d)(3)(E) of the CAA. EPA is thus changing the legal designation of the Cleveland area from nonattainment to attainment for the 2008 ozone standard. EPA is also approving, as a revision to the Ohio SIP, the state's maintenance plan for the area. The maintenance plan is designed to keep the Cleveland area in attainment of the 2008 ozone NAAQS through 2030. Finally, EPA finds adequate and is approving the newly-established 2020 and 2030 MVEBs for the Cleveland area.

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for these actions to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the area from certain CAA requirements that would otherwise apply to it. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule ''grants or recognizes an exemption or relieves a restriction,'' and section 553(d)(3), which allows an effective date less than 30 days after publication ''as otherwise provided by the agency for good cause found and published with the rule.'' The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule relieves the state of planning requirements for this ozone nonattainment area. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for these actions to become effective on the date of publication of these actions.

IV. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of

Indian country, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on tribes, impact any existing sources of air pollution on tribal lands, nor impair the maintenance of ozone national ambient air quality standards in tribal lands.

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 7, 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

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Oxides of nitrogen, Ozone, Volatile organic compounds.

40 CFR Part 81

Environmental protection, Administrative practice and procedure, Air pollution control, Designations and classifications, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 21, 2016.

Robert A. Kaplan

Acting Regional Administrator, Region 5.

■ Parts 52 and 81, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

■ 2. Section 52.1885 is amended by adding paragraph (pp)(3) to read as follows:

§ 52.1885 Control strategy: Ozone.

* * * * *

(pp) * * *

(3) Approval—On July 6, 2016, the Ohio Environmental Protection Agency submitted a request to redesignate the Cleveland area to attainment of the 2008 ozone NAAQS. As part of the redesignation request, the State submitted a maintenance plan as required by section 175A of the Clean Air Act. Elements of the section 175 maintenance plan include a contingency plan and an obligation to submit a subsequent maintenance plan revision in eight years as required by the Clean Air Act. The 2020 motor vehicle emissions budgets for the Cleveland area are 38.85 tons per summer day (TPSD) for VOC and 61.56 TPSD for NO_X. The 2030 motor vehicle emissions budgets for the Cleveland area are 30.80 TPSD for VOC and 43.82 TPSD for NO_X.

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 3. The authority citation for part 81 continues to read as follows:

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

■ 4. Section 81.336 is amended by revising the entry for Cleveland-Akron-Lorain, OH in the table entitled ''Ohio-2008 8-Hour Ozone NAAQS (Primary and secondary)'' to read as follows:

§ 81.336 Ohio.

* * * * *

OHIO—2008 8-HOUR OZONE NAAQS

[Primary and secondary]

Designated area	Designation		Classification	
	Date [1]	Type	Date [1]	Type
* * * *	*		*	*
Cleveland, OH: [2] Ashtabula County, Cuyahoga County, Geauga County, Lake County, Lorain County, Medina County, Portage County, Summit County.	1/6/2017	Attainment.		
* * * *	*		*	*

[1] This date is July 20, 2012, unless otherwise noted.

[2] Excludes Indian country located in each area, unless otherwise noted.

* * * * *

[FR Doc. 2016–31634 Filed 1–5–17; 8:45 am]

BILLING CODE 6560–50–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Parts 1230 and 2554

RIN 3045–AA67

Annual Civil Monetary Penalties Inflation Adjustment

AGENCY: Corporation for National and Community Service.

ACTION: Interim final rule.

SUMMARY: The Corporation for National and Community Service (CNCS) is updating its regulations to reflect required annual inflation-related increases to the civil monetary penalties in its regulations, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES: *Effective date:* This rule is effective January 15, 2017.

Comment due date: Technical comments may be submitted until February 6, 2017.

ADDRESSES: You may send your comments electronically through the Federal government's one-stop rulemaking Web site at *www.regulations.gov.* Also, you may mail or deliver your comments to Phyllis Green, Executive Assistant, Office of General Counsel, at the Corporation for National and Community Service, 250 E Street SW., Washington, DC 20525. Due to continued delays in CNCS's receipt of mail, we strongly encourage comments to be submitted online electronically. The TDD/TTY number is 800 833–3722. You may request this notice in an alternative format for the visually impaired.

FOR FURTHER INFORMATION CONTACT: Phyllis Green, Executive Assistant, Office of General Counsel, at 202–606–6709 or email to *pgreen@cns.gov.* Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 800–833–3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

I. Background

The Corporation for National and Community Service (CNCS) is a federal agency that engages more than five million Americans in service through its AmeriCorps, Senior Corps, Social Innovation Fund, and Volunteer Generation Fund programs to further its mission to improve lives, strengthen communities, and foster civic engagement through service and volunteering. For more information, visit NationalService.gov.

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Sec. 701 of Pub. L. 114–74) (the ''Act''), which is intended to improve the effectiveness of civil monetary penalties and to maintain the deterrent effect of such penalties, requires agencies to adjust the civil monetary penalties for inflation annually.

II. Method of Calculation

CNCS has two civil monetary penalties in its regulations. A civil monetary penalty under the Act is a penalty, fine, or other sanction that is for a specific monetary amount as provided by Federal law or has a maximum amount provided for by Federal law and is assessed or enforced by an agency pursuant to Federal law and is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts. (*See* 28 U.S.C. 2461 note).

The inflation adjustment for each applicable civil monetary penalty is determined using the percent increase in the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October of the year in which the amount of each civil money penalty was most recently established or modified. In the December 16, 2016, OMB Memo for the Heads of Executive Agencies and Departments, M–17–11, *Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015,* OMB published the multiplier for the required annual adjustment. The cost-of-living adjustment multiplier for 2017, based on the CPI–U for the month of October 2016, not seasonally adjusted, is 1.01636.

CNCS identified two civil penalties in its regulations: (1) The penalty associated with Restrictions on Lobbying (45 CFR 1230.400) and (2) the penalty associated with the Program Fraud Civil Remedies Act (45 CFR 2554.1).

The civil monetary penalties related to Restrictions on Lobbying (Section 319, Pub. L. 101–121; 31 U.S.C. 1352) range from $18,936 to $189,361. Using the 2017 multiplier, the new range of possible civil monetary penalties is from $19,246 to $192,459.

The Program Fraud Civil Remedies Act of 1986 (Pub. L. 99–509) civil monetary penalty has an upper limit of $10,781. Using the 2017 multiplier, the new upper limit of the civil monetary penalty is $10,957.

III. Summary of Final Rule

This final rule adjusts the civil monetary penalty amounts related to Restrictions on Lobbying (45 CFR 1230.400) and the Program Fraud Civil Remedies Act of 1986 (45 CFR 2554.1). The range of civil monetary penalties related to Restrictions on Lobbying increase from ''$18,936 to $189,361'' to ''$19,246 to $192,459.'' The civil monetary penalties for the Program Fraud Civil Remedies Act of 1986 increase from ''up to $10,781'' to ''up to $10,957.''

IV. Regulatory Procedures

A. Determination of Good Cause for Publication Without Notice and Comment

CNCS finds, under 5 U.S.C. 553(b)(3)(B), that there is good cause to except this rule from the public notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b). Because CNCS is implementing a final rule pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which requires CNCS to update its regulations based on a prescribed formula, CNCS has no discretion in the nature or amount of the change to the civil monetary penalties. Therefore, notice and comment for these proscribed updates is impracticable and unnecessary. As an interim final rule, no further regulatory action is required for the issuance of this legally binding rule. If you would like to provide technical comments, however, they may be submitted until February 6, 2017.

B. Review Under Procedural Statutes and Executive Orders

CNCS has determined that making technical changes to the amount of civil monetary penalties in its regulations does not trigger any requirements under procedural statutes and Executive Orders that govern rulemaking procedures.

V. Effective Date

This rule is effective January 15, 2017. The adjusted civil penalty amounts apply to civil penalties assessed on or after January 15, 2017, when the violation occurred after November 2, 2015. If the violation occurred prior to November 2, 2015, or a penalty was assessed prior to August 1, 2016, the pre-adjustment civil penalty amounts in effect prior to August 1, 2106, will apply.

List of Subjects

45 CFR Part 1230

Government contracts, Grant programs, Loan programs, Lobbying, Penalties, Reporting and recordkeeping requirements.

45 CFR Part 2554

Claims, Fraud, Organization and functions (Government agencies), Penalties.

For the reasons discussed in the preamble, under the authority of 42 U.S.C. 12651c(c), the Corporation for National and Community Service amends chapters XII and XXV, title 45 of the Code of Federal Regulations as follows:

PART 1230—NEW RESTRICTIONS ON LOBBYING

■ 1. The authority citation for part 1230 continues to read as follows:

Authority: Section 319, Pub. L. 101–121 (31 U.S.C. 1352); Pub. L. 93–113; 42 U.S.C. 4951, *et seq.;* 42 U.S.C. 5060.

§ 1230.400 [Amended]

■ 2. Amend § 1230.400:
■ a. In paragraphs (a), (b), and (e), by removing ''$18,936'' and adding in its place ''$19,246'' each place it appears.
■ b. In paragraphs (a), (b), and (e), by removing ''$189,361'' and adding in its place ''$192,459'' each place it appears.

Appendix A to Part 1230 [Amended]

■ 3. Amend appendix A to part 1230 by:
■ a. Removing ''$18,936'' and adding in its place ''$19,246'' each place it appears.
■ b. Removing ''$189,361'' and adding in its place ''$192,459'' each place it appears.

PART 2554—PROGRAM FRAUD CIVIL REMEDIES ACT REGULATIONS

■ 4. The authority citation for part 2554 continues to read as follows:

Authority: Pub. L. 99–509, Secs. 6101–6104, 100 Stat. 1874 (31 U.S.C. 3801–3812); 42 U.S.C. 12651c–12651d.

§ 2554.1 [Amended]

■ 5. Amend § 2554.1 by removing ''$10,781'' in paragraph (b) and adding in its place ''$10,957.''

Dated: December 28, 2016.

Jeremy Joseph,

General Counsel.

[FR Doc. 2016–31897 Filed 1–5–17; 8:45 am]

BILLING CODE 6050–28–P

Proposed Rules

Federal Register
Vol. 82, No. 4
Friday, January 6, 2017

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 430

[Docket Number EERE–2014–BT–STD–0048]

RIN 1904–AD37

Energy Conservation Program: Energy Conservation Standards for Consumer Central Air Conditioners and Heat Pumps

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Energy Policy and Conservation Act of 1975 (EPCA), as amended, prescribes energy conservation standards for various consumer products, including consumer central air conditioners and heat pumps. EPCA also requires the U.S. Department of Energy (DOE) to periodically determine whether more-stringent, amended standards would be technologically feasible and economically justified, and would save a significant amount of energy. In this proposed rule, DOE proposes to amend the energy conservation standards for consumer central air conditioners and heat pumps identical to those set forth in a direct final rule published elsewhere in this **Federal Register**. If DOE receives an adverse comment and determines that such comment may provide a reasonable basis for withdrawing the direct final rule, DOE will publish a notice withdrawing the direct final rule and will proceed with this proposed rule.

DATES: DOE will accept comments, data, and information regarding the proposed standards no later than April 26, 2017.

Comments regarding the likely competitive impact of the proposed standard should be sent to the Department of Justice contact listed in the **ADDRESSES** section before February 6, 2017.

ADDRESSES: *Instructions:* Any comments submitted must identify the proposed rule for energy conservation standards for consumer central air conditioners and heat pumps, and provide docket number EERE–2014–BT–STD–0048 and/or regulatory information number (RIN) 1904–AD37. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email: CACHeatPump2014STD0048@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.

3. *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.

4. *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.

No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section III of this document (''Public Participation'').

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Office of Energy Efficiency and Renewable Energy through the methods listed above and by email to *Chad_S_Whiteman@omb.eop.gov.*

EPCA requires the Attorney General to provide DOE a written determination of whether the proposed standard is likely to lessen competition. The U.S. Department of Justice Antitrust Division invites input from market participants and other interested persons with views on the likely competitive impact of the proposed standard. Interested persons may contact the Division at *energy.standards@atr.usdoj.gov* before February 6, 2017. Please indicate in the ''Subject'' line of your email the title and Docket Number of this proposed rule.

Docket: The dockets, which include **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 dockets are listed in the *www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

A link to the docket Web page for consumer central air conditioners and heat pumps can be found at: *www1.eere.energy.gov/buildings/appliance_standards/rulemaking.aspx/ruleid/72.* The *www.regulations.gov* Web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to submit a comment or review other public comments and the docket, contact the Appliance and Equipment Standards staff at (202) 586–6636 or by email: *Appliance_Standards_Public_Meetings@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Antonio Bouza, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–4563. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Johanna Jochum, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW., Washington, DC, 20585–0121. Telephone: (202) 287–6307. Email: *Johanna.Jochum@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

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I. Introduction

A. Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances (collectively referred to as ''covered products''), which includes the consumer central air conditioners and heat pumps that are the subject of this rulemaking. (42 U.S.C. 6292(a)(3))

Pursuant to EPCA, DOE's energy conservation program for covered products consists essentially of four parts: (1) Testing; (2) labeling; (3) the establishment of Federal energy conservation standards; and (4) certification and enforcement procedures. The Federal Trade Commission (FTC) is primarily responsible for labeling, and DOE implements the remainder of the program. Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product prior to the adoption of a new or amended energy conservation standard. (42 U.S.C. 6295(o)(3)(A) and (r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedures for central air conditioners and heat pumps appear at title 10 of the Code of Federal Regulations (CFR) part 430, subpart B, appendix M and M1.

The National Appliance Energy Conservation Act of 1987 (NAECA; Pub. L. 100–12) included amendments to EPCA that established the original energy conservation standards for central air conditioners and heat pumps. (42 U.S.C. 6295(d)(1)–(2)) EPCA, as amended, also requires DOE to conduct two cycles of rulemakings to determine whether to amend the energy conservation standards for central air conditioners and heat pumps. (42 U.S.C. 6295(d)(3)) The first cycle culminated in a final rule published in the **Federal Register** on August 17, 2004 (the August 2004 Rule), which prescribed energy conservation standards for central air conditioners and heat pumps manufactured or imported on and after January 23, 2006. 69 FR 50997. DOE completed the second of the two rulemaking cycles by issuing a direct final rule on June 6, 2011 (2011 Direct Final Rule), which was published in the **Federal Register** on June 27, 2011. 76 FR 37408. The 2011 Direct Final Rule (June 2011 DFR) amended standards for central air conditioners and heat pumps manufactured on or after January 1, 2015.

EPCA requires DOE to periodically review its already established energy conservation standards for a covered product. Not later than six years after issuance of any final rule establishing or amending a standard, DOE must publish a notice of determination that standards for the product do not need to be amended, or a notice of proposed rulemaking including new proposed standards. (42 U.S.C. 6295(m)(1)) Pursuant to this requirement, the next review that DOE would need to conduct must occur no later than six years from the issuance of the 2011 direct final rule. This direct final rule fulfills that requirement.

DOE must follow specific statutory criteria for prescribing new or amended standards for covered products, including consumer central air conditioners and heat pumps. Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and (3)(B)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)) Moreover, DOE may not prescribe a standard: (1) For certain products, including consumer central air conditioners and heat pumps, if no test procedure has been established for the product, or (2) if DOE determines by rule that the proposed standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) In deciding whether a proposed standard is economically justified, after receiving comments on the proposed standard, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination by, to the greatest extent practicable, considering the following seven factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary of Energy (Secretary) considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

DOE notes that the current energy conservation standards for central air conditioners and heat pumps (set forth at 10 CFR 430.32(c)) contain requirements for seasonal energy efficiency ratio (SEER), heating seasonal performance factor (HSPF), energy efficiency ratio (EER), and average off mode power consumption. Standards based upon the latter two metrics were newly adopted in the June 27, 2011 DFR for the reasons stated in that rulemaking. 76 FR 37408. As discussed in section II.B.1 and section II.B.3 of this proposed rule, DOE has chosen to specify performance standards based on EER and SEER for only the southwest region of the country. Pursuant to its mandate under 42 U.S.C. 6295(m)(1), this DOE rulemaking has considered amending the existing energy conservation standards for central air conditioners and heat pumps, and DOE is adopting the amended standards contained in this direct final rule.

EPCA, as codified, also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of evidence that the standard is likely to result in the unavailability in the United States of any covered product type (or class) or

performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) DOE generally considers these criteria as part of its analysis but consistently conducts a more thorough analysis of a given standard's projected impacts that extends beyond this presumption.

Additionally, 42 U.S.C. 6295(q)(1) specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. In this case, DOE must specify a different standard level for a type or class of covered product that has the same function or intended use, if DOE determines that products within such group: (A) Consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature that other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE must consider such factors as the utility to the consumer of the feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Under 42 U.S.C. 6295(o)(6), which was added to EPCA by section 306(a) of the Energy Independence and Security Act of 2007 (EISA 2007; Pub. L. 110–140), DOE may consider the establishment of regional standards for central air conditioners and heat pumps. Specifically, in addition to a base national standard for a product, DOE may for central air conditioners and heat pumps, establish one or two more-restrictive regional standards. (42 U.S.C. 6295(o)(6)(B)) The regions must include only contiguous States (with the exception of Alaska and Hawaii, which may be included in regions with which they are not contiguous), and each State may be placed in only one region (*i.e.,* an entire State cannot simultaneously be placed in two regions, nor can it be divided between two regions). (42 U.S.C. 6295(o)(6)(C)) Further, DOE can establish the additional regional standards only: (1) Where doing so would produce significant energy savings in comparison to a single national standard, (2) if the regional standards are economically justified, and (3) after considering the impact of these standards on consumers, manufacturers, and other market participants, including product distributors, dealers, contractors, and installers. (42 U.S.C. 6295(o)(6)(D))

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions set forth under 42 U.S.C. 6297(d).

Pursuant to further amendments to EPCA contained in EISA 2007, Public Law 110–140, any final rule for new or amended energy conservation standards promulgated after July 1, 2010, is required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) The SEER and HSPF metrics for central air conditioners and heat pumps already account for standby mode energy use, and the current standards include limits on off mode energy use.

As mentioned previously, EISA 2007 amended EPCA, in relevant part, to grant DOE authority to issue a final rule (hereinafter referred to as a ''direct final rule'') establishing an energy conservation standard on receipt of a statement submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, that contains recommendations with respect to an energy or water conservation standard that are in accordance with the provisions of 42 U.S.C. 6295(o). (42 U.S.C. 6295(p)(4)) Pursuant to 42 U.S.C. 6295(p)(4), the Secretary must also determine whether a jointly-submitted recommendation for an energy or water conservation standard satisfies 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable.

A notice of proposed rulemaking (NOPR) that proposes an identical energy efficiency standard must be published simultaneously with the direct final rule, and DOE must provide a public comment period of at least 110 days on this proposal. (42 U.S.C. 6295(p)(4)(A)–(B)) While DOE typically provides a comment period of 60 days on proposed standards, in this case, DOE provides a comment period of the same length as the comment period on the direct final rule—*i.e.* 110 days. Based on the comments received during this period, the direct final rule will either become effective, or DOE will withdraw it not later than 120 days after its issuance if (1) one or more adverse comments is received, and (2) DOE determines that those comments, when viewed in light of the rulemaking record related to the direct final rule, provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o) and for DOE to continue this rulemaking under the NOPR. (42 U.S.C. 6295(p)(4)(C)) Receipt of an alternative joint recommendation may also trigger a DOE withdrawal of the direct final rule in the same manner. *Id.*

Typical of other rulemakings, it is the substance, rather than the quantity, of comments that will ultimately determine whether a direct final rule will be withdrawn. To this end, the substance of any adverse comment(s) received will be weighed against the anticipated benefits of the jointly-submitted recommendations and the likelihood that further consideration of the comment(s) would change the results of the rulemaking. DOE notes that, to the extent an adverse comment had been previously raised and addressed in the rulemaking proceeding, such a submission will not typically provide a basis for withdrawal of a direct final rule. Nevertheless, if the Secretary makes such a determination, DOE must withdraw the direct final rule and proceed with the simultaneously-published NOPR. DOE must publish in the **Federal Register** the reason why the direct final rule was withdrawn. *Id.*

B. Background

According to the Energy Policy and Conservation Act's 6-year review requirement (42 U.S.C. 6295(m)(1)), DOE must publish a notice of proposed rulemaking to propose new standards for consumer central air conditioner and heat pump products or a notice of determination that the existing standards do not need to be amended by

June 6, 2017. On November 5, 2014, DOE initiated efforts pursuant to the 6-year lookback requirement by publishing a request for information (RFI) regarding central air conditioners and heat pumps to solicit comments on whether to amend the current energy conservation standards for consumer central air conditioner and heat pump products. 79 FR 65603. The November 2014 RFI also described the procedural and analytical approaches that DOE anticipated to use in order to evaluate potential amended energy conservation standards for central air conditioners and heat pumps.

On August 28, 2015, DOE published a notice of data availability (NODA) describing analysis to be used in support of the central air conditioners and heat pumps standards rulemaking. 80 FR 52206. The analysis for this notice provided the results of a series of DOE provisional analyses regarding potential energy savings and economic impacts of amending the central air conditioner and heat pump energy conservation standards. These analyses were conducted for the following categories: Engineering, consumer impacts, national impacts, and manufacturer impacts.

In response to the November 2014 RFI, Lennox formally requested that DOE convene a negotiated rulemaking to address potential amendments to the current standards, which would help ensure that all stakeholders have input into the discussion, analysis, and outcome of the rulemaking. (Lennox, No. 22) Other key industry stakeholders made similar suggestions. (American Council for an Energy-Efficient Economy, No. 23; Air Conditioning Contractors of America, No. 25; Heating, Air Conditioning & Refrigeration Distributors International, No. 26) ASRAC carefully evaluated this request, and the Committee voted to charter a working group to support the negotiated rulemaking effort requested by these parties.

Subsequently, DOE determined that the complexity of the CAC/HP rulemaking necessitated a combined effort to address these equipment types to ensure a comprehensive vetting of all issues and related analyses to support any final rule setting standards. To this end, DOE solicited the public for membership nominations to the CAC/HP Working Group that would be formed under the ASRAC charter by issuing a Notice of Intent to Establish the Central Air Conditioners and Heat Pumps Working Group To Negotiate a Notice of Proposed Rulemaking for Energy Conservation Standards. 80 FR 40938 (July 14, 2015). The CAC/HP Working Group was established under ASRAC in accordance with the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act—with the purpose of discussing and, if possible, reaching consensus on a set of energy conservation standards to propose/finalize for CACs and HPs. The CAC/HP Working Group was to consist of fairly representative parties having a defined stake in the outcome of the proposed standards, and would consult, as appropriate, with a range of experts on technical issues.

DOE received 26 nominations for membership. Ultimately, the CAC/HP Working Group consisted of 15 members, including one member from ASRAC and one DOE representative.[1] The CAC/HP Working Group met ten times (nine times in-person and once by teleconference). The meetings were held on August 26, 2015, September 10, 2015, September 28–29, 2015, October 13–14, 2015, October 26–27, 2015. November 18–19, 2015, December 1–2, 2015, December 16–17, 2015, January 11–12, 2016, and a webinar on January 19, 2016.

During the CAC/HP Working Group discussions, participants discussed setting new standards for single-package air conditioners. Specifically, arguments were made against raising the standard level for single-package systems due to the unavailability of full product lines, which span the entire range of cooling capacities, with efficiencies that are only modestly greater (*i.e.,* 15 SEER) than the current standard level (*i.e.,* 14 SEER). (ASRAC Public Meeting, No. 80 at pp. 75–6) After being informed that the national energy savings from a 15 SEER standard for single-package systems would be small (*i.e.,* approximately 0.1 quads), the Working Group agreed not to recommend raising the standards for these product classes. (ASRAC Public Meeting, No. 80 at pp. 90–91). In addition, some parties wanted the Group to recommend a level for standards for split-system heat pumps that would encourage use of two-speed equipment (*i.e.,* greater than 15 SEER), but the manufacturer representatives objected to this proposal due to two primary concerns: (1) Only a single compressor manufacturer supplies two-stage compressors, thereby creating the possibility of a limited or constrained supply of the most critical component of a two-speed system and (2) the likelihood, in replacement installations, that the utilization of existing thermostat control wiring could result in the use of only high-speed, thereby eliminating the efficiency gain resulting from low-speed operation during part-load conditions.

The CAC/HP Working Group successfully reached consensus on recommended energy conservation standards, as well as test procedure amendments for CACs and HPs. On January 19, 2016, the CAC/HP Working Group submitted the Term Sheet to ASRAC outlining its recommendations, which ASRAC subsequently adopted.[2]

After carefully considering the consensus recommendations for amending the energy conservation standards for CACs and HPs submitted by the CAC/HP Working Group and adopted by ASRAC, DOE has determined that these recommendations are in accordance with the statutory requirements of 42 U.S.C. 6295(p)(4) for the issuance of a direct final rule.

More specifically, these recommendations comprise a statement submitted by interested persons who are fairly representative of relevant points of view on this matter. In reaching this determination, DOE took into consideration the fact that the CAC/HP Working Group, in conjunction with ASRAC members who approved the recommendations, consisted of representatives of manufacturers of the covered equipment at issue, States, and efficiency advocates—all of which are groups specifically identified by Congress as relevant parties to any consensus recommendation. (42 U.S.C. 6295(p)(4)(A)) As delineated above, the Term Sheet was signed and submitted by a broad cross-section of interests, including the manufacturers who produce the subject products, trade associations representing these manufacturers and installation contractors, environmental and energy-efficiency advocacy organizations, and electric utility companies. Although States were not direct signatories to the Term Sheet, the ASRAC Committee approving the CAC/HP Working Group's

[1] The group members were Tony Bouza (U.S. Department of Energy), Marshall Hunt (Pacific Gas & Electric Company, San Diego Gas & Electric Company, Southern California Edison, and Southern California Gas Company), Andrew deLaski (Appliance Standards Awareness Project and ASRAC representative), Meg Waltner (Natural Resources Defense Council), John Hurst (Lennox), Karen Meyers (Rheem Manufacturing Company), Charles McCrudden (Air Conditioning Contractors of America), Harvey Sachs (American Council for an Energy Efficient Economy), Russell Tharp (Goodman Manufacturing), Karim Amrane (Air-Conditioning, Heating, and Refrigeration Institute), Don Brundage (Southern Company), Kristen Driskell (California Energy Commission), John Gibbons (United Technologies), Steve Porter (Johnstone Supply), and Jim Vershaw (Ingersoll Rand).

[2] Available at (copy and paste into browser): *https://www.regulations.gov/document?D=EERE-2014-BT-STD-0048-0076.*

recommendations included at least two members representing States—one representing the National Association of State Energy Officials (NASEO) and one representing the State of California.[3] Moreover, DOE does not read the statute as requiring a statement submitted by all interested parties before the Department may proceed with issuance of a direct final rule. By explicit language of the statute, the Secretary has the discretion to determine when a joint recommendation for an energy or water conservation standard has met the requirement for representativeness (*i.e.,* ''as determined by the Secretary''). *Id.*

DOE also evaluated whether the recommendation satisfies 42 U.S.C. 6295(o), as applicable. In making this determination, DOE conducted an analysis to evaluate whether the potential energy conservation standards under consideration achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified and result in significant energy conservation. The evaluation is the same comprehensive approach that DOE typically conducts whenever it considers potential energy conservation standards for a given type of product or equipment.

DOE has considered the recommended energy conservation standards and believes that they meet the EPCA requirements for issuance of a direct final rule. As a result, DOE published a direct final rule establishing energy conservation standards for consumer central air conditioners and heat pumps elsewhere in this **Federal Register**. If DOE receives adverse comments that may provide a reasonable basis for withdrawal and withdraws the direct final rule, DOE will consider those comments and any other comments received in determining how to proceed with this proposed rule.

For further background information on the proposed standards and the supporting analyses, please see the direct final rule published elsewhere in this **Federal Register**. That document includes additional discussion of the EPCA requirements for promulgation of energy conservation standards; the current standards for consumer central air conditioners and heat pumps; the history of the standards rulemakings establishing such standards; and information on the test procedures used to measure the energy efficiency of consumer central air conditioners and heat pumps. The document also contains an in-depth discussion of the analyses conducted in support of this rulemaking, the methodologies DOE used in conducting those analyses, and the analytical results.

II. Proposed Standards

When considering new or amended energy conservation standards, the standards that DOE adopts for any type (or class) of covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

For this proposed rule, DOE considered the impacts of amended standards for central air conditioners and heat pumps at each TSL, beginning with the maximum technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next-most-efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

To aid the reader in understanding the benefits and/or burdens of each TSL, tables in this section summarize the quantitative analytical results for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers who may be disproportionately affected by a standard and impacts on employment.

1. Benefits and Burdens of TSLs Considered for Central Air Conditioner and Heat Pump Standards

Table II–1 and Table II–2 summarize the quantitative impacts estimated for each TSL for central air conditioners and heat pumps. The national impacts are measured over the lifetime of central air conditioners and heat pumps purchased in the 30-year period that begins in the anticipated first year of compliance with any amended standards (2021–2050 or, in the case of the recommended TSL, 2023–2052). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle results. The efficiency levels contained in each TSL are described in section V.A of the direct final rule.

TABLE II–1—SUMMARY OF RESULTS FOR CENTRAL AIR CONDITIONER AND HEAT PUMP TSLS: NATIONAL IMPACTS

Category	TSL 1	Recommended TSL	TSL 3	TSL 4
FFC National Energy Savings				
Quads	1.3	3.2	8.6	14.2.
NPV of Consumer Costs and Benefits (2015$ billion)				
3% discount rate	5.7	12.2	1.1	(28.1).
7% discount rate	1.3	2.5	(10.0)	(31.4).
Cumulative Emissions Reduction (Total FFC Emissions)				
CO_2 (million metric tons)	76.68	188.3	508.7	841.0.
SO_2 (thousand tons)	40.94	100.8	272.4	452.4.
NO_X (thousand tons)	142.4	350.3	944.2	1,559.
Hg (tons)	0.151	0.372	1.005	1.669.

[3] These individuals were Deborah E. Miller (NASEO) and David Hungerford (California Energy Commission).

TABLE II–1—SUMMARY OF RESULTS FOR CENTRAL AIR CONDITIONER AND HEAT PUMP TSLS: NATIONAL IMPACTS—Continued

Category	TSL 1	Recommended TSL	TSL 3	TSL 4
CH_4 (thousand tons)	341.2	842.4	2,264	3,738.
CH_4 (million tons CO_2eq)*	9,553	23,586	63,387	104,677.
N_2O (thousand tons)	0.858	2.114	5.711	9.481.
N_2O (thousand tons CO_2eq)*	227.5	560.3	1,514	2,512.
Value of Emissions Reduction (Total FFC Emissions)				
CO_2 (2015$ billion)**	0.482 to 6.997	1.143 to 16.855	3.190 to 46.375	5.298 to 76.950.
NO_X—3% discount rate (2015$ million)	222.2 to 506.6	528.1 to 1204.1	1471.5 to 3355.0	2448.1 to 5581.5.
NO_X—7% discount rate (2015$ million)	80.0 to 180.4	178.6 to 402.6	525.4 to 1184.5	875.0 to 1972.9.

* CO_2eq is the quantity of CO_2 that would have the same global warming potential (GWP).
** Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.
Note: Parentheses indicate negative values.

TABLE II–2—SUMMARY OF RESULTS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS BY TSL: MANUFACTURER AND CONSUMER IMPACTS

Category	TSL 1	Recommended TSL*	TSL 3	TSL 4
Manufacturer Impacts				
Industry NPV (2015$ million)	3,852.0 to 4,466.2	3,803.9 to 4,381.9	3,382.0 to 4,512.2	3,360.6 to 4,889.6.
No-new-standards case INPV = $4,496.1.				
Change in Industry NPV (%)	(14.3) to (0.7)	(15.4) to (2.5)	(24.8) to 0.4	(25.3) to 8.8.
Consumer Average LCC Savings (2015$)				
Split Air Conditioners	N: $43 HD: $169 HH: $82	N: $43 HD: $150. HH: $39.	($122)	($304).
Split Heat Pumps	$72	$131	($25)	($425).
Package Air Conditioners	N/A	N/A	$43	($80).
Package Heat Pumps	N/A	N/A	$115	$115.
Space-Constrained Air Conditioners	N/A	N/A	N/A	$58.
Small-Duct High-Velocity	N/A	N/A	N/A	($540).
Shipment-Weighted Average**	$68	$75	($71)	($315).
Consumer Simple PBP (years)				
Split Air Conditioners	N: 10.5 HD: 5.4 HH: 5.5	N: 10.5 HD: 7.6. HH: 7.7.	15.2	19.2.
Split Heat Pumps	5.2	4.9	9.4	14.9.
Package Air Conditioners	N/A	N/A	8.9	12.3.
Package Heat Pumps	N/A	N/A	5.2	5.2.
Space-Constrained Air Conditioners	N/A	N/A	N/A	11.6.
Small-Duct High-Velocity	N/A	N/A	N/A	34.3.
Shipment-Weighted Average**	6.0	6.7	12.5	16.8.
% of Consumers that Experience Net Cost				
Split Air Conditioners	N: 25% HD: 14% HH: 15%	N: 25% HD: 42%. HH: 45%.	63%	75%.
Split Heat Pumps	9%	20%	54%	79%.
Package Air Conditioners	N/A	N/A	53%	69%.
Package Heat Pumps	N/A	N/A	39%	39%.
Space-Constrained Air Conditioners	N/A	N/A	N/A	60%.
Small-Duct High-Velocity	N/A	N/A	N/A	90%.
Shipment-Weighted Average*	14%	28%	59%	74%.

Note: Parentheses indicate negative values. N = North region. HD = Hot-dry region; HH = Hot-humid region.
* There are no impacts for Package Air Conditioners. Package Heat Pumps, Space-Constrained Air Conditioners, and Small-Duct High-Velocity because the standard levels are at the baseline efficiency.
** Weighted by shares of each product class in total projected shipments in 2021. Does not include shipments for SCAC and SDHV.

First, DOE considered TSL 4, which would save an estimated total of 14.2 quads of energy, an amount DOE considers significant. TSL 4 has an estimated NPV of consumer benefit of −$31.4 billion using a 7-percent discount rate, and −$28.1 billion using a 3-percent discount rate.

The cumulative emissions reductions at TSL 4 are 841 Mt of CO_2, 452.4 thousand tons of SO_2, 1,559 thousand tons of NO_X, 1.669 tons of Hg, 3,738 thousand tons of CH_4, and 9.481 thousand tons of N_2O. The estimated monetary value of the CO_2 emissions reductions at TSL 4 ranges from $5.298 billion to $76.950 billion.

At TSL 4, the average LCC savings is −$304 for split air conditioners, −$425 for split heat pumps, −$80 for package air conditioners, $115 for package heat pumps, $58 for space-constrained air conditioners, and −$540 for small-duct high-velocity air conditioners. The simple PBP is 19.2 years for split air conditioners, 14.9 years for split heat pumps, 12.3 years for package air conditioners, 5.2 years for package heat pumps, 11.6 years for space-constrained air conditioners, and 34.3 years for small-duct high-velocity air conditioners. The share of consumers experiencing a net LCC cost is 75 percent for split air conditioners, 79 percent for split heat pumps, 69 percent for package air conditioners, 39 percent for package heat pumps, 60 percent for space-constrained air conditioners, and 90 percent for small-duct high-velocity air conditioners.

At TSL 4, the projected change in INPV ranges from a decrease of $1,135.6 million to an increase of $393.5 million. If the more severe range of impacts is reached, TSL 4 could result in a net loss of up to 25.3 percent of INPV for manufacturers.

After considering the analysis and weighing the benefits and the burdens, the Secretary has tentatively concluded that, at TSL 4 for central air conditioner and heat pump standards, the benefits of energy savings and emissions reductions would be outweighed by the negative NPV of total consumer benefits at a 3-percent and 7-percent discount rate, negative average consumer LCC savings for most product classes, and the reduction in industry value.

Next, DOE considered TSL 3, which would save an estimated total of 8.6 quads of energy, an amount DOE considers significant. TSL 3 has an estimated NPV of consumer benefit of −$10 billion using a 7-percent discount rate, and $1.1 billion using a 3-percent discount rate.

The cumulative emissions reductions at TSL 3 are 508.7 Mt of CO_2, 272.4 thousand tons of SO_2, 944.2 thousand tons of NO_X, 1.005 tons of Hg, 2,264 thousand tons of CH_4, and 5.711 thousand tons of N_2O. The estimated monetary value of the CO_2 emissions reductions at TSL 3 ranges from $3.190 billion to $46.375 billion.

At TSL 3, the average LCC savings is −$122 for split air conditioners, −$25 for split heat pumps, $43 for package air conditioners, and $115 for package heat pumps. The simple PBP is 15.2 years for split air conditioners, 9.4 years for split heat pumps, 8.9 years for package air conditioners, and 5.2 years for package heat pumps. The share of consumers experiencing a net LCC cost is 63 percent for split air conditioners, 54 percent for split heat pumps, 53 percent for package air conditioners, and 39 percent for package heat pumps. There are no impacts on space-constrained air conditioners or small-duct high-velocity air conditioners at TSL 3.

At TSL 3, the projected change in INPV ranges from a decrease of $1,114.2 million to an increase of $16.1 million. If the more severe range of impacts is reached, TSL 3 could result in a net loss of up to 24.8 percent of INPV for manufacturers.

After considering the analysis and weighing the benefits and the burdens, the Secretary has tentatively concluded that at TSL 3 for central air conditioner and heat pump standards, the benefits of energy savings, positive NPV of consumer benefit at a 3-percent discount rate, and emissions reductions would be outweighed by the negative NPV of consumer benefit at a 7-percent discount rate, negative average LCC savings for most product classes, and the potential reduction in INPV for manufacturers.

Next, DOE considered the Recommended TSL, which would save an estimated total of 3.2 quads of energy, an amount DOE considers significant. The Recommended TSL has an estimated NPV of consumer benefit of $2.5 billion using a 7-percent discount rate, and $12.2 billion using a 3-percent discount rate.

The cumulative emissions reductions under the Recommended TSL are 188.3 Mt of CO_2, 100.8 thousand tons of SO_2, 350.3 thousand tons of NO_X, 0.372 tons of Hg, 842.4 thousand tons of CH_4, and 2.114 thousand tons of N_2O. The estimated monetary value of the CO_2 emissions reductions ranges from $1.143 billion to $16.855 billion.

Under the Recommended TSL, the average LCC savings for split air conditioners is $43 in the north region, $150 in the hot dry region, $39 in the hot humid region, and $131 for split heat pumps. The simple payback period for split air conditioners is 10.5 years in the north region, 7.6 years in the hot dry region, 7.7 years in the hot humid region, and 4.9 years for split heat pumps. The share of consumers experiencing a net LCC cost for split air conditioners is 25 percent in the north region, 42 percent in the hot dry region, 45 percent in the hot humid region, and 20 percent for split heat pumps. There are no impacts to packaged air conditioners, packaged heat pumps, space-constrained air conditioners, and small-duct high-velocity air conditioners under the Recommended TSL.

Under the Recommended TSL, the projected change in INPV ranges from a decrease of $692.3 million to a decrease of $114.2 million. If the more severe range of impacts is reached, TSL 3 could result in a net loss of up to 15.4 percent of INPV for manufacturers.

After considering the analysis and weighing the benefits and the burdens, the Secretary has tentatively concluded that under the Recommended TSL for central air conditioner and heat pump standards, the benefits of energy savings, positive NPV of consumer benefit, positive impacts on consumers (as indicated by positive average LCC savings and favorable PBPs), and emission reductions, would outweigh the negative impacts on some consumers and the potential reduction in INPV for manufacturers.

Under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this notice of proposed rulemaking that proposes amended energy conservation standards for central air conditioners and heat pumps at the Recommended TSL. The proposed amended energy conservation standards for central air conditioners and heat pumps as determined by the DOE test procedure at the time of the 2015–2016 ASRAC negotiations are presented in Table II–3.

TABLE II–3—PROPOSED AMENDED ENERGY CONSERVATION STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS AS DETERMINED BY THE DOE TEST PROCEDURE AT THE TIME OF THE 2015–2016 ASRAC NEGOTIATIONS

Product class	National		Southeast *	Southwest **	
	SEER	HSPF	SEER	SEER	EER
Split-System Air Conditioners with a Certified Cooling Capacity <45,000 Btu/h	14	.....	15	15	12.2/10.2 ***
Split-System Air Conditioners with a Certified Cooling Capacity ≥45,000 Btu/h	14	.....	14.5	14.5	11.7/10.2 ***
Split-System Heat Pumps	15	8.8	.....	.....	.....
Single-Package Air Conditioners †	14	.....	.....	.....	11.0
Single-Package Heat Pumps †	14	8.0	.....	.....	.....
Space-Constrained Air Conditioners †	12	.....	.....	.....	.....
Space-Constrained Heat Pumps †	12	7.4	.....	.....	.....
Small-Duct High-Velocity Systems †	12	7.2	.....	.....	.....

* Southeast includes: The states of Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virginia, the District of Columbia, and the U.S. territories.
** Southwest includes the states of Arizona, California, Nevada, and New Mexico.
*** The 10.2 EER amended energy conservation standard applies to split-system air conditioners with a seasonal energy efficiency ratio greater than or equal to 16.
† The energy conservation standards for small-duct high velocity and space-constrained product classes remain unchanged from current levels.

Table II–4 shows the amended energy conservation standards for central air conditioners and heat pumps as determined by the test procedure final rule issued by DOE on November 30, 2016, hereinafter referred to as the ''November 2016 test procedure final rule''.[4] (Docket No. EERE–2016–BT–TP–0029)

TABLE II–4—AMENDED ENERGY CONSERVATION STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS AS DETERMINED BY THE NOVEMBER 2016 TEST PROCEDURE FINAL RULE

Product class	National		Southeast *	Southwest **	
	SEER2	HSPF2	SEER2	SEER2	EER2
Split-System Air Conditioners with a Certified Cooling Capacity <45,000 Btu/h	13.4	.....	14.3	14.3	11.7/9.8 ***
Split-System Air Conditioners with a Certified Cooling Capacity ≥45,000 Btu/h	13.4	.....	13.8	13.8	11.2/9.8 ***
Split-System Heat Pumps	14.3	7.5	.....	.....	.....
Single-Package Air Conditioners †	13.4	.....	.....	.....	10.6
Single-Package Heat Pumps †	13.4	6.8	.....	.....	.....
Space-Constrained Air Conditioners †	11.7	.....	.....	.....	.....
Space-Constrained Heat Pumps †	11.9	6.3	.....	.....	.....
Small-Duct High-Velocity Systems †	12	6.1	.....	.....	.....

* Southeast includes: The states of Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virginia, the District of Columbia, and the U.S. territories.
** Southwest includes the states of Arizona, California, Nevada, and New Mexico.
*** The 9.8 EER amended energy conservation standard applies to split-system air conditioners with a seasonal energy efficiency ratio greater than or equal to 15.2.
† The energy conservation standards for small-duct high velocity and space-constrained product classes remain unchanged from current levels.

The following paragraph describes how DOE translated the energy conservation standards in Table II–3—which are in terms of SEER, HSPF, and EER as determined by the DOE test procedure at the time of the 2015–2016 ASRAC Negotiations—to the energy conservation standard levels in Table II–4—which are in terms of SEER2, HSPF2, and EER2 as determined by the November 2016 test procedure final rule. DOE used a methodology consistent with the recommendations of the CAC/HP Working Group to translate the SEER standard levels to SEER2 standard levels for the split-system and single-package product classes. Note that the heating load line slope factor established by the November 2016 test procedure final rule is different than the heating load line slope factors used by the CAC/HP Working Group in their Term Sheet recommendation #9. DOE translated the HSPF standard levels to HSPF2 standard levels for split-system and single-package heat pumps by adjusting for the intermediate heating load line slope factor established by the November 2016 test procedure final rule using interpolation. (November 2016 Test Procedure Final Rule, pp. 127–130)

Comments in response to the provisional translations for HSPF2 for split system and single-package heat pumps are summarized in the November 2016 test procedure final rule. (November 2016 Test Procedure Final Rule, pp. 127–130). Commenters agreed with the translation for split-system heat pumps, but industry commenters felt that the 6.8 value was too high for single-package heat pumps.

[4] The test procedure final rule issued by DOE on November 30, 2016, is accessible via the DOE Web site at: *http://energy.gov/eere/buildings/downloads/issuance-2016-11-30-energy-conservation-program-test-procedures-central-air.*

Alternative HSPF2 values that were suggested in comments ranged from 6.5 (Docket No. EERE–2016–BT–TP–0029, Lennox, No. 25 at p. 10) to 6.7 (Docket No. EERE–2016–BT–TP–0029, Goodman, No. 39 at p. 10) Data provided under confidentiality supports the range suggested in comments. DOE combined that data with the data it used to validate its interpolated value of 6.8. DOE found that the combined data shows that 6.7 HSPF2 is an appropriate translation. For this reason, DOE is proposing 6.7 HSPF2 for single-package heat pumps in this notice.

The August 2016 test procedure SNOPR and November 2016 test procedure final rule did not include translated levels for small-duct high velocity (SDHV) and space-constrained products. Neither did Recommendation #9 of the Term Sheet. Recommendation #9 did, however, state that the energy conservation standards for those product classes should remain unchanged from current levels (*i.e.* that there would be no change in stringency). (ASRAC Term Sheet, No. 76 at pp. 4–5) On October 27, 2016, DOE published a notice of data availability (NODA) that provided provisional translations of the CAC/HP Working Group's recommended energy conservation standard levels for small-duct high velocity and space constrained products (which are in terms of the test procedure at the time of the 2015–2016 Negotiations) into levels consistent with the test procedure proposed in the August 2016 test procedure SNOPR. Table II–5 presents the provisional translations included in the October 2016 NODA. Note that multiple provisional translations from SEER to SEER2 are included for space-constrained air conditioners and heat pumps because, at the time of the NODA publication, DOE had not finalized the test procedure which would establish the minimum external static pressure requirements.

TABLE II–5—PROVISIONAL TRANSLATIONS OF CAC/HP WORKING GROUP-RECOMMENDED ENERGY CONSERVATION STANDARD LEVELS INCLUDED IN OCTOBER 2016 NODA

Product class	CAC/HP Working group recommendation		August 2016 test procedure SNOPR translation	
	SEER	HSPF	SEER2	HSPF2
Small-Duct High-Velocity Systems	12	7.2	12	6.1
Space-Constrained Air Conditioners			11.6 */11.8 **	
Space-Constrained Heat Pumps	12		11.5 */11.9 **	6.3

* Estimated SEER2 at 0.50 in. wc.
** Estimated SEER2 at 0.30 in. wc.

In developing its provisional translations for space-constrained air conditioners published in the NODA, DOE reviewed existing test data, adjusted relevant measurements based on blower performance data, and translated the levels based on the average impact. For the space-constrained and SDHV heat pump translations published in the NODA, DOE also reviewed test data and confirmed that the 15% reduction from HSPF to HSPF2 that DOE observed for split-system and single-package heat pumps was appropriate also for space-constrained and SDHV heat pumps.

In written comments, manufacturers and AHRI expressed support for DOE's provisional translations for SDHV products. Unico stated that it reviewed all of its test reports from the previous two years and found its range of results validated DOE's translations for SDHV products. (Unico, No. 95 at p. 2). AHRI and Lennox also expressed support for DOE's SEER and HPSF to SEER2 and HSPF2 levels for SDHV products. (AHRI, No. 94 at p. 1; Lennox, No. 97 at p. 1) EEI commented that it did not agree with DOE's translation because the HSPF appears to drop by approximately 15.3%, even though there has been no change to the product. (EEI, No. 96 at p. 2).

Regarding the concern expressed by EEI, DOE's translations do not assume nor reflect any change to product design. EPCA requires DOE to consider changes in energy conservation standards if a test procedure change alters the measurement, but does not prohibit a test procedure change that alters the measurement. (42 U.S.C. 6293(e)) In the November 2016 test procedure final rule, DOE adopted provisions that amend the test procedure required to determine representations for CAC/HP, including SDHV products. These provisions impact the value of the test procedure results. For instance, the November 2016 test procedure final rule assumes higher heating loads for heat pumps in colder outdoor conditions, which will typically result in lower HSPF2 ratings. (November 2016 Test Procedure Final Rule, pp. 110–127) Simply stated, an SDHV product tested in accordance with the test procedure at the time of the 2015–2016 ASRAC Negotiations will get a different rating than the same SDHV product (without design changes) tested in accordance with the test procedure adopted in the November 2016 test procedure final rule. DOE's translations are intended to reflect these differences. DOE is using ''SEER2'', ''HSPF2'', and ''EER2'' to distinguish ratings determined by the November 2016 test procedure from the SEER, HSPF and EER ratings determined by past test procedures to mitigate confusion that may result from the possibility that products available before and after the November 2016 test procedure may have a different SEER2/HSPF2/EER2 than SEER/HSPF/EER rating despite no changes to design.

Unico's SDHV data validate DOE's translations, which are also supported by AHRI and Lennox. DOE did not receive any other comments or data suggesting that its translations for SDHV products are inappropriate. For these reasons, DOE is proposing the SDHV translations presented in the October 2016 NODA in this NOPR.

AHRI is concerned that the SEER2 translation DOE presented for space-constrained air conditioners is too high by 0.1. AHRI calculated SEER2 to be 11.7 at 0.30 in. wc. rather than 11.8. AHRI provided data for 4 space-constrained products to illustrate its results. (AHRI, No. 94 at p. 2). Lennox also commented that DOE's SEER2 translation for space-constrained air conditioners is too high by 0.1. (Lennox, No. 97 at p. 2) AHRI and Lennox also commented that DOE should adopt the same SEER2 standard for space-constrained air conditioners and heat pumps (AHRI, No. 94 at p.2; Lennox, No. 97 at p. 2) First Co. strongly disagrees with DOE's proposed translation of SEER to SEER2 values for space-constrained air conditioners because DOE's methodology for

determining SEER2 fails to account for the significant SEER reduction resulting from what they claim to be ''new'' coil-only testing requirements for space-constrained air conditioners. First Co. is referring to amendments to the certification requirements of 10 CFR 429 adopted for CAC/HP in the June 2016 test procedure final rule, which became effective in July 2016 and are required for representations starting December 5, 2016. (10 CFR 429.16(a)(1)) First Co. stated that prior to the June 2016 test procedure final rule, space constrained units, which are manufactured and sold only for installation with blower coil indoor units, have been tested with blower coil units with high-efficiency motors (ECMs). The high-efficiency motors average 200W/1000 scfm or less for indoor power compared with the default fan power value of 365W/1000 scfm applied under the ''coil- only'' test. First Co. claims that the impact of the ''coil-only'' test alone is approximately a 10% reduction in SEER of these products from 12 SEER to 10.8 SEER, and that DOE's methodology is flawed because it uses a starting point of 365W/1000 (*i.e.,* the ''coil-only'' default fan power value of the current test procedure) and only considers the change in energy usage from 365W/1000 scfm to 441 W/1000 scfm. They claim that this ignores the increase in energy usage from 200W/1000 scfm to 365W/1000 scfm, and the resulting SEER reduction, caused by the imposition of the ''coil-only'' test. First Co. submits that SEER2 should be calculated by applying the following methodology, which takes into account the new ''coil-only'' test and the changes in the August 2016 test procedure SNOPR: Replace 200W/1000 scfm (test data using ECM) with 411 W/1000 scfm and recalculate the SEER. First Co. indicates that applying this methodology, SEER will be reduced by approximately 10% for the coil only test and by an additional 4% to account for the suggested 411 W/1000 scfm number, resulting in a 10.4 SEER2 rating for space constrained air conditioners. (First Co., No. 93 at pp. 1, 2)

DOE appreciates the space-constrained air conditioner translation data provided by AHRI. DOE combined AHRI's data with the data DOE used to develop DOE's provisional translations. Note that after the October 2016 NODA, DOE issued the November 2016 test procedure final rule in which it adopted a minimum external static pressure requirement of 0.3 in. wc. for space-constrained air conditioners and heat pumps. (November 2016 Test Procedure Final Rule, pp. 97–99) Consequently, DOE combined AHRI's data with DOE's data reflective of performance at that operating condition. Once combined, the data validates AHRI's assertion that 11.7 is the appropriate SEER2 level for space-constrained air conditioners at 0.3 in. wc. Thus, DOE is adopting 11.7 SEER2 as the standard level for space-constrained air conditioners in this final rule. DOE disagrees with AHRI and Lennox that 11.7 SEER2 should also be used for space-constrained heat pumps. While space-constrained air conditioners are required to certify at least one coil-only combination that is representative of the least efficient coil-only combination distributed in commerce, space-constrained heat pumps have no coil-only requirement. (10 CFR 429.16(a)(1)) AHRI derived 11.7 SEER2 using 406 W/1000 scfm (the default fan power at 0.3 in. wc.) for indoor fan power consumption. As discussed in the November 2015 test procedure SNOPR and subsequently referenced in the November 2016 test procedure final rule, this default fan power value is reflective of the weighted-average performance of indoor fan by motor type distribution projected for the effective date of this standard, which includes a significant majority of lower-efficiency PSC motors. 80 FR 69319–20 and (November 2016 Test Procedure Final Rule, p. 104) First Co. states that most space-constrained blower-coil systems currently sold include a high-efficiency ECM motor. (First Co., No 93 at pp. 1–2) Brushless permanent magnet motors (often referred to as ''ECM'') are more efficient than PSC motors. Thus, 406 W/1000 scfm is not representative of the field operation of space-constrained blower-coil systems being sold. DOE's provisional analysis presented in the October 2016 NODA is consistent with First Co.'s claims, showing that higher-efficiency motors typically used in space-constrained blower-coil systems sold today consume less than 406 W/1000 scfm, resulting in a higher SEER2 level for space-constrained blower-coil systems compared to space-constrained coil-only systems. DOE did not receive any additional comments or data regarding the SEER2 level for space-constrained heat pumps. For these reasons, DOE finds that a higher SEER2 level for space-constrained heat pumps—which is based on blower-coil performance—compared to space-constrained air-conditioners—which is based on coil-only performance—is appropriate. DOE adopts its provisional translation of 11.9 SEER2 for space-constrained heat pumps for these reasons.

DOE provided a response to First Co.'s comment regarding the required coil-only test for testing of space constrained products in the November 30, 2016 test procedure final rule. (November 2016 Test Procedure Final Rule, pp. 146–148)

2. Summary of Benefits and Costs (Annualized) of the Proposed Amended Standards

The benefits and costs of the proposed amended standards can also be expressed in terms of annualized values. The annualized monetary values are the sum of: (1) The annualized national economic value (expressed in 2015$) of the benefits from operation of products that meet the proposed standards (consisting primarily of operating cost savings from using less energy, minus increases in product purchase costs, which is another way of representing consumer NPV), and (2) the annualized monetary value of the benefits of emission reductions, including CO_2 emission reductions.[5]

Estimates of annualized benefits and costs of the proposed amended standards for central air conditioners and heat pumps, expressed in 2015$, are shown in Table II–6. The results under the primary estimate are as follows.

Using a 7-percent discount rate for benefits and costs other than CO_2 reduction, (for which DOE used a 3-percent discount rate along with the average SCC series that uses a 3-percent discount rate ($40.6/t in 2015)), the estimated cost of the proposed standards is $741 million per year in increased product costs, while the estimated benefits are $1,041 million per year in reduced product operating costs, $337 million per year in CO_2 reductions, and $22 million per year in reduced NO_X emissions. In this case, the net benefit would amount to $659 million per year.

Using a 3-percent discount rate for all benefits and costs and the average SCC series that uses a 3-percent discount rate ($40.6/t in 2015), the estimated cost of the proposed standards is $747 million per year in increased product costs,

[5] To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2016, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (*e.g.,* 2020 or 2030), and then discounted the present value from each year to 2016. The calculation uses discount rates of 3 and 7 percent for all costs and benefits except for the value of CO_2 reductions, for which DOE used case-specific discount rates. Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in the compliance year, that yields the same present value.

while the estimated benefits are $1,488 million per year in reduced product operating costs, $337 million per year in CO_2 reductions, and $32 million per year in reduced NO_X emissions. In this case, the net benefit would amount to $1,110 million per year.

DOE also notes that, using a 7-percent discount rate for only the increased product costs and the reduced product operating costs, the net benefit would amount to $300 million per year. Using a 3-percent discount rate for only the increased product costs and the reduced product operating costs, the net benefit would amount to $741 million per year.

TABLE II–6—ANNUALIZED BENEFITS AND COSTS OF PROPOSED AMENDED STANDARDS (RECOMMENDED TSL) FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS *

	Discount rate %	Million 2015$/year		
		Primary estimate *	Low net benefits estimate *	High net benefits estimate *
Benefits				
Consumer Operating Cost Savings	7	1,041	1,005	1,147.
	3	1,488	1,425	1,653.
CO_2 Reduction (using mean SCC at 5% discount rate) **.	5	100	100	100.
CO_2 Reduction (using mean SCC at 3% discount rate) **.	3	337	337	337.
CO_2 Reduction (using mean SCC at 2.5% discount rate) **.	2.5	494	494	494.
CO_2 Reduction (using 95th percentile SCC at 3% discount rate) **.	3	1,027	1,027	1,027.
NO_X Reduction †	7	22	22	49.
	3	32	32	73.
Total Benefits ††	7 plus CO_2 range	1,163 to 2,090	1,127 to 2,054	1,296 to 2,223.
	7	1,400	1,364	1,533.
	3 plus CO_2 range	1,620 to 2,547	1,557 to 2,484	1,826 to 2,753.
	3	1,857	1,794	2,063.
Costs				
Consumer Incremental Installed Costs	7	741	784	723.
	3	747	799	725.
Net Benefits				
Total ††	7 plus CO_2 range	422 to 1,349	342 to 1,269	573 to 1,500.
	7	659	580	810.
	3 plus CO_2 range	873 to 1,800	757 to 1,684	1,100 to 2,028.
	3	1,110	994	1,338.

* This table presents the annualized costs and benefits associated with central air conditioners and heat pumps shipped in 2023–2052. These results include benefits to consumers which accrue after 2050 from the products purchased in 2023–2052. The incremental installed costs include incremental equipment cost as well as installation costs. The CO_2 reduction benefits are global benefits due to actions that occur nationally. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO 2015* Reference case, Low Estimate, and High Estimate, respectively. In addition, incremental product costs reflect a modest decline rate for projected product prices in the Primary Estimate, a constant rate in the Low Net Benefits Estimate, and a higher decline rate in the High Net Benefits Estimate. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

** The CO_2 reduction benefits are calculated using 4 different sets of SCC values. The first three use the average SCC calculated using 5%, 3%, and 2.5% discount rates, respectively. The fourth represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The SCC values are emission year specific.

† DOE estimated the monetized value of NO_X emissions reductions using benefit per ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule,* published in August 2015 by EPA's Office of Air Quality Planning and Standards. (Available at: *http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis.*) For the Primary Estimate and Low Net Benefits Estimate, DOE used a national benefit-per-ton estimate for NO_X emitted from the Electric Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski et al., 2009). For the High Net Benefits Estimate, the benefit-per-ton estimates were based on the Six Cities study (Lepuele et al., 2011); these are nearly two-and-a-half times larger than those from the ACS study.

†† Total Benefits for both the 3% and 7% cases are presented using only the average SCC with 3-percent discount rate. In the rows labeled "7% plus CO_2 range" and "3% plus CO_2 range," the operating cost and NO_X benefits are calculated using the labeled discount rate, and those values are added to the full range of CO_2 values.

III. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this proposed rule.

Submitting comments via *www.regulations.gov*. The *www.regulations.gov* Web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact

you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (''CBI'')). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or mail. Comments and documents submitted via email, hand delivery/courier, or mail also will be posted to *www.regulations.gov*. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well-marked copies: one copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person that would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

IV. Procedural Issues and Regulatory Review

The regulatory reviews conducted for this proposed rule are identical to those conducted for the direct final rule published elsewhere in this **Federal Register**. Please see the direct final rule for further details.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects in 10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, Small businesses.

Issued in Washington, DC, on December 5, 2016.

David J. Friedman,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE proposes to amend part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Section 430.32 is amended by revising paragraphs (c) introductory text, (c) through (3), and adding paragraphs (c)(5) and (6) to read as follows:

430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(c) *Central air conditioners and heat pumps.* The energy conservation standards defined in terms of the heating seasonal performance factor are based on Region IV, the minimum standardized design heating requirement, and the provisions of 10 CFR 429.16. (1) Central air conditioners and central air conditioning heat pumps manufactured on or after January 1, 2015, and before January 1, 2023, must have Seasonal Energy Efficiency Ratio and Heating Seasonal Performance Factor not less than:

Product class	Seasonal energy efficiency ratio (SEER)	Heating seasonal performance factor (HSPF)
(i) Split systems—air conditioners	13	
(ii) Split systems—heat pumps	14	8.2
(iii) Single package units—air conditioners	14	
(iv) Single package units—heat pumps	14	8.0
(v) Small-duct, high-velocity systems	12	7.2
(vi)(A) Space-constrained products—air conditioners	12	
(vi)(B) Space-constrained products—heat pumps	12	7.4

(2) In addition to meeting the applicable requirements in paragraph (c)(1) of this section, products in product class (i) of paragraph (c)(1) of this section (*i.e.,* split-systems—air conditioners) that are installed on or after January 1, 2015, and before January 1, 2023, in the States of Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, or Virginia, or in the District of Columbia, must have a Seasonal Energy Efficiency Ratio (SEER) of 14 or higher. Any outdoor unit model that has a certified combination with a rating below 14 SEER cannot be installed in these States. The least efficient combination of each basic model must comply with this standard.

(3)(i) In addition to meeting the applicable requirements in paragraph (c)(1) of this section, products in product classes (i) and (iii) of paragraph (c)(1) of this section (*i.e.,* split systems—air conditioners and single-package units—air conditioners) that are installed on or after January 1, 2015, and before January 1, 2023, in the States of Arizona, California, Nevada, or New Mexico must have a Seasonal Energy Efficiency Ratio (SEER) of 14 or higher and have an Energy Efficiency Ratio (EER) (at a standard rating of 95 °F dry bulb outdoor temperature) not less than the following:

Product class	Energy efficiency ratio (EER)
(A) Split systems—air conditioners with rated cooling capacity less than 45,000 Btu/hr	12.2
(B) Split systems—air conditioners with rated cooling capacity equal to or greater than 45,000 Btu/hr	11.7
(C) Single-package units—air conditioners	11.0

(ii) Any outdoor unit model that has a certified combination with a rating below 14 SEER or the applicable EER cannot be installed in this region. The least-efficient combination of each basic model must comply with this standard.

* * * * *

(5) Central air conditioners and central air conditioning heat pumps manufactured on or after January 1, 2023, must have Seasonal Energy Efficiency Ratio 2 and Heating Seasonal Performance Factor 2 not less than:

Product class	Seasonal energy efficiency ratio 2 (SEER2)	Heating seasonal performance factor 2 (HSPF2)
(i)(A) Split systems—air conditioners with a certified cooling capacity less than 45,000 Btu/hr	13.4	
(i)(B) Split systems—air conditioners with a certified cooling capacity equal to or greater than 45,000 Btu/hr	13.4	
(ii) Split systems—heat pumps	14.3	7.5
(iii) Single-package units—air conditioners	13.4	
(iv) Single-package units—heat pumps	13.4	6.7
(v) Small-duct, high-velocity systems	12	6.1
(vi)(A) Space-constrained products—air conditioners	11.7	
(vi)(B) Space-constrained products—heat pumps	11.9	6.3

(6)(i) In addition to meeting the applicable requirements in paragraph (c)(5) of this section, products in product classes (i) and (iii) of paragraph (c)(5) of this section (*i.e.,* split systems—air conditioners and single-package units—air conditioners) that are installed on or after January 1, 2023, in the southeast or southwest must have Seasonal Energy Efficiency Ratio 2 and Energy Efficiency Ratio 2 not less than:

Product class	Southeast *	Southwest **	
	SEER2	SEER2	EER2 ***
(A) Split-systems—air conditioners with a certified cooling capacity less than 45,000 Btu/hr	14.3	14.3	† 11.7/9.8
(B) Split-systems—air conditioners with a certified cooling capacity equal to or greater than 45,000 Btu/hr	13.8	13.8	†† 11.2/9.8
(C) Single-package units—air conditioners			10.6

* "Southeast" includes the States of Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virginia, the District of Columbia, and the U.S. Territories.

** "Southwest" includes the States of Arizona, California, Nevada, and New Mexico.

*** EER refers to the energy efficiency ratio at a standard rating of 95 °F dry bulb outdoor temperature.

† The 11.7 EER2 standard applies to products with a certified SEER2 less than 15.2. The 9.8 EER2 standard applies to products with a certified SEER2 greater than or equal to 15.2.

†† The 11.2 EER2 standard applies to products with a certified SEER2 less than 15.2. The 9.8 EER2 standard applies to products with a certified SEER2 greater than or equal to 15.2.

(ii) Any outdoor unit model that has a certified combination with a rating below the applicable standard level(s) for a region cannot be installed in that region. The least-efficient combination of each basic model must comply with this standard.

* * * * *

[FR Doc. 2016–29990 Filed 1–5–17; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9569; Directorate Identifier 2016–NM–052–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 supersede Airworthiness Directive (AD) 2013–03–12 for all Dassault Aviation Model MYSTERE–FALCON 50 airplanes. AD 2013–03–12 currently requires revising the maintenance program to incorporate new or revised maintenance requirements and airworthiness limitations. Since we issued AD 2013–03–12, the manufacturer has issued a revision to the airplane maintenance manual (AMM) that introduces new or more restrictive maintenance requirements and/or airworthiness limitations. This proposed AD would require revising the maintenance or inspection program, as applicable, to incorporate new or revised maintenance requirements and airworthiness limitations. We are proposing this AD to prevent reduced structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by February 21, 2017.

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

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

For service information identified in this NPRM, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9569; 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–2016–9569; Directorate Identifier 2016–NM–052–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

On February 1, 2013, we issued AD 2013–03–12, Amendment 39–17347 (78 FR 9798, February 12, 2013) (''AD 2013–03–12''). AD 2013–03–12 requires actions intended to address an unsafe condition on all Dassault Aviation Model MYSTERE–FALCON 50 airplanes. Since we issued AD 2013–03–12, the manufacturer has issued a revision to the AMM that introduces new or more restrictive maintenance requirements and/or airworthiness limitations.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2016–0067, dated April 7, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Dassault Aviation Model MYSTERE–FALCON 50 airplanes. The MCAI states:

> The airworthiness limitations and maintenance requirements for the Mystère Falcon 50 type design are included in DA Mystère Falcon 50 Aircraft Maintenance Manual (AMM) chapter 5–40 and are approved by EASA.
>
> Failure to implement these limitations or accomplish these tasks could result in an unsafe condition [reduced structural integrity of the airplane]. Consequently, compliance with these actions has been identified as mandatory for continued airworthiness.
>
> Consequently, EASA issued AD 2011–0246 [which corresponds to FAA AD 2013–03–12] to require accomplishment of the maintenance tasks, and implementation of the airworthiness limitations, as specified in DA Mystère Falcon 50 AMM chapter 5–40 Revision 21.
>
> Since that [EASA] AD was issued, DA issued revision 23 of the Mystere Falcon 50 AMM chapter 5–40 (hereafter referred to as 'the ALS' in this [EASA] AD), which introduces new and more restrictive maintenance requirements and/or airworthiness limitations.
>
> The ALS introduces, among others, the following changes:
>
> —Addition of more detailed data regarding SSIP program,
> —Task 53–50–35–220–802 ''Detailed inspection of the frame 35 upper and lower sections'', replacing Task 53–50–35–220–801,
> —Task 55–00–00–270–801 ''Ultrasonic inspection for stress corrosion in stabilizer hinges'', replacing Task 55–00–00–250–801, and
> —Task 78–31–00–250–802 ''Special detailed inspection (fluorescent penetrant) of thrust reverser door hinge fittings'', replacing Task 78–31–00–250–801.
>
> For the reasons described above, this [EASA] AD, retains the requirements of EASA AD 2011–0246, which is superseded, and requires the implementation of the maintenance tasks and airworthiness limitations, as specified in the ALS.

This proposed AD would require revising the maintenance or inspection program, as applicable, to incorporate

new or revised maintenance requirements and airworthiness limitations. 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–2016–9569.

Related Service Information Under 1 CFR Part 51

Dassault Aviation has issued Section 05–40/00, Airworthiness Limitations, of Chapter 5–40, Airworthiness Limitations, of the Dassault Falcon 50/50EX Maintenance Manual, Revision 23, dated July 2015. The service information describes maintenance requirements and/or airworthiness limitations. 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.

This AD requires revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections). Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (l)(1) of this proposed AD. The request should include a description of changes to the required actions that will ensure the continued damage tolerance of the affected structure.

Costs of Compliance

We estimate that this proposed AD affects 249 airplanes of U.S. registry.

The actions required by AD 2013–03–12, and retained in this proposed AD, take about 1 work-hour per product, at an average labor rate of $85 per work-hour. Based on these figures, the estimated cost of the actions that are required by AD 2013–03–12 is $85 per product.

We also estimate that it would take about 1 work-hour 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 $21,165, or $85 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2013–03–12, Amendment 39–17347 (78 FR 9798, February 12, 2013), and adding the following new AD:

Dassault Aviation: Docket No. FAA–2016–9569; Directorate Identifier 2016–NM–052–AD.

(a) Comments Due Date

We must receive comments by February 21, 2017.

(b) Affected ADs

(1) This AD replaces AD 2013–03–12, Amendment 39–17347 (78 FR 9798, February 12, 2013) (''AD 2013–03–12'').

(2) This AD affects AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (''AD 2010–26–05''), and AD 2012–02–18, Amendment 39–16941 (77 FR 12175, February 29, 2012) (''AD–2012–02–18'').

(c) Applicability

This AD applies to Dassault Aviation Model MYSTERE–FALCON 50 airplanes, certificated in any category, all manufacturer serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 05, Periodic inspections.

(e) Reason

This AD was prompted by a manufacturer revision to the airplane maintenance manual (AMM) that introduces new or more restrictive maintenance requirements and/or airworthiness limitations. We are issuing this AD to prevent reduced structural integrity of the airplane.

(f) Compliance

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

(g) Retained Maintenance Program Revision, With No Changes

This paragraph restates the requirements of paragraph (g) of AD 2013–03–12, with no changes. Within 30 days after March 19, 2013 (the effective date of AD 2013–03–12): Revise the maintenance program to incorporate all airworthiness limitations and maintenance tasks specified in Section 05–40/00, Airworthiness Limitations, of Chapter 5–40, Airworthiness Limitations, of the Dassault Falcon 50/50EX Maintenance Manual,

Revision 21, dated June 2011. The initial compliance times for the tasks are at the applicable times specified in Section 05–40/00, Airworthiness Limitations, of Chapter 5–40, Airworthiness Limitations, of the Dassault Falcon 50/50EX Maintenance Manual, Revision 21, dated June 2011, or within 30 days after March 19, 2013, whichever occurs later.

(h) Retained Provision Regarding Alternative Actions, Intervals, and Critical Design Configuration Control Limitations (CDCCLs), With New Exception

This paragraph restates the requirements of paragraph (h) of AD 2013–03–12, with a new exception. Except as required by paragraph (i) of this AD: After accomplishing the revisions required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections), intervals, and/or CDCCLs may be used other than those specified in Section 05–40/00, Airworthiness Limitations, of Chapter 5–40, Airworthiness Limitations, of the Dassault Falcon 50/50EX Maintenance Manual, Revision 21, dated June 2011, unless the actions, intervals, and/or CDCCLs are approved as an alternative methods of compliance (AMOC) in accordance with the procedures specified in paragraph (l)(1) of this AD.

(i) New Maintenance or Inspection Program Revision

Within 30 days after the effective date of this AD: Revise the maintenance or inspection program, as applicable, to incorporate airworthiness limitations, maintenance tasks, and associated thresholds and intervals specified in Section 05–40/00, Airworthiness Limitations, of Chapter 5–40, Airworthiness Limitations, of the Dassault Falcon 50/50EX Maintenance Manual, Revision 23, dated July 2015. The initial compliance times for the tasks are at the applicable times specified in Section 05–40/00, Airworthiness Limitations, of Chapter 5–40, Airworthiness Limitations, of the Dassault Falcon 50/50EX Maintenance Manual, Revision 23, dated July 2015, or within 30 days after the effective date of this AD, whichever occurs later. Accomplishing the revision of the maintenance or inspection program required by this paragraph terminates the requirements of paragraph (g) of this AD.

(j) New Provision Regarding Alternative Actions and Intervals

After the maintenance or inspection program has been revised as required by paragraph (i) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions and intervals are approved as an AMOC in accordance with the procedures specified in paragraph (l)(1) of this AD.

(k) Terminating Action for Certain ADs

Accomplishing the actions required by paragraph (g) or (i) of this AD terminates all requirements of AD 2010–26–05 and AD 2012–02–18 for the Dassault Aviation Model MYSTERE–FALCON 50 airplanes specified in those ADs.

(l) 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 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.

(m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2016–0067, dated April 7, 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–2016–9569.

(2) For service information identified in this AD, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.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 December 27, 2016.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–31963 Filed 1–5–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9567; Directorate Identifier 2016–NM–147–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2007–13–08, for certain Airbus Model A318, A319, A320, and A321 series airplanes. AD 2007–13–08 currently requires repetitive inspections of the auxiliary power unit (APU) starter motor, APU inlet plenum, and APU air intake for discrepancies; repetitive cleaning of the APU air intake, and applicable corrective actions. Since we issued AD 2007–13–08, a determination was made that the unsafe condition could occur on additional airplanes. This proposed AD would expand the applicability in AD 2007–13–08, and include an optional terminating installation for the repetitive actions. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 21, 2017.

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 Airbus, Airworthiness Office–EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 44 51; email: *account.airworth-eas@airbus.com;* Internet: *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on

the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9567; 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; 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–2016–9567; Directorate Identifier 2016–NM–147–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

On June 12, 2007, we issued AD 2007–13–08, Amendment 39–15112 (72 FR 33877, June 20, 2007) (''AD 2007–13–08''), for certain Airbus Model A318, A319, A320, and A321 series airplanes. AD 2007–13–08 was prompted by mandatory continuing airworthiness information issued by an airworthiness authority of another country to identify and correct an unsafe condition on an aviation product. AD 2007–13–08 currently requires repetitive inspections of the APU starter motor, APU inlet plenum, and APU air intake for discrepancies; repetitive cleaning of the APU air intake, and applicable corrective actions. We issued AD 2007–13–08 to detect and correct reverse flow during APU startup, leading to flame propagation in the APU air inlet and intake duct. Such conditions could result in an in-flight fire in the APU area.

Since we issued AD 2007–13–08, the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2016–0176, dated August 31, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Airbus Model A318, A319, A320, and A321 airplanes. The MCAI states:

> An operator reported black smoke at the rear of the fuselage during taxi after landing. The smoke was caused by a fire in the auxiliary power unit (APU) air intake. The subsequent analysis demonstrated that, following numerous unsuccessful APU start attempts in flight, there is a risk of reverse flow leading to flame propagation to the APU air inlet and air intake duct.
>
> This condition, if not detected and corrected, could result in an in-flight fire in the APU area.
>
> Prompted by these findings, Airbus issued Service Bulletin (SB) A320–49–1068 to provide inspection and cleaning instructions. The applicable Flight Crew Operating Manual (FCOM) already contained a limitation for the number of APU start attempts, as follows:
>
> **APU STARTER**
>
> *After 3 Starter Motor Duty Cycles, Wait 60 Minutes Before Attempting 3 More Cycles*
>
> To address this potential unsafe condition, EASA issued AD 2006–0153 to require repetitive inspections of the APU starter motor, APU inlet plenum and APU air intake [for discrepancies], as well as repetitive cleaning of the APU air intake [and applicable corrective actions].
>
> As the reverse flow inside the APU can only occur in flight with the APU inlet closed, various modifications (mod) were developed to introduce a new electronic control box (ECB) with associated software, the functionality of which keeps the APU inlet door open for 15 minutes, following an APU auto-shutdown in flight. Consequently, AD 2006–0153 was revised [which corresponds to FAA AD 2007–13–08], reducing the Applicability by excluding certain post-mod aeroplanes, and introducing these modifications as optional terminating actions.
>
> After EASA AD 2006–0153R2 was issued, it was determined that, as an APU ECB can be replaced (or moved from one aeroplane to another) in service, inadvertently installing a pre-mod ECB would reintroduce the unsafe condition. Prompted by this finding, EASA issued AD 2016–0159, retaining the requirements of EASA AD 2006–0153R2, which was superseded, expanding the Applicability and including references to additional optional terminating actions.
>
> Since EASA AD 2016–0159 was issued, it was determined that paragraph (5) of the [EASA] AD contained some erroneous statements, inadvertently excluding certain aeroplanes, those that have Airbus mod 23698 or mod 24498 embodied in production, from the repetitive actions.
>
> For the reason described above, this [EASA] AD retains the requirements of EASA AD 2016–0159, which is superseded, and corrects paragraph (5). For post-mod aeroplanes where, inadvertently, an 'affected' ECB has been installed in service, this AD adds the requirement to restore those aeroplanes to post-mod configuration by installation of a 'serviceable' ECB. This [EASA] AD also introduces some editorial changes, not affecting the required actions.

Discrepancies include a defective APU starter motor, misaligned brush wear indicator-pin, oil contamination of the brush wear indicator, and dirt, debris, dust, sand, oil, combustible residues, grease and other contaminations of the APU inlet plenum. Corrective actions include replacement of the APU starter motor and cleaning the APU air intake, if necessary. 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–2016–9567.

Related Service Information Under 1 CFR Part 51

Airbus has issued Service Bulletin A320–49–1068, Revision 01, dated February 2, 2006. The service information describes procedures for repetitive inspections for discrepancies of the APU starter motor, APU inlet plenum, and APU air intake, as well as repetitive cleaning of the APU air intake and applicable corrective actions.

Airbus has also issued the following service information, which describes procedures for replacing the ECB. These documents are distinct since they apply to different airplane models in different configurations.

- Airbus Service Bulletin A320–49–1070, dated July 28, 2006.
- Airbus Service Bulletin A320–49–1075, Revision 01, dated December 1, 2006.
- Airbus Service Bulletin A320–49–1077, Revision 04, dated February 27, 2013.
- Airbus Service Bulletin A320–49–1098, dated June 21, 2011.
- Airbus Service Bulletin A320–49–1102, dated January 3, 2012.
- Airbus Service Bulletin A320–49–1107, Revision 02, dated May 10, 2016.

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 these same type designs.

Costs of Compliance

We estimate that this proposed AD affects 1,182 airplanes of U.S. registry.

The actions required by AD 2007–13–08, and retained in this proposed AD, take about 4 work-hours per product, at an average labor rate of $85 per work-hour. Based on these figures, the estimated cost of the actions that are required by AD 2007–13–08 is $340 per product.

We also estimate that it would take about 4 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 $401,880, or $340 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 removing Airworthiness Directive (AD) 2007–13–08, Amendment 39–15112 (72 FR 33877, June 20, 2007), and adding the following new AD:

Airbus: Docket No. FAA–2016–9567; Directorate Identifier 2016–NM–147–AD.

(a) Comments Due Date

We must receive comments by February 21, 2017.

(b) Affected ADs

This AD replaces AD 2007–13–08, Amendment 39–15112 (72 FR 33877, June 20, 2007) (''AD 2007–13–08'').

(c) Applicability

This AD applies to Airbus airplanes identified in paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) of this AD, all manufacturer serial numbers, certificated in any category.

(1) Model A318–111, –112, –121, and –122 airplanes.

(2) Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes.

(3) Model A320–211, –212, –214, –231, –232, and –233 airplanes.

(4) Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 49, Airborne Auxiliary Power.

(e) Reason

This AD was prompted by a report of a fire in the auxiliary power unit (APU) air intake. An analysis demonstrated that, following numerous unsuccessful APU start attempts in flight, there is a risk of reverse airflow, leading to flame propagation to the APU air inlet and air intake duct. This AD was also prompted by the determination that AD 2007–13–08 only addresses the unsafe condition for certain airplanes. We are issuing this AD to detect and correct reverse flow during APU startup, leading to flame propagation in the APU air inlet and intake duct. Such conditions could result in an in-flight fire in the APU area.

(f) Compliance

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

(g) Repetitive Inspections and Corrective Actions

Except as provided by paragraph (i) of this AD, within 600 flight hours after July 25, 2007 (the effective date of AD 2007–13–08), or within 60 days after the effective date of this AD, whichever occurs later: Inspect the APU starter motor, APU air inlet plenum, and APU air intake of each affected APU identified in table 1 to paragraphs (g), (h), (i)(2), (j), and (k) of this AD for discrepancies; and do all applicable corrective actions before further flight; in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–49–1068, Revision 01, dated February 2, 2006. Repeat the inspection thereafter at intervals not to exceed 600 flight hours.

TABLE 1 TO PARAGRAPHS (g), (h), (i)(2), (j), AND (k) OF THIS AD—AFFECTED APU AND ELECTRONIC CONTROL BOX (ECB)

APU	ECB Part Numbers (P/N)
APIC APS 3200.	4500003D, 4500003E, 4500003F, 4500003G, 4500003H, or 4500003J.
Honeywell 131–9A.	3888394–120201, 3888394–121202, 3888394–121203, 3888394–221202, or 3888394–221203.
Honeywell GTCP36–300.	307950–1, 307950–2, 307950–3, 307950–4, 304640–1, 304640–2, 304640–3, 304640–4, 304817–1, or 304817–2.

(h) Repetitive Cleanings

Except as provided by paragraph (i) of this AD, prior to the accumulation of 2,400 flight hours since first flight of the airplane, or within 600 flight hours after July 25, 2007 (the effective date of AD 2007–13–08), or within 60 days after the effective date of this AD, whichever occurs latest, unless accomplished previously in accordance with Airbus Service Bulletin A320–49–1098,

dated June 21, 2011: Clean the APU air intake of each affected APU identified in table 1 to paragraphs (g), (h), (i)(2), (j), and (k) of this AD, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320–49–1068, Revision 01, dated February 2, 2006. Repeat the cleaning task thereafter at intervals not to exceed 2,400 flight hours.

(i) Exceptions to Requirements in Paragraphs (g) and (h) of This AD

(1) For airplanes equipped with an APU and associated ECB part number identified in table 2 to paragraphs (i)(1), (i)(2), and (j) of this AD, the actions specified in paragraphs (g) and (h) of this AD are not required.

TABLE 2 TO PARAGRAPHS (i)(1), (i)(2), AND (j) OF THIS AD—NON-AFFECTED ECB

APU	ECB Part Numbers (P/N)
APIC APS 3200.	4500003K, 4500003L, or 4500003M.
Honeywell 131–9A.	3888394–121204, 3888394–121205, 3888394–221204, 3888394–221205, or 3888394–321206.
Honeywell GTCP36–300.	304640–5, 304817–3, or 3888394–230301.

(2) For airplanes on which Airbus Modification 35803, 35936, 152289, 152645, 155015, or 157848 has been embodied in production, the actions specified in paragraphs (g) and (h) of this AD are not required provided that, within 30 days after the effective date of this AD, the applicable actions specified in paragraphs (i)(2)(i) and (i)(2)(ii) of this AD are done.

(i) The part number of the installed ECB is identified.

(ii) Any affected ECB identified in table 1 to paragraphs (g), (h), (i)(2), (j), and (k) of this AD that is found to be installed is replaced with an ECB having a part number identified in table 2 to paragraphs (i)(1), (i)(2), and (j) of this AD, as applicable to the APU installed on the airplane; and the replacement is done in accordance with the Accomplishment Instructions of the applicable service information identified in paragraph (i)(2)(ii)(A), (i)(2)(ii)(B), (i)(2)(ii)(C), (i)(2)(ii)(D), (i)(2)(ii)(E), or (i)(2)(ii)(F) of this AD; or using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, or the European Aviation Safety Agency (EASA), or Airbus's EASA Design Organization Approval (DOA).

(A) Airbus Service Bulletin A320–49–1070, dated July 28, 2006.

(B) Airbus Service Bulletin A320–49–1075, Revision 01, dated December 1, 2006.

(C) Airbus Service Bulletin A320–49–1077, Revision 04, dated February 27, 2013.

(D) Airbus Service Bulletin A320–49–1098, dated June 21, 2011.

(E) Airbus Service Bulletin A320–49–1102, dated January 3, 2012.

(F) Airbus Service Bulletin A320–49–1107, Revision 02, dated May 10, 2016.

(3) For airplanes on which an APU ECB having a part number approved after the effective date of this AD is installed, the actions specified in paragraphs (g) and (h) of this AD are not required, provided the conditions specified in paragraphs (i)(3)(i) and (i)(3)(ii) of this AD are met.

(i) The part number must be approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA.

(ii) The installation must be accomplished in accordance with airplane modification instructions approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA.

(j) Optional Terminating Action

Replacing an affected ECB identified in table 1 to paragraphs (g), (h), (i)(2), (j), and (k) of this AD with an ECB having a part number identified in table 2 to paragraphs (i)(1), (i)(2), and (j) of this AD, as applicable to the APU installed on the airplane, constitutes terminating action for the repetitive inspections required by paragraphs (g) and (h) of this AD. The replacement must be done in accordance with the Accomplishment Instructions of the applicable service information identified in paragraph (i)(2)(ii) (A), (i)(2)(ii)(B), (i)(2)(ii)(C), (i)(2)(ii)(D), (i)(2)(ii)(E), or (i)(2)(ii)(F) of this AD, or using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA.

(k) Parts Installation Prohibition

As of the effective date of this AD, no person may install on any airplane an APU with an associated ECB identified in table 1 to paragraphs (g), (h), (i)(2), (j), and (k) of this AD.

(l) Credit for Previous Actions

This paragraph provides credit for actions specified in paragraphs (i)(2) and (j) of this AD, if those actions were performed before the effective date of this AD using any of the service information specified in paragraphs (l)(1) through (l)(7) of this AD.

(1) Airbus Service Bulletin A320–49–1075, dated September 22, 2006, which was incorporated by reference in AD 2007–13–08.

(2) Airbus Service Bulletin A320–49–1077, dated March 21, 2007, which is not incorporated by reference in this AD.

(3) Airbus Service Bulletin A320–49–1077, Revision 01, dated August 9, 2007, which is not incorporated by reference in this AD.

(4) Airbus Service Bulletin A320–49–1077, Revision 02, dated July 1, 2008, which is not incorporated by reference in this AD.

(5) Airbus Service Bulletin A320–49–1077, Revision 03, dated December 8, 2008, which is not incorporated by reference in this AD.

(6) Airbus Service Bulletin A320–49–1107, dated November 5, 2013, which is not incorporated by reference in this AD.

(7) Airbus Service Bulletin A320–49–1107, Revision 01, dated July 28, 2015, which is not incorporated by reference in this AD.

(m) 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1405; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.*

(i) 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.

(ii) AMOCs approved previously for AD 2007–13–08 are approved as AMOCs for the corresponding provisions of paragraphs (g) and (h) of this AD.

(2) *Contacting the Manufacturer:* As of the effective date of this AD, for any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(n) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2016–0176, dated August 31, 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–2016–9567.

(2) For service information identified in this AD, contact Airbus, Airworthiness Office–EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 44 51; email: *account.airworth-eas@airbus.com;* Internet: *http://www.airbus.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 December 23, 2016.

Thomas Groves,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–31960 Filed 1–5–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9570; Directorate Identifier 2016–NM–185–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all The Boeing Company Model 707 airplanes and Model 720 and 720B series airplanes. This proposed AD was prompted by a determination that undetected web fatigue cracking caused by oil canning may exist in the station 1440 aft pressure bulkhead web. This proposed AD would require repetitive detailed inspections for any oil canning or cracking of the station 1440 aft pressure bulkhead web, and related corrective actions if necessary. We are proposing this AD to address the unsafe condition on these products.

DATES: We must receive comments on this proposed AD by February 21, 2017.

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 Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone: 562–797–1717; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9570.

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–2016–9570; 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: George Garrido, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5232; fax: 562–627–5210; email: *george.garrido@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–2016–9570; Directorate Identifier 2016–NM–185–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 determined that undetected web fatigue cracking caused by oil canning may exist in the station 1440 aft pressure bulkhead Web. Oil canning is defined as a locally buckled forward area of the aft pressure bulkhead web between the radial stiffeners and the circumferential tear straps, which can pop outward when the fuselage is pressurized, causing a stress reversal cycle during each flight that may lead to fatigue cracking of the aft pressure bulkhead web. Oil canning may lead to cracking and related damage (including sharp creases; gouges; cracks; deformation to a radial stiffener, circumferential tear strap, Y-chord, or terminal fitting splice plate; or damaged holes) or irregularity (including loose or missing fasteners, pressure leakage, fasteners within 1 inch of any oil canning location, or an oil canning location within 2 inches of another oil canning location). This condition, if not corrected, could result in an undetected fatigue crack in the aft pressure bulkhead web growing to a length that could result in reduced structural integrity of the web and lead to rapid decompression of the airplane.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing 707 Alert Service Bulletin A3543, dated September 15, 2016 (''ASB A3543, Revision 0''). The service information describes procedures for repetitive detailed inspections for any oil canning or cracking of the station 1440 aft pressure bulkhead web, and related corrective actions. 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 these same type designs.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information.'' For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9570.

The phrase ''related investigative actions'' is used in this proposed AD. Related investigative actions are follow-on actions that (1) are related to the primary action, and (2) further investigate the nature of any condition found. Related investigative actions in an AD could include, for example, inspections.

The phrase ''corrective actions'' is used in this proposed AD. Corrective actions correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Differences Between This Proposed AD and the Service Information

ASB A3543, Revision 0, specifies to contact the manufacturer for certain instructions, but this proposed AD would require using repair methods, modification deviations, and alteration deviations in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD affects 12 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection for oil canning	6 work-hours × $85 per hour = $510 per inspection cycle.	$0	$510 per inspection cycle.	$6,120 per inspection cycle

We estimate the following costs to do any additional inspections that would be required based on the results of the initial proposed inspection. These cost estimates are for one canning location. We have no way of determining the number of aircraft that might need these actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Oil canning zone determination and inspection	1 work-hour × 85 per hour = $85	$0	$85
Detailed inspection and eddy current inspection for cracks.	13 work-hours × $85 per hour = 1,105	0	$1,105
High frequency eddy current inspection for crack location, length, and orientation.	2 work-hours × 85 per hour = 170	0	$170

We have received no definitive data that would enable us to provide cost estimates for certain corrective 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):

The Boeing Company: Docket No. FAA–2016–9570; Directorate Identifier 2016–NM–185–AD.

(a) Comments Due Date

We must receive comments by February 21, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the airplanes, certificated in any category, as identified in Boeing 707 Alert Service Bulletin A3543, dated September 15, 2016 (''ASB A3543, Revision 0''), and in paragraphs (c)(1) and (c)(2) of this AD.

(1) The Boeing Company Model 707–100 Long Body, –200, –100B Long Body, and –100B Short Body series airplanes; and Model 707–300, –300B, –300C, and –400 series airplanes.

(2) The Boeing Company Model 720 and 720B series airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by a determination that undetected web fatigue cracking caused by oil canning may exist in the station 1440 aft pressure bulkhead web. We are issuing this AD to detect and correct fatigue cracking of the aft pressure bulkhead web, which could grow in length and ultimately reduce the structural integrity of the web and lead to rapid decompression of the airplane.

(f) Compliance

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

(g) Repetitive Inspections and Related Investigative and Corrective Actions

At the applicable time specified in paragraph 1.E., ''Compliance,'' of ASB A3543, Revision 0, except as required by paragraph (h)(1) of this AD: Do all applicable actions specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD, in accordance with the Accomplishment Instructions of ASB A3543, Revision 0, except as required by paragraph (h)(2) of this AD.

(1) Do a detailed inspection of the station 1440 aft pressure bulkhead web for any oil canning. Repeat the inspection at the applicable time specified in paragraph 1.E., ''Compliance,'' of ASB A3543, Revision 0.

(2) Do all applicable related investigative actions, including detailed, eddy current, and high frequency eddy current (HFEC) inspections. Repeat the applicable inspections thereafter at the applicable time specified in paragraph 1.E., ''Compliance,'' of ASB A3543, Revision 0.

(3) Do all applicable corrective actions at the applicable time specified in paragraph 1.E., ''Compliance,'' of ASB A3543, Revision 0.

(h) Service Information Exceptions

(1) Where ASB A3543, Revision 0, specifies a compliance time ''after the original issue date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(2) Where Boeing Alert Service Bulletin A3543, dated September 15, 2016, specifies to contact Boeing for repair instructions, and specifies that action as Required for Compliance (RC), this AD requires repair using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(i) Special Flight Permit

Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the airplane can be repaired, but if any crack is found as identified in ASB A3543, Revision 0, concurrence by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, is required before issuance of the special flight permit.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles ACO, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (k)(1) of this AD. Information may be emailed to: *9–ANM-LAACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) Except as required by paragraph (h) of this AD: For service information that contains steps that are labeled as RC, the provisions of paragraphs (j)(4)(i) and (j)(4)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or substep is labeled ''RC Exempt,'' then the RC requirement is removed from that step or substep. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(k) Related Information

(1) For more information about this AD, contact George Garrido, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles ACO, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5232; fax: 562–627–5210; email: *george.garrido@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone: 562–797–1717; Internet: *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on December 27, 2016.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–31964 Filed 1–5–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–103477–14]

RIN 1545–BL96

Chapter 4 Regulations Relating to Verification and Certification Requirements for Certain Entities and Reporting by Foreign Financial Institutions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking; notice of proposed rulemaking by cross-reference to temporary regulation.

SUMMARY: This document contains proposed regulations under chapter 4 of Subtitle A (sections 1471 through 1474) of the Internal Revenue Code of 1986 (Code) describing the verification requirements (including certifications of compliance) and events of default for entities that agree to perform the chapter 4 due diligence, withholding, and reporting requirements on behalf of certain foreign financial institutions (FFIs) or the chapter 4 due diligence and reporting obligations on behalf of certain non-financial foreign entities. These proposed regulations also describe the certification requirements and procedures for IRS's review of certain trustees of trustee-documented trusts and the procedures for IRS's review of periodic certifications provided by registered deemed-compliant FFIs. In addition, these proposed regulations describe the procedures for future modifications to the requirements for certifications of compliance for participating FFIs. These proposed regulations also describe the requirements for certifications of compliance for participating FFIs that are members of consolidated compliance groups. In addition, in the Rules and Regulations section of this issue of the **Federal Register**, the Department of the Treasury (Treasury Department) and IRS are issuing temporary regulations that provide additional guidance under chapter 4 (temporary chapter 4 regulations). The text of the temporary chapter 4

regulations also serves as the text of the regulations contained in this document that are proposed by cross-reference to the temporary chapter 4 regulations. The preamble to the temporary chapter 4 regulations explains the temporary chapter 4 regulations and these proposed regulations that cross-reference to the temporary chapter 4 regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by April 6, 2017.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–103477–14), Internal Revenue Service, Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–103477–14), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224; or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS–REG–103477–14).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Kamela Nelan, (202) 317–6942; concerning submissions of comments and/or requests for a public hearing, Regina Johnson, (202) 317–6901 (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Background

I. In General

A. Chapter 4

Sections 1471 through 1474 under chapter 4 of Subtitle A (chapter 4) were added to the Code on March 18, 2010, as part of the Hiring Incentives to Restore Employment Act of 2010, Public Law 111–147. Chapter 4 (commonly known as the Foreign Account Tax Compliance Act, or FATCA) generally requires withholding agents to withhold tax on certain payments to foreign financial institutions (FFIs) that do not agree to report certain information to the IRS regarding their U.S. accounts under section 1471(b)(1). Chapter 4 also generally requires withholding agents to withhold tax on certain payments to certain non-financial foreign entities (NFFEs) that do not provide to the withholding agent information on their substantial United States owners (substantial U.S. owners) or a certification that they have no such owners. On January 28, 2013, final regulations (TD 9610) under chapter 4 were published in the **Federal Register** (78 FR 5874), and on September 10, 2013, corrections to the final regulations were published in the **Federal Register** (78 FR 55202). TD 9610 and the September 2013 corrections are referred to collectively in this preamble as the 2013 final regulations. On March 6, 2014, temporary regulations (TD 9657) under chapter 4 were published in the **Federal Register** (79 FR 12812) and corrections to the temporary regulations were published in the **Federal Register** on July 1, 2014, and November 18, 2014 (79 FR 37175 and 78 FR 68619, respectively). In this preamble, TD 9657 and the corrections thereto are referred to collectively as the 2014 temporary regulations, and together with the 2013 final regulations, as the chapter 4 regulations. A notice of proposed rulemaking cross-referencing the 2014 temporary regulations was published in the **Federal Register** on March 6, 2014 (79 FR 12868).

To address situations where foreign law would prevent an FFI from reporting directly to the IRS the information required by chapter 4, the Treasury Department, in collaboration with certain foreign governments, developed two alternative model intergovernmental agreements, known as the Model 1 IGA and the Model 2 IGA. Under the Model 1 IGA, an FFI that is treated as a reporting Model 1 FFI is treated as complying with and not subject to withholding under section 1471 provided that the FFI complies with the requirements specified in the Model 1 IGA and reports information about its U.S. accounts to the Model 1 IGA jurisdiction, which is followed by the automatic exchange of that information on a government-to-government basis with the United States. Under the Model 2 IGA, an FFI that is treated as a reporting Model 2 FFI follows the terms of the FFI agreement and reports information about U.S. accounts directly to the IRS. See Revenue Procedure 2014–38, 2014–29 I.R.B. 131, as may be amended, for the FFI agreement. An FFI identified as a nonreporting financial institution pursuant to a Model 1 or Model 2 IGA is not required to report information on U.S. accounts unless specifically required as a condition of its applicable chapter 4 status.

II. Background on Sponsored Entities

A. In General

The chapter 4 regulations permit certain FFIs and NFFEs to be sponsored by other entities for purposes of satisfying their chapter 4 requirements. Under the 2013 final regulations, an FFI treated as complying with the requirements of section 1471(b)(1) (a deemed-compliant FFI) includes a sponsored FFI. In addition, the 2014 temporary regulations provide that a NFFE excepted from providing information regarding its substantial U.S. owners to a withholding agent (an excepted NFFE) includes a NFFE that is a direct reporting NFFE or a sponsored direct reporting NFFE. In the preamble to the 2014 temporary regulations, the Treasury Department and IRS announced that regulations describing the verification requirements of a sponsoring entity of a sponsored FFI or sponsored direct reporting NFFE (sponsored entities) would be proposed and issued separately from the 2014 temporary regulations.

B. Background on Sponsored FFIs and Trustee-Documented Trusts

The chapter 4 regulations provide two general categories of deemed-compliant FFIs: Registered deemed-compliant FFIs and certified deemed-compliant FFIs. A registered deemed-compliant FFI includes an FFI that satisfies the requirements of § 1.1471–5(f)(1)(i)(F)(*1*) or (*2*) to qualify as either a sponsored investment entity or a sponsored controlled foreign corporation. A certified deemed-compliant FFI includes an FFI that satisfies the requirements of § 1.1471–5(f)(2)(iii) to qualify as a sponsored, closely-held investment vehicle. The chapter 4 regulations provide that a sponsored FFI under any of the foregoing sections must have an agreement with a sponsoring entity under which the sponsoring entity performs, on behalf of the sponsored FFI, all of the due diligence, withholding, reporting, and other requirements that the FFI would have been required to perform if it were a participating FFI. A sponsoring entity of a sponsored FFI must register with the IRS as a sponsoring entity on Form 8957, FATCA Registration, via the FATCA registration Web site available at *http://www.irs.gov/fatca*, and must also register any sponsored investment entity or sponsored controlled foreign corporation within the time specified in § 1.1471–5(f)(1)(i)(F)(*3*)(*iii*). The 2014 temporary regulations reserve on the rules for verification of compliance and the events of default for a sponsoring entity of a sponsored FFI.

The Model 1 and Model 2 IGAs treat certain financial institutions as nonreporting financial institutions. Under Annex II of the Model 1 IGA, a nonreporting financial institution that is a sponsored investment entity, sponsored controlled foreign corporation, or sponsored, closely held investment vehicle is treated as a deemed-compliant FFI for purposes of section 1471. A sponsoring entity of a

sponsored entity subject to a Model 1 IGA agrees to perform, on behalf of the sponsored entity, all of the due diligence, withholding, reporting, and other requirements that the sponsored entity would have been required to perform if it were a reporting Model 1 financial institution. As a result, a sponsoring entity of a sponsored entity subject to a Model 1 IGA reports to the applicable Model 1 IGA jurisdiction with respect to the financial accounts maintained by the sponsored entity.

Under the Model 1 and Model 2 IGAs, a nonreporting financial institution includes a financial institution that ''otherwise qualifies as a deemed-compliant FFI . . . under relevant U.S. Treasury Regulations.'' Thus, a financial institution covered by a Model 1 or Model 2 IGA may choose to qualify as a sponsored investment entity, controlled foreign corporation, or closely held investment vehicle pursuant to § 1.1471–5(f) instead of Annex II of the Model 1 or Model 2 IGA. In such a case, the financial institution must satisfy all of the requirements applicable to such an entity in the regulations, including the requirement for the sponsoring entity to report information directly to the IRS, even in the case of a financial institution covered by a Model 1 IGA.

Under Annex II of the Model 2 IGA, a financial institution that is a sponsored investment entity or sponsored controlled foreign corporation is treated as a registered deemed-compliant FFI, and a financial institution that is a sponsored, closely held investment vehicle is treated as a certified deemed-compliant FFI. A sponsoring entity of a sponsored entity subject to a Model 2 IGA agrees to perform, on behalf of the sponsored entity, all of the due diligence, withholding, reporting, and other requirements that the sponsored entity would have been required to perform if it were a reporting Model 2 FFI. As a result, the sponsoring entity of a sponsored entity subject to a Model 2 IGA registers with the IRS and reports to the IRS with respect to financial accounts of the sponsored entity. Annex II of the Model 2 IGA also provides that a registered deemed-compliant FFI must register with the IRS on the FATCA registration Web site and have its responsible officer certify every three years to the IRS that all of the requirements for the deemed-compliant category claimed by the financial institution have been satisfied since July 1, 2014.

The Model 1 and Model 2 IGAs treat certain FFIs that are trusts as nonreporting financial institutions. Under Annex II of the Model 1 IGA, a financial institution that is a trustee-documented trust is treated as a deemed-compliant FFI. Under Annex II of the Model 2 IGA, a financial institution that is a trustee-documented trust is treated as a certified deemed-compliant FFI. Under both the Model 1 IGA and the Model 2 IGA, a trust qualifies as a trustee-documented trust provided that the trustee of the trust is a U.S. financial institution, reporting Model 1 FFI, or participating FFI that reports all of the information required to be reported pursuant to the IGA with respect to U.S. accounts or U.S. reportable accounts (as applicable) of the trust. A trustee of a trustee-documented trust subject to a Model 1 or Model 2 IGA should register with the IRS. A trustee of a trustee-documented trust subject to a Model 2 IGA reports to the IRS with respect to the trust, whereas a trustee of a trustee-documented trust subject to a Model 1 IGA reports to the applicable Model 1 IGA jurisdiction.

C. Background on Sponsored Direct Reporting NFFEs

Section 1472(c)(1)(G) permits the Treasury Department and IRS to issue regulations exempting withholding agents from withholding or reporting under section 1472(a) with respect to payments beneficially owned by certain persons identified by the Treasury Department and IRS, which are referred to in the chapter 4 regulations as excepted NFFEs. As noted in Part II.A of this Background, the 2014 temporary regulations include direct reporting NFFEs as a class of excepted NFFEs.

A direct reporting NFFE is a NFFE that elects to report information about its substantial U.S. owners directly to the IRS (rather than to the withholding agent) and that meets the requirements of § 1.1472–1(c)(3). A direct reporting NFFE may elect to be treated as a sponsored direct reporting NFFE if another entity, other than a nonparticipating FFI, agrees to act as its sponsoring entity for performing all of the due diligence, reporting, and other requirements that the NFFE would have been required to perform as a direct reporting NFFE. The sponsoring entity of a sponsored direct reporting NFFE must register with the IRS as a sponsoring entity and must also register the NFFE with the IRS as a sponsored direct reporting NFFE as required in the chapter 4 regulations. The sponsoring entity must also comply with the verification procedures and other compliance-related requirements provided in the regulations. The 2014 temporary regulations reserve on the verification procedures and the events of default for a sponsoring entity of a sponsored direct reporting NFFE.

Under section VI(b) of Annex I of the Model 1 and Model 2 IGAs, an active NFFE includes a NFFE that is treated as an excepted NFFE under the chapter 4 regulations. An active NFFE (including a direct reporting NFFE) does not need to be reported as a U.S. account by a reporting Model 1 FFI or reporting Model 2 FFI with which the NFFE holds an account.

III. Background on Verification Requirements for Participating FFIs and Compliance FIs

Under the chapter 4 regulations, a participating FFI is required to establish and implement a compliance program for satisfying its requirements under § 1.1471–4. The responsible officer of the FFI must periodically certify to the IRS that the FFI maintains effective internal controls or, if the responsible officer cannot make this certification, he or she must make a qualified certification. If there is an event of default, the IRS will notify the FFI and request remediation. The FFI must respond to the notice of default and provide information to the IRS. If the FFI does not provide a response, the IRS may deliver a notice of termination that terminates the FFI's participating FFI status.

The chapter 4 regulations permit a participating FFI that is a member of an expanded affiliated group to elect to be part of a consolidated compliance program under the authority of a participating FFI, reporting Model 1 FFI, or U.S. financial institution that is a member of the same expanded affiliated group (compliance FI). The compliance FI must establish and maintain the consolidated compliance program and perform a consolidated periodic review on behalf of each member FFI that elects to be part of the consolidated compliance program (electing FFI).

IV. Background on Certification Requirements for Registered Deemed-Compliant FFIs

An FFI may be a registered deemed-compliant FFI if it meets the requirements of a class of FFIs specified in § 1.1471–5(f)(1). Certain classes of registered deemed-compliant FFIs have compliance obligations as a condition of their status under this section. For example, a registered deemed-compliant FFI that is a nonreporting member of a participating FFI group under § 1.1471–5(f)(1)(i)(B) must monitor its accounts to ensure that it identifies any account that becomes a U.S. account or an account held by a recalcitrant account holder or

nonparticipating FFI and meets its requirement to transfer or close such accounts (or become a participating FFI). In order for the IRS to verify that a registered deemed-compliant FFI meets the requirements of its applicable deemed-compliant status and is satisfying any such compliance obligations, the chapter 4 regulations require a registered deemed-compliant FFI to have its responsible officer certify every three years to the IRS that the FFI meets the requirements for its applicable deemed-compliant status.

Explanation of Provisions

I. Sponsoring Entities of Sponsored FFIs

These proposed regulations provide verification requirements for a sponsoring entity of a sponsored FFI that are generally similar to the verification requirements for a compliance FI. See Part IV of this Explanation of Provisions for the verification requirements for consolidated compliance programs. Under these proposed regulations, a sponsoring entity must maintain a compliance program to oversee its compliance with respect to each sponsored FFI for purposes of satisfying the deemed-compliant status requirements of § 1.1471–5(f)(1)(i)(F) or (f)(2)(iii) or an applicable Model 2 IGA. The deemed-compliant status requirements include: (i) The assumption by the sponsoring entity of due diligence, withholding, and reporting obligations on behalf of each sponsored FFI, and (ii) compliance with the additional requirements for status as a sponsoring entity, such as registering with the IRS.

These proposed regulations consolidate all of the verification requirements for a sponsoring entity. The 2014 temporary regulations, in § 1.1471–5T(f)(1)(i)(F)(*3*)(*vi*), (f)(1)(i)(F)(*3*)(*vii*), (f)(2)(iii)(D)(*4*), and (f)(2)(iii)(D)(*5*), require a sponsoring entity to perform the verification procedures described in § 1.1471–4(f) on behalf of a sponsored FFI and also perform the verification procedures described in § 1.1471–5(j) and (k) on behalf of itself. The 2014 temporary regulations, in § 1.1471–5T(j) and (k), reserved such verification procedures. These proposed regulations include all of the sponsoring entity's verification requirements in proposed § 1.1471–5(j).

These proposed regulations also require that a sponsoring entity appoint a responsible officer (as defined in § 1.1471–1(b)(116) of these proposed regulations) to oversee the compliance of the sponsoring entity with respect to each sponsored FFI for purposes of satisfying the requirements of § 1.1471–5(f)(1)(i)(F) or (f)(2)(iii) or of an applicable Model 2 IGA. The responsible officer must certify to the IRS by July 1 of the calendar year following the end of each certification period that the sponsoring entity is compliant with the requirements to be a sponsoring entity and maintains effective internal controls with respect to all sponsored FFIs for which it acts (or provides a qualified certification) on the form and in the manner prescribed by the IRS. A sponsored FFI is not required to appoint its own responsible officer. Although the preamble to the 2014 temporary regulations states that under proposed regulations a sponsoring entity would be required to make two separate compliance certifications (one on behalf of its sponsored FFI(s) and another on the sponsoring entity's own behalf), the Treasury Department and IRS have determined that a single certification is sufficient for this purpose.

Under these proposed regulations, in general, a sponsoring entity must make a certification regarding its compliance with respect to all sponsored FFIs for which it acts during the certification period. However, with respect to a certification period, a sponsoring entity is generally not required to certify for a sponsored FFI that first agrees to be sponsored by the sponsoring entity during the six month period prior to the end of the certification period, provided that the sponsoring entity makes certifications for such sponsored FFI for subsequent certification periods and the first such certification covers both the subsequent certification period and the portion of the prior certification period during which such FFI was sponsored by the sponsoring entity. However, the preceding sentence does not apply with respect to a sponsored FFI that, immediately before the FFI agrees to be sponsored by the sponsoring entity, was a participating FFI, registered deemed-compliant FFI, or sponsored, closely held investment vehicle. The sponsoring entity may certify for a sponsored FFI described in the preceding sentence for the portion of the certification period prior to the date that the FFI first agrees to be sponsored by the sponsoring entity if the sponsoring entity obtains from the FFI (or the FFI's sponsoring entity, if applicable) a written certification that the FFI has complied with its applicable chapter 4 requirements during such portion of the certification period, provided that: (1) The sponsoring entity does not know that such certification is unreliable or incorrect; and (2) the certification for the sponsored FFI for the subsequent certification period covers both the subsequent certification period and the portion of the prior certification period during which such FFI was sponsored by the sponsoring entity. The first certification period begins on the later of the date the sponsoring entity is issued a GIIN to act as a sponsoring entity or June 30, 2014.

The requirements for the certification of compliance may be modified to include additional certifications or information (such as quantitative or factual information related to the sponsoring entity's compliance), provided that such additional information or certifications are published at least 90 days before being made effective in order to allow for public comment. The Treasury Department and IRS intend to coordinate any such modification to the requirements for the certification of compliance for sponsoring entities with any modification to the requirements for the certification of compliance for participating FFIs. See Part IV of this Explanation of Provisions for certifications required by participating FFIs.

These proposed regulations provide that the responsible officer of a sponsoring entity must make the certification described in § 1.1471–4(c)(7) (preexisting account certification of a participating FFI) with respect to each sponsored FFI that enters into the sponsorship agreement with the sponsoring entity during the certification period. However, with respect to a certification period, the preexisting account certification is not required for a sponsored FFI if, immediately before it first agrees to be sponsored by the sponsoring entity, the FFI was a participating FFI, a sponsored FFI, or a registered deemed-compliant FFI that is a local FFI or a restricted fund, and the FFI (or the FFI's former sponsoring entity, if applicable) provides a written certification to the sponsoring entity that the FFI has made the preexisting account certification required of it, provided that the sponsoring entity does not know that such certification is unreliable or incorrect. Furthermore, since a participating FFI could have up to two years to complete the required due diligence on its preexisting accounts under § 1.1471–4(c)(3)(ii) and (c)(5)(i), the preexisting account certification is not required for a sponsored FFI that first agrees to be sponsored by the sponsoring entity during the two year period prior to the end of such certification period, provided that the

sponsoring entity makes the preexisting account certification for such FFI for the subsequent certification period. The preexisting account certification for the certification period must be submitted by the due date of the sponsoring entity's certification of compliance for the certification period and on the form and in the manner prescribed by the IRS. With respect to a sponsored FFI for which the sponsoring entity is required to make a preexisting account certification, a preexisting obligation means any account, instrument, or contract (including any debt or equity interest) maintained, executed, or issued by the sponsored FFI that is outstanding on the earlier of the date the FFI is issued a GIIN as a sponsored FFI of the sponsoring entity or the date the FFI or the sponsoring entity first represents to a withholding agent or financial institution that the FFI is a sponsored FFI of the sponsoring entity.

These proposed regulations permit the IRS to make general inquiries to a sponsoring entity regarding its compliance with its applicable requirements, similar to the general inquiries the IRS may make to a participating FFI with respect to its compliance (as provided in final regulations under chapter 4 published together with the temporary chapter 4 regulations). These proposed regulations provide that the IRS may request any additional information from the sponsoring entity (including a copy of the sponsorship agreement that the sponsoring entity has entered into with each sponsored FFI) necessary to determine its compliance with the due diligence, withholding, and reporting requirements of § 1.1471–4 or an applicable Model 2 IGA with respect to each sponsored FFI and to assist the IRS with its review of account holder compliance with tax reporting requirements. These proposed regulations also provide that if the IRS determines that the sponsoring entity may not have substantially complied with the requirements of a sponsoring entity with respect to any sponsored FFI for which it acts, the IRS may make inquiries to the sponsoring entity regarding its compliance with the requirements of a sponsoring entity and may request the performance of specified review procedures. Inquiries regarding the compliance of a sponsoring entity with respect to a sponsored FFI subject to the requirements of an applicable Model 2 IGA will be made using the procedures described in these proposed regulations, except as otherwise provided in an applicable Model 2 IGA.

These proposed regulations describe the events of default for a sponsoring entity and the termination procedures following an event of default. The Treasury Department and IRS recognize that some events of default may relate only to a particular sponsored FFI (or several such FFIs) for which the sponsoring entity acts and thus should not affect the statuses of other sponsored FFIs for which the sponsoring entity acts or the status of the sponsoring entity. In other cases, an event of default may relate to a sponsoring entity's failure to comply with its own requirements, such as when it fails to establish and maintain a compliance program or perform a periodic review. Accordingly, these proposed regulations provide IRS the discretion to determine whether, based on facts and circumstances, an event of default should result in the termination of the sponsoring entity's status as a sponsoring entity, the deemed-compliant statuses of one or more sponsored FFIs, or both the status of the sponsoring entity and the statuses of one or more sponsored FFIs. If a sponsoring entity's status is terminated, the sponsoring entity may not reregister as a sponsoring entity for any sponsored FFI or any sponsored entity subject to a Model 1 IGA without prior written approval from the IRS. A sponsored FFI whose sponsoring entity's status is terminated may register on the FATCA registration Web site as a participating FFI or registered deemed-compliant FFI or may be registered on the FATCA registration Web site as a sponsored FFI of a new sponsoring entity (other than an entity that has a relationship to the terminated sponsoring entity described in section 267(b)), as applicable. However, if the sponsored FFI's status is terminated (independent of a termination of the sponsoring entity), the sponsored FFI must obtain prior written approval from the IRS in order to register as a participating FFI or registered deemed-compliant FFI or be registered as a sponsored FFI of a new sponsoring entity.

The definition of sponsored FFI in the 2013 final regulations is limited to an entity that is a sponsored investment entity, sponsored controlled foreign corporation, or sponsored, closely held investment vehicle under § 1.1471–5(f)(1)(i)(F) or § 1.1471–5(f)(2)(iii). These proposed regulations expand the definition of sponsored FFI to also include a sponsored investment entity, sponsored controlled foreign corporation, or sponsored, closely held investment vehicle treated as a deemed-compliant FFI under an applicable Model 2 IGA. These proposed regulations do not impose verification requirements or specify events of default for a sponsoring entity of a sponsored entity subject to an applicable Model 1 IGA. The obligations of such a sponsoring entity are governed by the laws and requirements of the applicable Model 1 IGA jurisdiction. However, the IRS may treat a sponsored entity covered by a Model 1 IGA as a nonparticipating FFI pursuant to Article 5(2)(b) of an applicable Model 1 IGA if the IRS determines that there is significant non-compliance with the obligations of the IGA by the sponsored entity that has not been resolved within 18 months. In addition, pursuant to the termination procedures described in the previous paragraph, the IRS may revoke the status of a sponsoring entity based on an event of default relating to one or more sponsored FFIs. Consistent with Annex II of the Model 1 IGA, such revocation would prevent the sponsoring entity from sponsoring an FFI subject to a Model 1 IGA. The IRS may also notify such Model 1 IGA jurisdiction of the revocation. A sponsored entity subject to a Model 1 IGA whose sponsor's status is terminated would need to become a reporting Model 1 FFI, obtain a new sponsor, or meet the requirements of another deemed-compliant status.

As described in Part II.B of the Background of this preamble, the Model 2 IGA allows certain sponsored FFIs to be treated as deemed-compliant FFIs and provides that the IRS may revoke a sponsoring entity's status if there is a material failure by the sponsoring entity to comply with the obligations described in Annex II of the IGA. Accordingly, the verification requirements and events of default in these proposed regulations apply to a sponsoring entity of a sponsored FFI subject to an applicable Model 2 IGA. In addition, the procedures for IRS inquiries specified in these proposed regulations apply to a sponsoring entity of a sponsored FFI subject to an applicable Model 2 IGA except to the extent otherwise provided in the applicable Model 2 IGA. Although Annex II of the Model 2 IGA permits the IRS to revoke a sponsoring entity's status upon a material failure (as described above), because the Treasury Department and IRS believe that a consistent standard for when to terminate a sponsoring entity's status should apply, these proposed regulations provide that the IRS will not revoke the status of a sponsoring entity of a sponsored FFI subject to a Model 2 IGA unless there is an event of default

and the procedures for termination described in these proposed regulations have been applied.

II. Trustees of Trustee-Documented Trusts

These proposed regulations provide that a trustee of a trustee-documented trust subject to a Model 2 IGA shall appoint a responsible officer who will maintain a compliance program and oversee the trustee's compliance with respect to each trustee-documented trust for purposes of satisfying the requirements of an applicable Model 2 IGA. The responsible officer must perform a periodic review of the sufficiency of the trustee's compliance program for each certification period. The responsible officer must also certify to the IRS that the trustee has established a compliance program, performed a periodic review, and reported to the IRS all of the information required to be reported with respect to each trustee-documented trust for each certification period. Certain late-joining trustee-documented trusts may be excluded from a certification under rules similar to those provided in these proposed regulations for sponsored FFIs. The IRS will not unilaterally revoke the status of, or issue a notice of default to, a trustee of such a trust. Instead, subject to the requirements of an applicable Model 2 IGA, these proposed regulations permit the IRS to make inquiries to the trustee regarding its compliance with its applicable requirements and notify the Model 2 IGA jurisdiction if the trustee has not complied with its requirements with respect to one or more trustee-documented trusts established in that jurisdiction. The IRS may also notify an applicable Model 1 IGA jurisdiction of the trustee's non-compliance with respect to its requirements as a trustee of a trustee-documented trust subject to a Model 2 IGA if the trustee also acts on behalf of trustee-documented trusts in the Model 1 IGA jurisdiction or if the trustee is located in the Model 1 IGA jurisdiction.

III. Sponsoring Entities of Sponsored Direct Reporting NFFEs

These proposed regulations include verification requirements and the events of default for a sponsoring entity of a sponsored direct reporting NFFE. These proposed regulations also specify the requirements for a sponsorship agreement between a sponsoring entity and each sponsored direct reporting NFFE for which it acts.

Under these proposed regulations, a sponsoring entity must appoint a responsible officer to oversee the compliance of the sponsoring entity with respect to each sponsored direct reporting NFFE. The responsible officer of the sponsoring entity must make a periodic certification to the IRS on the form and in the manner prescribed by the IRS. The certification requirements of a sponsoring entity of a sponsored direct reporting NFFE are more limited than the certification requirements of a sponsoring entity of a sponsored FFI because the obligations of a sponsoring entity of a sponsored direct reporting NFFE are more limited than those of a sponsoring entity of a sponsored FFI. A sponsoring entity of a sponsored direct reporting NFFE must certify that it meets the requirements of a sponsoring entity, that it has a written sponsorship agreement that meets the requirements in these proposed regulations in effect with each sponsored direct reporting NFFE, that there have been no events of default (or that such events have been remediated), and that the sponsoring entity has corrected any failures to report on Form 8966, ''FATCA Report,'' with respect to any sponsored direct reporting NFFE.

In general, a sponsoring entity must make the periodic certification with respect to all sponsored direct reporting NFFEs for which it acts during the certification period. However, with respect to a certification period, a sponsoring entity is not required to certify for a sponsored direct reporting NFFE that first agrees to be sponsored by the sponsoring entity during the six month period prior to the end of the certification period, provided that the sponsoring entity makes certifications for such sponsored direct reporting NFFE for subsequent certification periods and the first such certification covers both the subsequent certification period and the portion of the prior certification period during which the sponsored direct reporting NFFE was sponsored by the sponsoring entity. However, the preceding sentence does not apply to a sponsored direct reporting NFFE that, immediately before the NFFE agrees to be sponsored by the sponsoring entity, was a direct reporting NFFE or sponsored direct reporting NFFE of another sponsoring entity. The sponsoring entity may certify for a sponsored direct reporting NFFE described in the preceding sentence for the portion of the certification period prior to the date that the NFFE first agrees to be sponsored by the sponsoring entity if the sponsoring entity obtains from the NFFE (or the NFFE's sponsoring entity, if applicable) a written certification that the NFFE has complied with its applicable chapter 4 requirements during such portion of the certification period, provided that: (1) The sponsoring entity does not know that such certification is unreliable or incorrect; and (2) the certification for the sponsored direct reporting NFFE for the subsequent certification period covers both the subsequent certification period and the portion of the prior certification period during which such NFFE was sponsored by the sponsoring entity. The first certification period will begin on the later of the date the sponsoring entity is issued a GIIN to act as a sponsoring entity or June 30, 2014.

Under these proposed regulations, the IRS may make inquiries to a sponsoring entity to determine the sponsoring entity's compliance with its requirements. The IRS may also request any additional information from the sponsoring entity (including a copy of the sponsorship agreement that the sponsoring entity has entered into with each sponsored direct reporting NFFE). If the IRS determines that the sponsoring entity may not have substantially complied with the requirements of a sponsoring entity with respect to any sponsored direct reporting NFFE for which it acts, the IRS may request additional information to verify the sponsoring entity's compliance with such requirements and may request the performance of specified review procedures.

These proposed regulations also specify the events of default and termination procedures applicable to a sponsoring entity of a sponsored direct reporting NFFE. Consistent with the verification requirements for direct reporting NFFEs in the chapter 4 regulations, a notice of default is triggered by an event of default. An event of default may result in the termination of the sponsoring entity's status as a sponsoring entity, the statuses of one or more sponsored direct reporting NFFEs as such, or both the status of a sponsoring entity and the statuses of one or more sponsored direct reporting NFFEs. A sponsored direct reporting NFFE whose sponsoring entity's status is terminated may register on the FATCA registration Web site as a direct reporting NFFE or sponsored direct reporting NFFE, unless the sponsored direct reporting NFFE's status is also terminated, in which case the sponsored direct reporting NFFE must obtain prior written approval from the IRS in order to register.

IV. Modifications to the Verification Requirements for Participating FFIs and Compliance FIs

These proposed regulations provide that the requirements for a participating

FFI's certification of compliance (described in § 1.1471–4(f)(3)) may be modified through an amendment to the FFI agreement to include additional certifications or information (such as quantitative or factual information related to the FFI's compliance with the FFI agreement), provided that any additional information or certifications required are published at least 90 days before being added to the FFI agreement to allow for public comment. See also section 12.02 of the FFI agreement (covering modifications to the FFI agreement imposing additional requirements on participating FFIs). Additionally, any such amendment to the FFI agreement will be published only after these proposed regulations are published as final regulations.

These proposed regulations modify the procedures and timeframes for notices of default and terminations applicable to participating FFIs in the chapter 4 regulations to conform to the procedures and timeframes for sponsoring entities in these proposed regulations. These proposed regulations include a minimum period of 45 days for a participating FFI to respond to a notice of default. Within 30 days of a termination of an FFI's participating FFI status, the FFI must send a notice of termination to each withholding agent from which the FFI receives payments and each financial institution with which it holds an account to which a withholding certificate or other documentation was provided. Requests for reconsideration of a notice of default or a notice of termination must be made within 90 days of the notice of default or notice of termination (as applicable). An FFI that has had its participating FFI status terminated may not reregister on the FATCA registration Web site as a participating FFI or a registered deemed-compliant FFI unless it receives written approval from the IRS.

The chapter 4 regulations provide that when an FFI elects to be part of a consolidated compliance program (electing FFI), each branch that it maintains (including a limited branch or a branch described in § 1.1471–5(f)(1)) must be subject to periodic review as part of such program. These proposed regulations clarify that a branch of an electing FFI located in a Model 1 IGA jurisdiction is excluded from the periodic review. In addition, these proposed regulations clarify that the responsible officer of the compliance FI must make the periodic certification described in § 1.1471–4(f)(3) (or a qualified certification) on the form and in the manner prescribed by the IRS. In general, the certification must be made on behalf of all electing FFIs in the compliance group during the certification period. However, with respect to a certification period, a compliance FI is not required to make a certification for an electing FFI that first elects to be part of the consolidated compliance program of the compliance FI during the six month period prior to the end of the certification period, provided that the compliance FI makes certifications for such electing FFI for subsequent certification periods, and the first such certification covers both the subsequent certification period and the portion of the prior certification period during which such FFI was an electing FFI in the consolidated compliance program of the compliance FI. However, the preceding sentence does not apply to an electing FFI that, immediately before the electing FFI elects to be part of the consolidated compliance program, was a participating FFI or registered deemed-compliant FFI. The compliance FI may certify for an electing FFI described in the preceding sentence for the portion of the certification period prior to the date that the electing FFI elects to be part of the consolidated compliance program if the compliance FI obtains from the FFI (or the FFI's former compliance FI, if applicable) a written certification that the FFI has complied with its applicable chapter 4 requirements during such portion of the certification period, provided that: (1) The compliance FI does not know that such certification is unreliable or incorrect; and (2) the certification for the electing FFI for the subsequent certification period covers both the subsequent certification period and the portion of the prior certification period during which such FFI was an electing FFI in the consolidated compliance program of the compliance FI. The first certification period for a compliance group begins on the later of the date the compliance FI is issued a GIIN or June 30, 2014, and ends at the close of the third full calendar year following such date. Each subsequent certification period is the three calendar year period following the previous certification period.

These proposed regulations provide that the responsible officer of a compliance FI must make the certification described in § 1.1471–4(c)(7) (preexisting account certification of a participating FFI) with respect to each electing FFI that elects to be part of the consolidated compliance program under the compliance FI during the certification period (as defined in § 1.1471–4(f)(3)(i)). Notwithstanding the preceding sentence, a preexisting account certification is not required for an electing FFI if, immediately before electing to be part of the consolidated compliance program under the compliance FI, the FFI was a participating FFI or a registered deemed-compliant FFI that is a local FFI or restricted fund, and the FFI (or the FFI's former compliance FI, if applicable) provides a written certification to the compliance FI that the FFI has made the preexisting account certification required of it, unless the compliance FI knows that such certification is unreliable or incorrect. In addition, a preexisting account certification is not required for a certification period for an electing FFI that elects to be part of the consolidated compliance program under the compliance FI during the two year period prior to the end of such certification period, provided that the compliance FI makes the preexisting account certification for such FFI by the due date of the certification of compliance for the subsequent certification period. The preexisting account certification, if required for a certification period, must be submitted by the due date of the FFI's periodic certification of compliance for the certification period, on the form and in the manner prescribed by the IRS.

V. Certification and Verification Requirements for Registered Deemed-Compliant FFIs

The chapter 4 regulations do not explicitly provide that the IRS may apply verification procedures and make inquiries regarding the certifications provided by registered deemed-compliant FFIs. These proposed regulations provide that the IRS may make inquiries of, and request additional information from and the performance of specified review procedures by, a registered deemed-compliant FFI to verify the FFI's compliance with the requirements of its applicable deemed-compliant status. These requirements are similar to the provisions for the IRS's verification of a participating FFI's compliance with the FFI agreement. If the IRS determines that a registered deemed-compliant FFI has not complied with the requirements of the deemed-compliant status claimed by the FFI, the IRS may terminate the FFI's deemed-compliant status. A registered deemed-compliant FFI that has had its status terminated may request reconsideration of the termination by submitting a written request to the IRS within 90 days of the notice of termination.

Proposed Effective/Applicability Dates

These proposed regulations apply on the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required.

The IRS intends that the information collection requirements in these proposed regulations will be satisfied by submitting certifications to the IRS electronically. For purposes of the Paperwork Reduction Act, the reporting burden associated with the collection of information in these proposed regulations will be reflected in the OMB Form 83–1, Paperwork Reduction Act Submission, associated with the certification.

It is hereby certified that the collection of information requirement in these proposed regulations will not have a significant economic impact on a substantial number of small entities because these proposed regulations affect foreign persons, not domestic entities. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and IRS request comments on all aspects of the proposed rules, including comments on the clarity of the proposed rules and how they could be made easier with which to comply. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Kamela Nelan, Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.1471–1 is amended by revising paragraphs (b)(99), (b)(116), and (b)(121) to read as follows:

§ 1.1471–1 Scope of chapter 4 and definitions.

* * * * *

(b) * * *

(99) [The text of proposed § 1.1471–1(b)(99) is the same as the text of § 1.1471–1T(b)(99) published elsewhere in this issue of the **Federal Register**].

* * * * *

(116) *Responsible officer.* The term responsible officer means, with respect to a participating FFI, an officer of any participating FFI or reporting Model 1 FFI in the participating FFI's expanded affiliated group with sufficient authority to fulfill the duties of a responsible officer described in § 1.1471–4, which include the requirement to periodically certify to the IRS regarding the FFI's compliance with its FFI agreement. The term responsible officer means, in the case of a registered deemed-compliant FFI, an officer of any deemed-compliant FFI or participating FFI in the deemed-compliant FFI's expanded affiliated group with sufficient authority to ensure that the FFI meets the applicable requirements of § 1.1471–5(f). The term responsible officer means, with respect to a sponsoring entity, an officer of the sponsoring entity with sufficient authority to fulfill the duties of a responsible officer described in § 1.1471–5(j) or § 1.1472–1(f) (as applicable). If a participating FFI elects to be part of a consolidated compliance program, the term responsible officer means an officer of the compliance FI (as described in § 1.1471–4(f)) with sufficient authority to fulfill the duties of a responsible officer described in § 1.1471–4(f)(2) and (3) on behalf of each FFI in the compliance group.

* * * * *

(121) *Sponsored FFI.* The term sponsored FFI means any entity described in § 1.1471–5(f)(1)(i)(F) (describing sponsored investment entities and sponsored controlled foreign corporations) or § 1.1471–5(f)(2)(iii) (describing sponsored, closely held investment vehicles). The term sponsored FFI also means a sponsored investment entity, a sponsored controlled foreign corporation, or a sponsored, closely held investment vehicle treated as deemed-compliant under an applicable Model 2 IGA.

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■ **Par. 3.** Section 1.1471–3 is amended by:

■ 1. Revising paragraph (c)(1).

■ 2. Adding paragraphs (c)(3)(iii)(B)(*5*) and (c)(6)(ii)(E)(*4*).

■ 3. Revising paragraphs (c)(7)(ii) and (d)(6)(i)(F).

The revisions and additions read as follows:

§ 1.1471–3 Identification of payee.

* * * * *

(c) * * *

(1) [The text of proposed § 1.1471–3(c)(1) is the same as the text of § 1.1471–3T(c)(1) published elsewhere in this issue of the **Federal Register**].

* * * * *

(3) * * *

(iii) * * *

(B) * * *

(*5*) [The text of proposed § 1.1471–3(c)(3)(iii)(B)(*5*) is the same as the text of § 1.1471–3T(c)(3)(iii)(B)(*5*) published elsewhere in this issue of the **Federal Register**].

* * * * *

(6) * * *

(ii) * * *

(E) * * *

(*4*) [The text of proposed § 1.1471–3(c)(6)(ii)(E)(*4*) is the same as the text of § 1.1471–3T(c)(6)(ii)(E)(*4*) published elsewhere in this issue of the **Federal Register**].

* * * * *

(7) * * *

(ii) [The text of proposed § 1.1471–3(c)(7)(ii) is the same as the text of § 1.1471–3T(c)(7)(ii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(d) * * *

(6) * * *

(i) * * *

(F) [The text of proposed § 1.1471–3(d)(6)(i)(F) is the same as the text of § 1.1471–3T(d)(6)(i)(F) published elsewhere in this issue of the **Federal Register**].

* * * * *

■ **Par. 4.** Section 1.1471–4 is amended by:

■ 1. Revising paragraphs (c)(2)(ii)(B)(*2*)(*iii*), (d)(4)(iv)(C) and (D), (f)(2)(ii)(A), (f)(3)(i), and (g)(2).
■ 2. Adding paragraphs (d)(2)(ii)(G) and (f)(2)(ii)(B)(*1*) and (*2*).

The revisions and additions read as follows:

§ 1.1471–4 FFI agreement.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(B) * * *

(*2*) * * *

(*iii*) [The text of proposed § 1.1471–4(c)(2)(ii)(B)(*2*)(*iii*) is the same as the text of § 1.1471–4T(c)(2)(ii)(B)(*2*)(*iii*) published elsewhere in this issue of the **Federal Register**].

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(G) [The text of proposed § 1.1471–4(d)(2)(ii)(G) is the same as the text of § 1.1471–4T(d)(2)(ii)(G) published elsewhere in this issue of the **Federal Register**].

* * * * *

(4) * * *

(iv) * * *

(C) [The text of proposed § 1.1471–4(d)(4)(iv)(C) is the same as the text of § 1.1471–4T(d)(4)(iv)(C) published elsewhere in this issue of the **Federal Register**].

(D) [The text of proposed § 1.1471–4(d)(4)(iv)(D) is the same as the text of § 1.1471–4T(d)(4)(iv)(D) published elsewhere in this issue of the **Federal Register**].

* * * * *

(f) * * *

(2) * * *

(ii) * * *

(A) *In general.* A participating FFI that is a member of an expanded affiliated group that includes one or more FFIs may elect to be part of a consolidated compliance program (and perform a consolidated periodic review) under the authority of a participating FFI, reporting Model 1 FFI, or U.S. financial institution (compliance FI) that is a member of the electing FFI's expanded affiliated group, regardless of whether all such members so elect. In addition, when an FFI elects to be part of a consolidated compliance program, each branch that it maintains (including a limited branch or a branch described in § 1.1471–5(f)(1)), other than a branch located in a Model 1 IGA jurisdiction, must be subject to periodic review as part of such program and included on the periodic certification (described in paragraph (f)(2)(ii)(B)(*1*) of this section). See § 1.1471–5(j) for the requirement of a sponsoring entity to establish and implement a compliance program for its sponsored FFIs.

(B) * * *

(*1*) *Periodic certification.* On or before July 1 of the calendar year following the end of the certification period, the responsible officer of the compliance FI must make the certification described in either paragraph (f)(3)(ii) or (f)(3)(iii) of this section with respect to all electing FFIs for which it acts during the certification period on the form and in the manner prescribed by the IRS. The certification must be made on behalf of all electing FFIs in the compliance group during the certification period. In general, with respect to a certification period, a compliance FI is not required to make a certification for an electing FFI that first elects to be part of the consolidated compliance program of the compliance FI during the six month period prior to the end of the certification period, provided that the compliance FI makes certifications for such electing FFI for subsequent certification periods, and the first such certification covers both the subsequent certification period and the portion of the prior certification period during which such FFI was an electing FFI in the consolidated compliance program of the compliance FI. However, the preceding sentence does not apply to an electing FFI that, immediately before the electing FFI elects to be part of the consolidated compliance program, was a participating FFI or registered deemed-compliant FFI. The compliance FI may certify for an electing FFI described in the preceding sentence for the portion of the certification period prior to the date that the electing FFI elects to be part of the consolidated compliance program if the compliance FI obtains from the FFI (or the FFI's former compliance FI, if applicable) a written certification that the FFI has complied with its applicable chapter 4 requirements during such portion of the certification period, provided that: (1) The compliance FI does not know that such certification is unreliable or incorrect; and (2) the certification for the electing FFI for the subsequent certification period covers both the subsequent certification period and the portion of the prior certification period during which such FFI was an electing FFI in the consolidated compliance program of the compliance FI. The first certification period for a compliance group begins on the later of the date the compliance FI is issued a GIIN or June 30, 2014, and ends at the close of the third full calendar year following such date. Each subsequent certification period is the three calendar year period following the previous certification period.

(*2*) *Preexisting account certification.* The responsible officer of a compliance FI must make the certification described in paragraph (c)(7) of this section (preexisting account certification of a participating FFI) with respect to each electing FFI that elects to be part of the consolidated compliance program under the compliance FI during the certification period. However, a preexisting account certification is not required for an electing FFI if immediately before electing to be part of the consolidated compliance program under the compliance FI the FFI was a participating FFI or a registered deemed-compliant FFI that is a local FFI or restricted fund, and the FFI (or the FFI's former compliance FI, if applicable) provides a written certification to the compliance FI that the FFI has made the preexisting account certification required under paragraph (c)(7) of this section, § 1.1471–5(f)(1)(i)(A)(*7*), or § 1.1471–5(f)(1)(i)(D)(*6*) (as applicable), unless the compliance FI knows that such written certification is unreliable or incorrect. In addition, a preexisting account certification is not required for an electing FFI that elects to be part of the consolidated compliance program under the compliance FI during the two year period prior to the end of the certification period, provided that the compliance FI makes the preexisting account certification for such FFI for the subsequent certification period. The certification required under this paragraph (f)(2)(ii)(B)(*2*) for the certification period must be submitted by the due date of the FFI's certification of compliance required under paragraph (f)(2)(ii)(B)(*1*) of this section for the certification period, on the form and in the manner prescribed by the IRS.

(3) * * *

(i) *In general.* In addition to the certifications required under paragraph (c)(7) of this section, on or before July 1 of the calendar year following the end of each certification period, the responsible officer must make the certification described in either paragraph (f)(3)(ii) or (iii) of this section on the form and in the manner prescribed by the IRS. The first certification period begins on the effective date of the FFI agreement and ends at the close of the third full calendar year following the effective date of the FFI agreement. Each subsequent certification period is the three calendar year period following the previous certification period, unless the FFI agreement provides for a different

period. The responsible officer must either certify that the participating FFI maintains effective internal controls or, if the participating FFI has identified an event of default (defined in paragraph (g) of this section) or a material failure (defined in paragraph (f)(3)(iv) of this section) that it has not corrected as of the date of the certification, must make the qualified certification described in paragraph (f)(3)(iii) of this section. The certification of compliance described in paragraph (f)(3)(ii) or (iii) of this section may be modified through an amendment to the FFI agreement to include any additional certifications or information (such as quantitative or factual information related to the FFI's compliance with the FFI agreement), provided that any additional information or certifications are published at least 90 days before being incorporated into the FFI agreement to allow for public comment.

* * * * *

(g) * * *

(2) *Notice of event of default.* Following an event of default known by or disclosed to the IRS, the IRS will deliver to the participating FFI a notice of default specifying the event of default. The IRS will request that the participating FFI remediate the event of default within 45 days (unless additional time is requested and agreed to by the IRS). The participating FFI must respond to the notice of default and provide information responsive to an IRS request for information or state the reasons why the participating FFI does not agree that an event of default has occurred. Taking into account the terms of any applicable Model 2 IGA, if the participating FFI does not provide a response within the specified time period, the IRS may, at its sole discretion, deliver a notice of termination that terminates the FFI's participating FFI status. If the FFI's participating FFI status is terminated, in addition to the requirements in § 1.1471–3(c)(6)(ii)(E)(*2*), the FFI must, within 30 days of the termination, send notice of the termination to each withholding agent from which it receives payments and each financial institution with which it holds an account for which a withholding certificate or other documentation was provided. An FFI that has had its participating FFI status terminated may not reregister on the FATCA registration Web site as a participating FFI or registered deemed-compliant FFI unless it receives written approval from the IRS to register. A participating FFI may request, within 90 days of a notice of default or notice of termination, reconsideration of a notice of default or notice of termination by written request to the IRS.

* * * * *

■ **Par. 5.** Section 1.1471–5 is amended by:

■ 1. Revising paragraph (f)(1)(i)(F)(*3*)(*vi*).

■ 2. Removing paragraph (f)(1)(i)(F)(*3*)(*vii*).

■ 3. Redesignating paragraph (f)(1)(i)(F)(*3*)(*viii*) as new paragraph (f)(1)(i)(F)(*3*)(*vii*),

■ 4. Revising paragraph (f)(1)(i)(F)(*4*).

■ 5. Adding paragraph (f)(1)(iv).

■ 6. Revising paragraph (f)(2)(iii)(D)(*4*).

■ 7. Removing paragraph (f)(2)(iii)(D)(*5*).

■ 8. Redesignating paragraph (f)(2)(iii)(D)(*6*) as new paragraph (f)(2)(iii)(D)(*5*).

■ 9. Revising paragraph (f)(2)(iii)(E),

■ 10. Revising paragraphs (j) and (k).

■ 11. Redesignating paragraph (l) as paragraph (m).

■ 12. Adding new paragraph (l).

The revisions and additions read as follows:

§ 1.1471–5 Definitions applicable to section 1471.

* * * * *

(f) * * *

(1) * * *

(i) * * *

(F) * * *

(*3*) * * *

(*vi*) Complies with the verification procedures described in paragraph (j) of this section;

* * * * *

(*4*) The IRS may revoke a sponsoring entity's status with respect to one or more sponsored FFIs if there is an event of default as defined in paragraph (k)(1) of this section and following the termination procedures described in paragraphs (k)(2), (k)(3), and (k)(4) of this section.

* * * * *

(iv) *IRS review of compliance by registered deemed-compliant FFIs*—(A) *General inquiries.* With respect to a registered deemed-compliant FFI described in paragraph (f)(1)(i)(A), (C), or (D) of this section, the IRS, based upon the information reporting forms described in § 1.1471–4(d)(3)(v), (d)(5)(vii), or (d)(6)(iv) filed with the IRS for each calendar year (if applicable), may request additional information with respect to the information reported (or required to be reported) on the forms, the account statements described in § 1.1471–4(d)(4)(v), or to confirm that the FFI has no reporting requirements for the calendar year. The IRS may request additional information from the FFI to determine the FFI's compliance with § 1.1471–4 (if applicable) and to assist the IRS with its review of account holder compliance with tax reporting requirements. For IRS review of compliance with respect to a registered deemed-compliant FFI described in paragraph (f)(1)(i)(F) of this section (describing sponsored investment entities and controlled foreign corporations), see paragraph (j)(4) of this section.

(B) *Inquiries regarding substantial non-compliance.* With respect to a registered deemed-compliant FFI described in paragraph (f)(1)(i)(A) through (E) of this section, the IRS, based on the information reporting forms described in § 1.1471–4(d)(3)(v), (d)(5)(vii), or (d)(6)(iv) filed with the IRS for each calendar year (if applicable), the certifications made by the responsible officer described in paragraph (f)(1)(ii)(B) of this section (or the absence of such certifications), or any other information related to the FFI's compliance with the requirements of the deemed-compliant status claimed by the FFI, may determine in its discretion that the FFI may not have substantially complied with the requirements of the deemed-compliant status claimed by the FFI. In such a case, the IRS may request from the responsible officer (or designee) information necessary to verify the FFI's compliance with the requirements for the deemed-compliant status claimed by the FFI. For example, in the case of a local FFI under paragraph (f)(1)(i)(A) of this section, the IRS may request a description or copy of the FFI's policies and procedures for identifying accounts held by specified U.S. persons not resident in the jurisdiction in which the FFI is incorporated or organized, identifying entities controlled or beneficially owned by such persons, and identifying nonparticipating FFIs. The IRS may also request the performance of specified review procedures by a person (including an external auditor or third-party consultant) that the IRS identifies as competent to perform such procedures given the facts and circumstances surrounding the FFI's potential failure to comply with the requirements of the deemed-compliant category claimed by the FFI. If the IRS determines that the FFI has not complied with the requirements of the deemed-compliant status claimed by the FFI, the IRS may terminate the FFI's deemed-compliant status. If the FFI's deemed-compliant status is terminated, the FFI must send notice of the termination to each withholding agent from which it receives payments and each financial institution with which it holds an

account for which a withholding certificate or other documentation was provided within 30 days after the termination. An FFI that has had its deemed-compliant status terminated may not reregister on the FATCA registration Web site as a registered deemed-compliant FFI or register on the FATCA registration Web site as a participating FFI unless it receives written approval from the IRS. A registered deemed-compliant FFI may request, within 90 days of a notice of termination, reconsideration of the notice of termination by written request to the IRS.

(2) * * *

(iii) * * *

(D) * * *

(*4*) Complies with the verification procedures described in paragraph (j) of this section; and

* * * * *

(E) The IRS may revoke a sponsoring entity's status as a sponsoring entity with respect to one or more sponsored FFIs if there is an event of default as defined in paragraph (k)(1) of this section and following the termination procedures described in paragraphs (k)(2), (k)(3), and (k)(4) of this section. A sponsoring entity is not liable for any failure to comply with the obligations contained in paragraph (f)(2)(iii)(D) of this section unless the sponsoring entity is a withholding agent that is separately liable for the failure to withhold on or report with respect to a payment made by the sponsoring entity on behalf of the sponsored FFI. A sponsored FFI will remain liable for any failure of its sponsoring entity to comply with the obligations contained in paragraph (f)(2)(iii)(D) of this section that the sponsoring entity has agreed to undertake on behalf of the FFI, even if the sponsoring entity is also a withholding agent and is itself separately liable for the failure to withhold on or report with respect to a payment made by the sponsoring entity on behalf of the sponsored FFI. The same tax, interest, or penalties, however, shall not be collected more than once.

* * * * *

(j) *Sponsoring entity verification*—(1) *In general.* This paragraph (j) describes the requirements for a sponsoring entity of a sponsored FFI to establish and implement a compliance program for satisfying its requirements as a sponsoring entity and to provide a certification of compliance with its requirements. This paragraph (j) also describes the procedures for the IRS to review the sponsoring entity's compliance with respect to each sponsored FFI for purposes of satisfying the requirements of paragraph (f)(1)(i)(F) or (f)(2)(iii) of this section or an applicable Model 2 IGA. This paragraph (j) also requires a sponsoring entity to have in place a written sponsorship agreement as described in paragraph (j)(3)(v)(B) of this section with each sponsored FFI. References in this paragraph (j) or paragraph (k) of this section to a sponsored FFI mean a sponsored FFI to which the requirements of paragraph (f)(1)(i)(F) or (f)(2)(iii) of this section or an applicable Model 2 IGA apply.

(2) *Compliance program.* The sponsoring entity must appoint a responsible officer to oversee the compliance of the sponsoring entity with respect to each sponsored FFI for purposes of satisfying the requirements of paragraph (f)(1)(i)(F) or (f)(2)(iii) of this section or an applicable Model 2 IGA. The responsible officer must (either personally or through designated persons) establish a compliance program that includes policies, procedures, and processes sufficient for the sponsoring entity to satisfy the requirements described in the preceding sentence. The responsible officer (or designee) must periodically review the sufficiency of the sponsoring entity's compliance program, the sponsoring entity's compliance with respect to each sponsored FFI for purposes of satisfying the requirements of paragraph (f)(1)(i)(F) or (f)(2)(iii) of this section or an applicable Model 2 IGA, and the compliance of each sponsored FFI with the due diligence, withholding, and reporting requirements of § 1.1471–4 or an applicable Model 2 IGA during the certification period described in paragraph (j)(3)(iii) of this section. The results of the periodic review must be considered by the responsible officer in making the periodic certifications described in paragraph (j)(3) of this section.

(3) *Certification of compliance*—(i) *In general.* In addition to the certification required under paragraph (j)(5) of this section (preexisting account certification), on or before July 1 of the calendar year following the certification period, the responsible officer of the sponsoring entity must make the certification described in paragraph (j)(3)(v) of this section and either the certification described in paragraph (j)(3)(vi)(A) of this section or the certification described in paragraph (j)(3)(vi)(B) of this section with respect to all sponsored FFIs for which the sponsoring entity acts during the certification period on the form and in the manner prescribed by the IRS.

(ii) *Late-joining sponsored FFIs.* In general, with respect to a certification period, a sponsoring entity is not required to make a certification for a sponsored FFI that first agrees to be sponsored by the sponsoring entity during the six month period prior to the end of the certification period, provided that the sponsoring entity makes certifications for such sponsored FFI for subsequent certification periods and the first such certification covers both the subsequent certification period and the portion of the prior certification period during which such FFI was sponsored by the sponsoring entity. However, the preceding sentence does not apply to a sponsored FFI that, immediately before the FFI agrees to be sponsored by the sponsoring entity, was a participating FFI, registered deemed-compliant FFI, or sponsored, closely held investment vehicle of another sponsoring entity. The sponsoring entity may certify for a sponsored FFI described in the preceding sentence for the portion of the certification period prior to the date that the FFI first agrees to be sponsored by the sponsoring entity if the sponsoring entity obtains from the FFI (or the FFI's sponsoring entity, if applicable) a written certification that the FFI has complied with its applicable chapter 4 requirements during such portion of the certification period, provided that: (1) The sponsoring entity does not know that such certification is unreliable or incorrect; and (2) the certification for the sponsored FFI for the subsequent certification period covers both the subsequent certification period and the portion of the prior certification period during which such FFI was sponsored by the sponsoring entity.

(iii) *Certification period.* The first certification period begins on the later of the date the sponsoring entity is issued a GIIN to act as a sponsoring entity or June 30, 2014, and ends at the close of the third full calendar year following such date. Each subsequent certification period is the three calendar year period following the previous certification period.

(iv) *Additional certifications or information.* The certification of compliance described in paragraph (j)(3) of this section may be modified to include additional certifications or information (such as quantitative or factual information related to the sponsoring entity's compliance with respect to each sponsored FFI for purposes of satisfying the requirements of paragraph (f)(1)(i)(F) or (f)(2)(iii) of this section or an applicable Model 2 IGA), provided that such additional information or certifications are published at least 90 days before being

made effective in order to allow for public comment.

(v) *Certifications regarding sponsoring entity and sponsored FFI requirements.* The responsible officer of the sponsoring entity must certify to the following statements—

(A) The sponsoring entity meets all of the requirements of a sponsoring entity as described in paragraph (f)(1)(i)(F)(*3*) or (f)(2)(iii)(D) of this section or an applicable Model 2 IGA, including the chapter 4 status required of such entity;

(B) The sponsoring entity has a written sponsorship agreement in effect with each sponsored FFI authorizing the sponsoring entity to fulfill the requirements of paragraph (f)(1)(i)(F) or (f)(2)(iii) of this section or an applicable Model 2 IGA with respect to each sponsored FFI; and

(C) Each sponsored FFI treated as a sponsored investment entity, a sponsored controlled foreign corporation, or a sponsored, closely held investment vehicle by the sponsoring entity meets the requirements of its respective status.

(vi) *Certifications regarding internal controls*—(A) *Certification of effective internal controls.* The responsible officer of the sponsoring entity must certify to the following statements—

(*1*) The responsible officer of the sponsoring entity has established a compliance program that is in effect as of the date of the certification and that has been subject to the review as described in paragraph (j)(2) of this section;

(*2*) With respect to material failures (defined in paragraph (j)(3)(vii) of this section)—

(*i*) There are no material failures for the certification period; or

(*ii*) If there were any material failures, appropriate actions were taken to remediate such failures and to prevent such failures from reoccurring; and

(*3*) With respect to any failure to withhold, deposit, or report to the extent required under § 1.1471–4 or an applicable Model 2 IGA with respect to any sponsored FFI for any year during the certification period, the sponsored FFI has corrected such failure by paying (or directing the sponsoring entity to pay) any taxes due (including interest and penalties) and filing (or directing the sponsoring entity to file) the appropriate return (or amended return).

(B) *Qualified certification.* If the responsible officer of the sponsoring entity has identified an event of default (defined in paragraph (k)(1) of this section) or a material failure (defined in paragraph (j)(3)(vii) of this section) that the sponsoring entity has not corrected as of the date of the certification, the responsible officer must certify to the following statements—

(*1*) The responsible officer of the sponsoring entity has established a compliance program that is in effect as of the date of the certification and that has been subjected to the review as described in paragraph (j)(2) of this section;

(*2*) With respect to the event of default or material failure—

(*i*) The responsible officer (or designee) has identified an event of default; or

(*ii*) The responsible officer has determined that there are one or more material failures as defined in paragraph (j)(3)(vii) of this section and that appropriate actions will be taken to prevent such failures from reoccurring;

(*3*) With respect to any failure to withhold, deposit, or report to the extent required under § 1.1471–4 or an applicable Model 2 IGA with respect to any sponsored FFI for any year during the certification period, the sponsored FFI will correct such failure by paying (or directing the sponsoring entity to pay) any taxes due (including interest and penalties) and filing (or directing the sponsoring entity to file) the appropriate return (or amended return); and

(*4*) The responsible officer (or designee) will respond to any notice of default under paragraph (k)(2) of this section or will provide to the IRS a description of each material failure and a written plan to correct each such failure when requested under paragraph (j)(4) of this section.

(vii) *Material failures defined.* A material failure is a failure of the sponsoring entity with respect to each sponsored FFI to satisfy the requirements of paragraph (f)(1)(i)(F) or (f)(2)(iii) of this section or an applicable Model 2 IGA if the failure was the result of a deliberate action on the part of one or more employees of the sponsoring entity or was an error attributable to a failure of the sponsoring entity to implement internal controls sufficient for the sponsoring entity to meet its requirements. A material failure will not constitute an event of default unless such material failure occurs in more than limited circumstances when a sponsoring entity has not substantially complied with the requirements described in the preceding sentence. Material failures include the following—

(A) With respect to any sponsored FFI, the deliberate or systematic failure of the sponsoring entity to report accounts that such sponsored FFI was required to treat as U.S. accounts, withhold on passthru payments to the extent required, deposit taxes withheld to the extent required, accurately report recalcitrant account holders (or non-consenting U.S. accounts under an applicable Model 2 IGA), or accurately report with respect to nonparticipating FFIs as required under § 1.1471–4(d)(2)(ii)(F) or an applicable Model 2 IGA;

(B) A criminal or civil penalty or sanction imposed on the sponsoring entity or any sponsored FFI (or any branch or office of the sponsoring entity or any sponsored FFI) by a regulator or other governmental authority or agency with oversight over the sponsoring entity's or sponsored FFI's compliance with the AML due diligence procedures to which it (or any branch or office thereof) is subject and that is imposed based on a failure to properly identify account holders under the requirements of those procedures;

(C) A potential future tax liability of any sponsored FFI related to its compliance (or lack thereof) with the due diligence, withholding, and reporting requirements of § 1.1471–4 or an applicable Model 2 IGA for which such sponsored FFI has established, for financial statement purposes, a tax reserve or provision;

(D) A potential contractual liability under the agreement described in paragraph (j)(3)(v)(B) of this section of the sponsoring entity to any sponsored FFI related to such sponsoring entity's compliance (or lack thereof) with paragraph (f)(1)(i)(F) or (f)(2)(iii) of this section or an applicable Model 2 IGA for which the sponsoring entity has established, for financial statement purposes, a reserve or provision; and

(E) Failure to register with the IRS as a sponsoring entity or to register each sponsored FFI required to be registered under paragraph (f)(1)(i)(F)(*3*)(*iii*) of this section or an applicable Model 2 IGA.

(4) *IRS review of compliance*—(i) *General inquiries.* The IRS, based upon the information reporting forms described in § 1.1471–4(d)(3)(v), (d)(5)(vii), or (d)(6)(iv) filed with the IRS (or the absence of such reporting) by the sponsoring entity for each calendar year with respect to any sponsoring FFI, may request additional information with respect to the information reported (or required to be reported) on the forms, the account statements described in § 1.1471–4(d)(4)(v) with respect to one or more sponsored FFIs, or confirmation that the FFI has no reporting requirements. The IRS may also request any additional information from the sponsoring entity (including a copy of each sponsorship agreement the sponsoring entity has entered into with each sponsored FFI) necessary to

determine the compliance with the due diligence, withholding, and reporting requirements of § 1.1471–4 or an applicable Model 2 IGA with respect to each sponsored FFI and to assist the IRS with its review of account holder compliance with tax reporting requirements.

(ii) *Inquiries regarding substantial non-compliance.* Based on the information reporting forms described in § 1.1471–4(d)(3)(v), (d)(5)(vii), or (d)(6)(iv) filed with the IRS by the sponsoring entity for each calendar year with respect to any sponsored FFI (or the absence of reporting), the certifications made by the responsible officer described in paragraphs (j)(3) and (j)(5) of this section (or the absence of such certifications), or any other information related to the sponsoring entity's compliance with respect to any sponsored FFI for purposes of satisfying the requirements of paragraph (f)(1)(i)(F) or (f)(2)(iii) of this section or an applicable Model 2 IGA, the IRS may determine in its discretion that the sponsoring entity may not have substantially complied with such requirements. In such a case, the IRS may request from the responsible officer (or designee) information necessary to verify the sponsoring entity's compliance with such requirements. The IRS may request, for example, a description or copy of the sponsoring entity's policies and procedures for fulfilling the requirements of paragraph (f)(1)(i)(F) or (f)(2)(iii) of this section or an applicable Model 2 IGA, a description or copy of the sponsoring entity's procedures for conducting its periodic review, or a copy of any written reports documenting the findings of such review. The IRS may also request the performance of specified review procedures by a person (including an external auditor or third-party consultant) that the IRS identifies as competent to perform such procedures given the facts and circumstances surrounding the sponsoring entity's potential failure to comply with respect to each sponsored FFI with the requirements of paragraph (f)(1)(i)(F) or (f)(2)(iii) of this section or an applicable Model 2 IGA.

(iii) *Compliance procedures for a sponsored FFI subject to a Model 2 IGA.* In the case of a sponsored FFI subject to the requirements of an applicable Model 2 IGA, the procedures described in paragraph (j)(4) of this section apply, except as otherwise provided in the applicable Model 2 IGA.

(5) *Preexisting account certification.* The responsible officer of a sponsoring entity must make the certification described in § 1.1471–4(c)(7) (preexisting account certification of a participating FFI) with respect to each sponsored FFI that enters into the sponsorship agreement with the sponsoring entity during the certification period (as defined in paragraph (j)(3)(iii) of this section). However, the preexisting account certification is not required for a sponsored FFI that, immediately before the FFI first agrees to be sponsored by the sponsoring entity, was a participating FFI, a sponsored FFI of another sponsoring entity, or a registered deemed-compliant FFI that is a local FFI or a restricted fund, if the FFI (or the FFI's former sponsoring entity, if applicable) provides a written certification to the sponsoring entity that the FFI has made the preexisting account certification required under § 1.1471–4(c)(7) or paragraph (f)(1)(i)(A)(*7*) or (f)(1)(i)(D)(*6*) of this section (as applicable), unless the sponsoring entity knows that such written certification is unreliable or incorrect. In addition, the preexisting account certification is not required for a sponsored FFI that enters into the sponsorship agreement with the sponsoring entity during the two year period prior to the end of the certification period, provided that the sponsoring entity makes the preexisting account certification for such FFI for the subsequent certification period. The certification described in this paragraph (j)(5) for the certification period must be submitted by the due date of the sponsoring entity's certification of compliance required under paragraph (j)(3) of this section for the certification period, on the form and in the manner prescribed by the IRS. With respect to a sponsored FFI for which the sponsoring entity makes a preexisting account certification, a preexisting obligation means any account, instrument, or contract (including any debt or equity interest) maintained, executed, or issued by the sponsored FFI that is outstanding on the earlier of the date the FFI is issued a GIIN as a sponsored FFI or the date the FFI first agrees to be sponsored by the sponsoring entity.

(k) *Sponsoring entity event of default*—(1) *Defined.* An event of default with regard to a sponsoring entity occurs if the sponsoring entity fails to perform material obligations required with respect to the due diligence, withholding, and reporting requirements of § 1.1471–4 or an applicable Model 2 IGA with respect to any sponsored FFI, to establish or maintain a compliance program as described in paragraph (j)(2) of this section, or to perform a periodic review described in paragraph (j)(2) of this section. An event of default also includes the occurrence of any of the following—

(i) With respect to any sponsored FFI, failure to obtain, in any case in which foreign law would (but for a waiver) prevent the reporting of U.S. accounts required under § 1.1471–4(d), valid and effective waivers from holders of U.S. accounts or failure to otherwise close or transfer such U.S. accounts as required under § 1.1471–4(i);

(ii) With respect to any sponsored FFI, failure to significantly reduce, over a period of time, the number of account holders or payees that such sponsored FFI is required to treat as recalcitrant account holders or nonparticipating FFIs, as a result of the sponsoring entity failing to comply with the due diligence procedures set forth in § 1.1471–4(c);

(iii) With respect to any sponsored FFI, failure to fulfill the requirements of § 1.1471–4(i) in any case in which foreign law prevents or otherwise limits withholding under § 1.1471–4(b);

(iv) Failure to take timely corrective actions to remedy a material failure described in paragraph (j)(3)(vii) of this section after making a qualified certification described in paragraph (j)(3)(vi)(B) of this section;

(v) Failure to make the preexisting account certification required under paragraph (j)(5) of this section or the periodic certification required under paragraph (j)(3) of this section with respect to any sponsored FFI within the specified time period;

(vi) Making incorrect claims for refund on behalf of any sponsored FFI;

(vii) Failure to cooperate with an IRS request for additional information under paragraph (j)(4) of this section;

(viii) Making any fraudulent statement or misrepresentation of material fact to the IRS or representing to a withholding agent or the IRS its status as a sponsoring entity for an entity other than an entity for which it acts as a sponsoring entity;

(ix) The sponsoring entity is no longer authorized to perform the requirements of a sponsoring entity with respect to one or more sponsored FFIs; or

(x) Failure to have the written sponsorship agreement described in paragraph (j)(3)(v)(B) of this section in effect with each sponsored FFI.

(2) *Notice of event of default.* Following an event of default known by or disclosed by the sponsoring entity to the IRS, the IRS will deliver to the sponsoring entity a notice of default specifying the event of default and, if applicable, identifying each sponsored FFI to which the notice relates. The IRS

will request that the sponsoring entity remediate the event of default within 45 days (unless additional time is requested and agreed to by the IRS). The sponsoring entity must respond to the notice of default and provide information responsive to an IRS request for information or state the reasons why the sponsoring entity does not agree that an event of default has occurred.

(3) *Remediation of event of default.* A sponsoring entity will be permitted to remediate an event of default to the extent that it agrees with the IRS on a remediation plan. Such a plan may, for example, allow a sponsoring entity to remediate an event of default described in paragraph (k)(1) of this section with respect to a sponsored FFI by providing specific information regarding the U.S. accounts maintained by such sponsored FFI when the sponsoring entity has been unable to report all of the information with respect to such accounts as required under § 1.1471–4(d) and has been unable to close or transfer such accounts. The IRS may, as part of a remediation plan, require additional information from the sponsoring entity or the performance of the specified review procedures described in paragraph (j)(4)(ii) of this section.

(4) *Termination*—(i) *In general.* If the sponsoring entity does not provide a response to a notice of default within the period specified in paragraph (k)(2) of this section or does not remediate the event of default as described in paragraph (k)(3) of this section, the IRS may deliver a notice of termination that terminates the sponsoring entity's status, the status of one or more sponsored FFIs as deemed-compliant FFIs, or both the sponsoring entity and one or more sponsored FFIs.

(ii) *Termination of sponsoring entity.* If the IRS terminates the status of the sponsoring entity, the sponsoring entity must send notice of the termination to each sponsored FFI for which it acts, as well as each withholding agent from which it receives payments and each financial institution with which it holds an account for which a withholding certificate or other documentation was provided with respect to each sponsored FFI within 30 days after the date of termination. A sponsoring entity that has had its status terminated cannot register on the FATCA registration Web site to act as a sponsoring entity for any sponsored FFI or for any entity that is a sponsored entity under a Model 1 IGA unless it receives written approval from the IRS to register. Unless the status of a sponsored FFI has been terminated, the sponsored FFI may register on the FATCA registration Web site as a participating FFI or registered deemed-compliant FFI (as applicable). However, a sponsored FFI whose sponsoring entity has been terminated may not register or represent its status as a sponsored FFI of a sponsoring entity that has a relationship described in section 267(b) to the sponsoring entity that was terminated without receiving written approval from the IRS.

(iii) *Termination of sponsored FFI.* If the IRS notifies the sponsoring entity that the status of a sponsored FFI is terminated (but not the sponsoring entity's status), the sponsoring entity must remove the sponsored FFI from the sponsoring entity's registration account on the FATCA registration Web site and send notice of the termination to each withholding agent from which the sponsored FFI receives payments and each financial institution with which it holds an account for which a withholding certificate or other documentation was provided with respect to such sponsored FFI within 30 days after the date of termination. A sponsored FFI that has had its status as a sponsored FFI terminated (independent from a termination of status of its sponsoring entity) may not register on the FATCA registration Web site as a participating FFI or registered deemed-compliant FFI unless it receives written approval from the IRS.

(iv) *Reconsideration of notice of default or notice of termination.* A sponsoring entity or sponsored FFI may request, within 90 days of a notice of default or notice of termination, reconsideration of the notice of default or notice of termination by written request to the IRS.

(v) *Sponsoring entity of sponsored FFIs subject to a Model 2 IGA.* Subject to the provisions of an applicable Model 2 IGA, the IRS may revoke the status of a sponsoring entity with respect to one or more sponsored FFIs subject to a Model 2 IGA if there is an event of default as defined in paragraph (k)(1) of this section and following the notice, remediation, and termination procedures described in paragraphs (k)(2), (k)(3), and (k)(4) of this section.

(l) *Trustee-documented trust verification*—(1) *Compliance program.* A trustee of a trust treated as a trustee-documented trust under an applicable Model 2 IGA must establish and implement a compliance program for purposes of satisfying the requirements of an applicable Model 2 IGA with respect to each such trust. The trustee must appoint a responsible officer who must (either personally or through designated persons) establish policies, procedures, and processes sufficient for the trustee to implement the compliance program. The responsible officer (or designee) must periodically review the sufficiency of the trustee's compliance program and the trustee's compliance with respect to each trust for purposes of satisfying the requirements of an applicable Model 2 IGA for each certification period described in paragraph (l)(2) of this section. The results of the periodic review must be considered by the responsible officer in making the certification described in paragraph (l)(2) of this section.

(2) *Certification of compliance*—(i) *In general.* On or before July 1 of the calendar year following the end of the certification period, the responsible officer must make a certification for the certification period with respect to all trustee-documented trusts described in paragraph (l)(1) of this section on the form and in the manner prescribed by the IRS.

(ii) *Late-joining trustee-documented trusts.* In general, with respect to a certification period, the responsible officer of a trustee is not required to make a certification for a trustee-documented trust for which the trustee first agreed to act as the trustee for purposes of the trust's status as a trustee-documented trust during the six month period prior to the end of the certification period, provided that the responsible officer of the trustee makes certifications for such trustee-documented trust for subsequent certification periods and the first such certification covers both the subsequent certification period and the portion of the prior certification period during which the trustee acted as the trustee of the trustee-documented trust. However, the preceding sentence does not apply to a trustee-documented trust that, immediately before the trustee first agrees to act as the trustee for purposes of the trust's status as a trustee-documented trust, was a trustee-documented trust of another trustee. The trustee of a trustee-documented trust may certify for a trustee-documented trust described in the preceding sentence for the portion of the certification period prior to the date that the trustee first agrees to act as the trustee for purposes of the trust's status as a trustee-documented trust if the trustee obtains from the trustee-documented trust (or the trust's former trustee, if applicable) a written certification that the trust has complied with its applicable chapter 4 requirements during such portion of the certification period, provided that: (1) The trustee does not know that such certification is unreliable or incorrect; and (2) the certification for the trustee-documented trust for the subsequent

certification period covers both the subsequent certification period and the portion of the prior certification period during which the trustee acts as the trustee for purposes of the trust's status as a trustee-documented trust.

(iii) *Certification period.* The first certification period begins on the later of the date the trustee is issued a GIIN to act as a trustee of a trustee-documented trust or June 30, 2014, and ends at the close of the third full calendar year following such date. Each subsequent certification period is the three calendar year period following the previous certification period.

(iv) *Certifications.* The responsible officer of the trustee must certify to the following statements—

(A) The responsible officer of the trustee has established a compliance program that is in effect as of the date of the certification and has performed a periodic review described in paragraph (l)(1) of this section for the certification period; and

(B) The trustee has reported to the IRS on Form 8966, ''FATCA Report'' (or such other form as the IRS may prescribe), all of the information required to be reported pursuant to the applicable Model 2 IGA with respect to all U.S. accounts of each trustee-documented trust for which the trustee acts during the certification period by the due date of Form 8966 (including extensions) for each year.

(3) *IRS review of compliance by trustees of trustee-documented trusts*—(i) *General inquiries.* Based upon the information reporting forms filed with the IRS (or the absence of such reporting) by a trustee with respect to any trustee-documented trust subject to a Model 2 IGA for each calendar year, and subject to the requirements of an applicable Model 2 IGA, the IRS may request from the trustee additional information with respect to the information reported on the forms with respect to any trustee-documented trust or a confirmation that the trustee has no reporting requirements with respect to any trustee-documented trust. The IRS may also request any additional information to determine the trustee's compliance for purposes of satisfying the trust's requirements as a trustee-documented trust under an applicable Model 2 IGA or to assist the IRS with its review of account holder compliance with tax reporting requirements.

(ii) *Inquiries regarding substantial non-compliance.* The IRS, based on the information reporting forms filed with the IRS by a trustee with respect to any trustee-documented trust subject to a Model 2 IGA for each calendar year (or the absence of such reporting), the certification described in paragraph (l)(2) of this section (or the absence of such certification), or any other information related to the trustee's compliance with respect to any trustee-documented trust for purposes of satisfying the trust's applicable Model 2 IGA requirements, may determine in its discretion that the trustee may not have substantially complied with the requirements applicable to a trustee of a trustee-documented trust. In such a case, the IRS may request from the responsible officer information necessary to verify the trustee's compliance with such requirements. The IRS may also request the performance of specified review procedures by a person (including an external auditor or third-party consultant) that the IRS identifies as competent to perform such procedures given the circumstances surrounding the trustee's potential failure to comply with the requirements of an applicable Model 2 IGA with respect to one or more trustee-documented trusts. The IRS may notify the applicable Model 2 IGA jurisdiction that the trustee has not complied with its requirements as a trustee of one or more trustee-documented trusts

* * * * *

■ **Par. 6.** Section 1.1472–1 is amended by revising paragraphs (c)(5)(iii), (f), and (g) to read as follows:

§ 1.1472–1 Withholding on NFFEs.

* * * * *

(c) * * *

(5) * * *

(iii) *Revocation of status as sponsoring entity.* The IRS may revoke a sponsoring entity's status as a sponsoring entity with respect to all sponsored direct reporting NFFEs if there is an event of default as defined in paragraph (g) of this section with respect to any sponsored direct reporting NFFE.

* * * * *

(f) *Sponsoring entity verification*—(1) *In general.* This paragraph (f) describes the requirements for a sponsoring entity to provide a certification of compliance with respect to each sponsored direct reporting NFFE for purposes of satisfying the requirements of paragraph (c)(5) of this section and defines the certification period for such certifications. This paragraph (f) also describes the procedures for the IRS to review the sponsoring entity's compliance with such requirements during the certification period. Finally, this paragraph (f) describes the requirement that a sponsoring entity have in place a written sponsorship agreement with each sponsored direct reporting NFFE for which it acts and specifies the terms of such agreement. See paragraph (g)(1)(i) of this section, describing an event of default for a sponsoring entity that does not have a sponsorship agreement with each sponsored direct reporting NFFE for which it acts as a sponsoring entity. References in this paragraph (f) or paragraph (g) of this section to a sponsored direct reporting NFFE mean a sponsored direct reporting NFFE for which the sponsoring entity acts as a sponsoring entity under paragraph (c)(5)(ii) of this section.

(2) *Certification of compliance*—(i) *In general.* The sponsoring entity must appoint a responsible officer to oversee the sponsoring entity's compliance with respect to each sponsored direct reporting NFFE for purposes of satisfying the requirements of paragraph (c)(5) of this section. On or before July 1 of the calendar year following the certification period, the responsible officer of the sponsoring entity must make a certification for the certification period with respect to all sponsored direct reporting NFFEs for which the sponsoring entity acts during the certification period on the form and in the manner prescribed by the IRS.

(ii) *Late-joining sponsored direct reporting NFFEs.* In general, with respect to a certification period, a sponsoring entity is not required to make a certification for a sponsored direct reporting NFFE that first agrees to be sponsored by the sponsoring entity during the six month period prior to the end of the certification period, provided that the sponsoring entity makes certifications for such sponsored direct reporting NFFE for subsequent certification periods, and the first such certification covers both the subsequent certification period and the portion of the prior certification period during which the sponsored direct reporting NFFE was sponsored by the sponsoring entity. However, the preceding sentence does not apply to a sponsored direct reporting NFFE that, immediately before the NFFE agrees to be sponsored by the sponsoring entity, was a direct reporting NFFE or sponsored direct reporting NFFE of another sponsoring entity. The sponsoring entity may certify for a sponsored direct reporting NFFE described in the preceding sentence for the portion of the certification period prior to the date that the NFFE first agrees to be sponsored by the sponsoring entity if the sponsoring entity obtains from the NFFE (or the NFFE's sponsoring entity, if applicable) a written certification that the NFFE has complied with its applicable chapter 4

requirements during such portion of the certification period, provided that: (1) The sponsoring entity does not know that such certification is unreliable or incorrect; and (2) the certification for the sponsored direct reporting NFFE for the subsequent certification period covers both the subsequent certification period and the portion of the prior certification period during which such NFFE was sponsored by the sponsoring entity.

(iii) *Certification period.* The first certification period begins on the later of the date the sponsoring entity is issued a GIIN to act as a sponsoring entity or June 30, 2014, and ends at the close of the third full calendar year after such date. Each subsequent certification period is the three calendar year period following the close of the previous certification period.

(iv) *Certifications.* The certification will require the responsible officer of the sponsoring entity to certify to the following statements—

(A) The sponsoring entity meets all of the requirements of a sponsoring entity described in paragraph (c)(5)(ii) of this section;

(B) The sponsoring entity has the written sponsorship agreement described in paragraph (f)(4) of this section in effect with each sponsored direct reporting NFFE;

(C) There were no events of default (as defined in paragraph (g) of this section) with respect to the sponsoring entity, or, to the extent there were any such events of default, appropriate measures were taken by the sponsoring entity to remediate and prevent such events from reoccurring; and

(D) With respect to any failure to report to the extent required under paragraph (c)(3)(ii) of this section with respect to one or more sponsored direct reporting NFFEs, the sponsoring entity has corrected such failure by filing the appropriate information returns.

(3) *IRS review of compliance*—(i) *General inquiries.* The IRS, based upon the information reporting forms described in paragraph (c)(3)(ii) of this section filed with the IRS (or the absence of such reporting) by the sponsoring entity for each calendar year with respect to any sponsored direct reporting NFFE, may request additional information with respect to the information reported (or required to be reported) on the forms about any substantial U.S. owner reported on the form or the records for each direct reporting NFFE described in paragraph (c)(3)(iv) of this section. The IRS may also request any additional information from the sponsoring entity (including a copy of each sponsorship agreement the sponsoring entity has entered into with each sponsored FFI) to determine its compliance with paragraph (f) of this section with respect to each sponsored direct reporting NFFE and to assist the IRS with its review of any substantial U.S. owners' compliance with tax reporting requirements.

(ii) *Inquiries regarding substantial non-compliance.* If, based on the information reporting forms referenced in paragraph (c)(3)(ii) of this section filed with the IRS by the sponsoring entity for each calendar year with respect to any sponsored direct reporting NFFE (or the absence of such reporting), the certification made by the responsible officer described in paragraph (f)(2) of this section (or the absence of such certification), or any other information related to the sponsoring entity's compliance with the requirements of a sponsoring entity with respect to each sponsored direct reporting NFFE for purposes of satisfying the requirements of paragraph (c)(5) of this section, the IRS determines in its discretion that the sponsoring entity may not have substantially complied with these requirements, the IRS may request from the responsible officer information necessary to verify the sponsoring entity's compliance with such requirements. The IRS may also request the performance of specified review procedures by a person (including an external auditor or third-party consultant) that the IRS identifies as competent to perform such procedures given the circumstances surrounding the sponsoring entity's potential failure to comply with the requirements of a sponsoring entity.

(4) *Sponsorship agreement.* The sponsoring entity must have a written sponsorship agreement in effect between the sponsoring entity and each sponsored direct reporting NFFE in which—

(i) The sponsored direct reporting NFFE agrees to provide the sponsoring entity access to the sponsored direct reporting NFFE's books and records regarding each of its owners (including AML/KYC documentation regarding the sponsored direct reporting NFFE's owners provided by the sponsored direct reporting NFFE with respect to each financial account it holds) and such other information sufficient for the sponsoring entity to determine the direct and indirect substantial U.S. owners of the sponsored direct reporting NFFE, including the information about such owners required under paragraph (c)(3)(ii) of this section to be reported on Form 8966, ''FATCA Report'' (or such other form as the IRS may prescribe);

(ii) The sponsored direct reporting NFFE obtains a valid and effective waiver of any legal prohibitions on reporting the information about its direct and indirect substantial U.S. owners required under paragraph (c)(3)(ii) of this section to be reported on Form 8966 (or such other form as the IRS may prescribe);

(iii) The sponsored direct reporting NFFE authorizes the sponsoring entity to act on the sponsored direct reporting NFFE's behalf with respect to the sponsored direct reporting NFFE's obligations as a sponsored direct reporting NFFE (for example, authorizing the sponsoring entity to file Form 8966 on the sponsored direct reporting NFFE's behalf, responding to the IRS inquiries described in paragraph (f)(3) of this section, and providing the certification described in paragraph (f)(2) of this section);

(iv) The sponsored direct reporting NFFE agrees to identify to the sponsoring entity on request each withholding agent and financial institution to which the sponsored direct reporting NFFE reports its status as a sponsored direct reporting NFFE and agrees to provide to the sponsoring entity a copy of the withholding certificate or written statement prescribed in § 1.1471–3(d)(11)(x)(B) (as applicable) that the sponsored direct reporting NFFE provides to each such withholding agent or financial institution;

(v) The sponsored direct reporting NFFE represents that it does not have any formal or informal practices or procedures to assist its substantial U.S. owners with the avoidance of the requirements of chapter 4;

(vi) The sponsored direct reporting NFFE agrees to cooperate with the sponsoring entity in responding to any IRS inquiries under paragraph (f)(3) of this section with respect to the sponsored direct reporting NFFE; and

(vii) The sponsoring entity retains the records described in paragraphs (c)(3)(iii) and (iv) of this section for the longer of six years or the retention period under the sponsoring entity's normal business procedures. A sponsoring entity may be required to extend the retention period if the IRS requests such an extension prior to the expiration of the period.

(g) *Sponsoring entity event of default*—(1) *Defined.* An event of default by the sponsoring entity means the occurrence of any of the following—

(i) Failure to have the written sponsorship agreement described in paragraph (f)(4) of this section in effect with each sponsored direct reporting NFFE;

(ii) Failure to satisfy the requirements of paragraph (c)(3)(iii) of this section with respect to each sponsored direct reporting NFFE that the NFFE would have been required to satisfy as a direct reporting NFFE;

(iii) Failure to report to the IRS on Form 8966, ''FATCA Report,'' (or such other form as the IRS may prescribe) all of the information required under paragraph (c)(3)(ii) of this section with respect to each sponsored direct reporting NFFE and each of its substantial U.S. owners (or report to the IRS on Form 8966 that the sponsored direct reporting NFFE had no substantial U.S. owners) by the due date of the form (including any extensions);

(iv) Failure to make the certification required under paragraph (f)(2) of this section;

(v) Failure to cooperate with an IRS request for additional information described in paragraph (f)(3) of this section, including requests for the records described in paragraph (c)(3)(iv) of this section and requests to extend the retention period for these records as described in (f)(4)(vii) of this section;

(vi) Making any fraudulent statement or misrepresentation of material fact to the IRS or representing to a withholding agent or the IRS its status as a sponsoring entity under paragraph (c)(5) of this section for an entity other than an entity for which it acts as a sponsoring entity; or

(vii) Failure to obtain from each sponsored direct reporting NFFE the information required to report on Form 8966.

(2) *Notice of event of default.* Following an event of default known by or disclosed to the IRS, the IRS will deliver to the sponsoring entity a notice of default specifying the event of default and, if applicable, identifying each sponsored direct reporting NFFE to which the notice relates. The IRS will request that the sponsoring entity remediate the event of default within 45 days (unless additional time is requested and agreed to by the IRS). The sponsoring entity must respond to the notice of default and provide information responsive to an IRS request for information or state the reasons why the sponsoring entity does not agree that an event of default has occurred.

(3) *Remediation of event of default.* A sponsoring entity will be permitted to remediate an event of default to the extent that it agrees with the IRS on a remediation plan. The IRS may, as part of a remediation plan, require additional information from the sponsoring entity, remedial actions, or the performance of the specified review procedures described in paragraph (f)(3)(ii) of this section.

(4) *Termination*—(i) *In general.* If the sponsoring entity does not provide a response to a notice of default within the period specified in paragraph (g)(2) of this section, or if the sponsoring entity does not satisfy the conditions of the remediation plan within the time period specified by the IRS, the IRS may deliver a notice of termination that terminates the sponsoring entity's status, the status of one or more sponsored direct reporting NFFEs as a direct reporting NFFE, or both the sponsoring entity and one or more sponsored direct reporting NFFEs.

(ii) *Termination of sponsoring entity.* If the IRS notifies the sponsoring entity that its status is terminated, the sponsoring entity must send notice of the termination to each withholding agent from which it receives payments and each financial institution with which it holds an account for which a withholding certificate or written statement prescribed in § 1.1471–3(d)(11)(x)(B) (as applicable) was provided with respect to each sponsored direct reporting NFFE within 30 days after the date of termination. A sponsoring entity that has had its status terminated cannot reregister on the FATCA registration Web site to act as a sponsoring entity for any sponsored direct reporting NFFE unless it receives written approval from the IRS. Unless the status of the sponsored direct reporting NFFEs has been terminated, the sponsored direct reporting NFFEs may register on the FATCA registration Web site as direct reporting NFFEs or as sponsored direct reporting NFFEs of another sponsoring entity, other than a sponsoring entity that is related to the sponsoring entity that was terminated. An entity is related to the terminated sponsoring entity if they have a relationship with each other that is described in section 267(b).

(iii) *Termination of sponsored direct reporting NFFE.* If the IRS notifies the sponsoring entity that the status of a sponsored direct reporting NFFE is terminated (but not the sponsoring entity's status), the sponsoring entity must remove the sponsored direct reporting NFFE from the sponsoring entity's registration account on the FATCA registration Web site and send notice of the termination to each withholding agent from which the sponsored direct reporting NFFE receives payments and each financial institution with which it holds an account for which a withholding certificate or written statement prescribed in § 1.1471–3(d)(11)(x)(B) (as applicable) was provided with respect to such sponsored direct reporting NFFE within 30 days after the date of termination. A sponsored direct reporting NFFE that has had its status as a sponsored direct reporting NFFE terminated (independent from a termination of status of its sponsoring entity) may not register on the FATCA registration Web site as a direct reporting NFFE or as a sponsored direct reporting NFFE of another sponsoring entity unless it receives written approval from the IRS.

(iv) *Reconsideration of notice of default or notice of termination.* A sponsoring entity or sponsored direct reporting NFFE may request, within 90 days of a notice of default or notice of termination, reconsideration of the notice of default or notice of termination by written request to the IRS.

* * * * *

■ **Par. 7.** Section 1.1474–1 is amended by adding paragraph (d)(4)(vii) to read as follows:

§ 1.1474–1 Liability for withheld tax and withholding agent reporting.

(d) * * *

(4) * * *

(vii) [The text of proposed § 1.1474–1(d)(4)(vii) is the same as the text of § 1.1474–1T(d)(4)(vii) published elsewhere in this issue of the **Federal Register**].

* * * * *

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2016–31599 Filed 12–30–16; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–134247–16]

RIN 1545–BN73

Revision of Regulations Under Chapter 3 Regarding Withholding of Tax on Certain U.S. Source Income Paid to Foreign Persons

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the Department of the Treasury (Treasury Department) and the IRS are issuing temporary regulations (TD 9808) that revise certain provisions of the final

regulations regarding withholding of tax on certain U.S. source income paid to foreign persons and requirements for certain claims for refund or credit of income tax made by foreign persons. The text of the temporary regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by April 6, 2017.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–134247–16), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–134247–16), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–134247–16).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Leni Perkins, (202) 317–6942; concerning submissions of comments and/or requests for a public hearing, Regina Johnson, (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend the Income Tax Regulations (26 CFR part 1) relating to section 1441 of the Internal Revenue Code (Code). The temporary regulations set forth rules relating to withholding and reporting requirements under chapter 3 of the Code, including rules relating to claims for a reduced rate of withholding under an income tax treaty. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13653. Therefore, a regulatory assessment is not required.

It is hereby certified that the collection of information in this notice of proposed rulemaking will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6).

The domestic small business entities that are subject to the collections of information in this notice of proposed rulemaking are those domestic business entities that are payors of certain U.S. source income to foreign persons. These domestic small business entities are subject to comprehensive rules under chapter 3 to identify the proper treatment of payees for purposes of that chapter's information reporting and tax withholding purposes. The domestic small business entities subject to the collections of information in this notice of proposed rulemaking are also subject to comprehensive information reporting and tax withholding rules under chapters 4 and 61 with respect to payments of certain U.S. source income subject to information reporting and tax reporting under chapter 3. These payors are also subject to information and reporting rules under section 3406.

Payors of payments that are subject to the information reporting and withholding regimes under chapter 3 play an important role in U.S. tax compliance by providing information about payments made to, and income earned by, U.S. and foreign taxpayers.

Although the Treasury Department and the IRS anticipate that a substantial number of domestic small entities will be affected by the collection of information in this notice of proposed rulemaking, the Treasury Department and the IRS believe that the economic impact to these entities resulting from the information collection requirements will not be significant. The reporting obligations under these proposed regulations flow from the obligations that domestic small entities may have as withholding agents for payments of amounts subject to withholding under sections 1441 or 1442. As withholding agents, these entities have already been subject to the overall framework of these regulations, and the economic burden of complying with any additional requirements will be minimal. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act is not required. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments that are submitted timely to the IRS as prescribed in this preamble under the "**ADDRESSES**" heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules, including comments on the clarity of the proposed rules and how compliance therewith could be made easier. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Leni C. Perkins, Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.1441–1 is amended by:

■ 1. Adding paragraphs (b)(7)(ii)(B) and (c)(2)(ii).

■ 2. Revising paragraph (c)(3)(ii).

■ 3. Adding paragraphs (c)(38)(ii), (e)(2)(ii)(B), (e)(3)(iv)(C)(*3*), (e)(4)(i)(B), (e)(4)(ii)(A)(*2*), (e)(4)(iv)(D), and (e)(4)(iv)(E).

The revisions and additions read as follows:

§ 1.1441–1 Requirement for the deduction and withholding of tax on payments to foreign persons.

* * * * *

(b) * * *

(7) * * *

(ii) * * *

(B) [The text of the proposed amendment to § 1.1441–1(b)(7)(ii)(B) is the same as the text of § 1.1441–1T(b)(7)(ii)(B) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(c) * * *

(2) * * *

(ii) [The text of the proposed amendment to § 1.1441–1(c)(2)(ii) is the same as the text of § 1.1441–1T(c)(2)(ii) published elsewhere in this issue of the **Federal Register**.]

(3) * * *

(ii) [The text of the proposed amendment to § 1.1441–1(c)(3)(ii) is the same as the text of § 1.1441–1T(c)(3)(ii) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(38) * * *

(ii) [The text of the proposed amendment to § 1.1441–1(c)(38)(ii) is the same as the text of § 1.1441–1T(c)(38)(ii) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(B) [The text of the proposed amendment to § 1.1441–1(e)(2)(ii)(B) is the same as the text of § 1.1441–1T(e)(2)(ii)(B) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(3) * * *

(iv) * * *

(C) * * *

(*3*) [The text of the proposed amendment to § 1.1441–1(e)(3)(iv)(C)(*3*) is the same as the text of § 1.1441–1T(e)(3)(iv)(C)(*3*) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(4) * * *

(i) * * *

(B) [The text of the proposed amendment to § 1.1441–1(e)(4)(i)(B) is the same as the text of § 1.1441–1T(e)(4)(i)(B) published elsewhere in this issue of the **Federal Register**.]

(ii) * * *

(A) * * *

(*2*) [The text of the proposed amendment to § 1.1441–1(e)(4)(ii)(A)(*2*) is the same as the text of § 1.1441–1T(e)(4)(ii)(A) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(iv) * * *

(D) [The text of the proposed amendment to § 1.1441–1(e)(4)(iv)(D) is the same as the text of § 1.1441–1T(e)(4)(iv)(D) published elsewhere in this issue of the **Federal Register**.]

(E) [The text of the proposed amendment to § 1.1441–1(e)(4)(iv)(E) is the same as the text of § 1.1441–1(e)(4)(iv)(E) published elsewhere in this issue of the **Federal Register**.]

* * * * *

■ **Par. 3.** Section 1.1441–2 is amended by adding paragraph (a)(8) to read as follows:

§ 1.1441–2 Amounts subject to withholding.

(a) * * *

(8) [The text of the proposed amendment to § 1.1441–2(a)(8) is the same as the text of § 1.1441–2T(a)(8) published elsewhere in this issue of the **Federal Register**.]

* * * * *

■ **Par. 4.** Section 1.1441–6 is amended by:

■ 1. Adding paragraphs (b)(1)(i) and (b)(1)(ii).

■ 2. Revising paragraphs (c)(1) and (c)(5)(i).

The additions and revision read as follows:

§ 1.1441–6 Claim of reduced withholding under an income tax treaty.

* * * * *

(b) * * *

(1) * * *

(i) [The text of the proposed amendment to § 1.1441–6(b)(1)(i) is the same as the text of § 1.1441–6T(b)(1)(i) published elsewhere in this issue of the **Federal Register**.]

(ii) [The text of the proposed amendment to § 1.1441–6(b)(1)(ii) is the same as the text of § 1.1441–6T(b)(1)(ii) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(c) * * *

(1) [The text of the proposed amendment to § 1.1441–6(c)(1) is the same as the text of § 1.1441–6T(c)(1) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(5) * * *

(i) [The text of the proposed amendment to § 1.1441–6(c)(5)(i) is the same as the text of § 1.1441–6T(c)(5)(i) published elsewhere in this issue of the **Federal Register**.]

* * * * *

■ **Par. 5.** Section 1.1441–7 is amended by adding paragraph (b)(10)(iv) to read as follows:

§ 1.1441–7 General provisions relating to withholding agents.

* * * * *

(b) * * *

(10) * * *

(iv) [The text of the proposed amendment to § 1.1441–7(b)(10)(iv) is the same as the text of § 1.1441–7T(b)(10)(iv) published elsewhere in this issue of the **Federal Register**.]

* * * * *

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2016–31589 Filed 12–30–16; 4:15 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 1

[NPS–WASO–REGS–17326; GPO Deposit Account 4311H2]

RIN 1024–AE30

General Provisions; Electronic Cigarettes

AGENCY: National Park Service; Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service proposes to revise the regulation that defines smoking to include the use of electronic cigarettes and other electronic nicotine delivery systems. The National Park Service also proposes to allow a superintendent to close an area, building, structure, or facility to smoking when necessary to maintain public health and safety.

DATES: Comments must be received by 11:59 p.m. EST on March 7, 2017.

ADDRESSES: You may submit your comments, identified by Regulation Identifier Number (RIN) 1024–AE30, by any of the following methods:

• *Electronically:* Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Hard copy:* Mail or hand deliver to: A.J. North, Regulations Program, National Park Service, 1849 C Street NW., MS–2355, Washington, DC 20240.

Instructions: All submissions received must include the agency name and RIN for this rulemaking. We will only accept comments as noted above. We will not accept comments via email, fax or by any other methods. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Sara Newman, Director, Office of Public Health, by telephone 202–513–7225, or email *sara_newman@nps.gov.*

SUPPLEMENTARY INFORMATION:

Background

General Authority and Jurisdiction

In the National Park Service Organic Act of 1916, Congress granted the National Park Service (NPS) broad

authority to regulate the use of areas under its jurisdiction to ''conserve the scenery, natural and historic objects, and wild life in [National Park] System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.'' 54 U.S.C. 100101. The Organic Act authorizes the Secretary of the Interior, acting through the NPS, to ''prescribe such regulations as the Secretary considers necessary or proper for the use and management of [National Park] System units.'' 54 U.S.C. 100751.

NPS Smoking Regulation and Policy

The NPS protects park resources and visitors by regulating smoking within park areas. The regulation governing smoking (36 CFR 2.21) was last amended in 1983. This regulation allows the superintendent to designate a portion of a park area, or all or a portion of a building, structure, or facility as closed to smoking when necessary to protect park resources, reduce the risk of fire, or prevent conflicts among visitor use activities. The regulation prohibits smoking in an area or location so designated and within all caves and caverns. The existing definition of ''smoking'' in section 1.4 is limited to combustible sources such as a tobacco cigarette; it does not include the use of electronic cigarettes and other electronic nicotine delivery systems (ENDS). Since 2009, ENDS have emerged as an alternative means of nicotine delivery, one that does not require the burning of tobacco. Essentially, when a user ''draws'' on an ENDS, a liquid solution containing nicotine is heated and vaporized, and inhaled by the user. The user then exhales a vapor that mimics the exhalation from a lit tobacco cigarette.

NPS policy with respect to tobacco smoking is found in Director's Order #50D (Smoking Policy), originally issued in 2003, and then revised and reissued in 2009. The purpose of the Order—in conformity with Executive Order 13058 (Protecting Federal Employees and the Public From Exposure to Tobacco Smoke in the Federal Workplace)—is to ''protect employees and park visitors from the health hazards and annoyances associated with'' exposure to environmental tobacco smoke, commonly known as ''second-hand'' smoke, which is a known human carcinogen.

The Director issued Policy Memorandum 15–03 (Use of Electronic Nicotine Delivery Systems) on September 10, 2015. This policy establishes NPS guidance on the use of ENDS within all facilities and vehicles that are Government owned or leased, and within concessions facilities. The purpose of the Policy Memorandum is to afford all NPS employees and park visitors the same protections from exposure to nicotine and other harmful substances that may be found in ENDS vapor that are currently in place for tobacco smoke. Under this policy, use of ENDS is now treated as tobacco smoking and all provisions of Director's Order #50D apply to ENDS use. With regard to concessions facilities, the Policy Memorandum requires that ENDS use be treated the same as smoking for purposes of NPS Management Policies (2006).

Director's Order #50D and Policy Memorandum 15–03 are available online on the NPS Office of Policy Web site at *http://www.nps.gov/applications/npspolicy/index.cfm* by clicking on the drop-down menu and selecting ''Smoking'' from the list of policy subjects.

Proposed Revision of NPS Regulations at 36 CFR 1.4 and 2.21

The NPS proposes to apply its smoking regulations at 36 CFR 2.21 to ENDS use the same way they currently apply to tobacco smoking. The basis for this regulatory change is stated below and in Policy Memorandum 15–03 and will make NPS regulations consistent with NPS policy on this subject.

Non-smokers are exposed to nicotine and other potentially harmful components of ENDS vapor at higher than background levels when passively exposed to second hand vapor.[1] The vapor exhaled from an ENDS also contains potentially harmful levels of particulate matter in addition to nicotine, as well as potentially toxic compounds such as carbonyls, metals, and organic volatile compounds.[2] There has been increased attention in the scientific community to explore the level of potentially harmful constituents in ENDS vapor.[3] Despite lower levels of nicotine than in second-hand smoke, exhaled ENDS aerosols result in similar nicotine uptake levels as measured by blood serum cotinine levels in bystanders.[4] In the case of particulate matter, epidemiological studies show adverse effects of particulate matter when only slightly elevated above background levels indicating that we should strive to achieve the lowest concentrations possible.[5] The Division of Pharmaceutical Analysis of the Food and Drug Administration (FDA) analyzed the ingredients in a sample of cartridges from two leading brands of ENDS, and found the devices emitted (1) tobacco-specific nitrosamines (human carcinogens), and (2) diethylene glycol, a chemical used in antifreeze that is toxic to humans.[6] Further research is required before it is known whether second hand exposure to ENDS vapor will result in negative health outcomes as with tobacco smoke.[7] According to the World Health Organization (WHO), simply because ENDS exhaled aerosols contain lower levels of toxicants than tobacco smoke it does not mean second hand exposure is acceptable and special consideration is needed for sensitive populations like pregnant women, developing fetuses, and adolescents.[8]

The Surgeon General's 2014 report The Health Consequences of Smoking-50 Years of Progress (Report) documents the devastating health consequences of tobacco smoking and also calls for ''rigorous surveillance'' of ENDS in order to weigh their risks and potential benefits (*e.g.,* their possible efficacy in reducing use of combustible tobacco products).[9] (Page 761). The Report concludes that, in light of the links between tobacco product use and ill health, ''all products containing tobacco and nicotine should be assumed to be both harmful and addictive.'' (Page 780). In 2016, the Surgeon General issued a report entitled ''E-Cigarette Use Among Youth and Young Adults.''[10] This Report emphasized that ENDS use among youth and young adults is a public health concern. The Report concluded that aerosol can contain harmful and potentially harmful constituents, including nicotine, which can cause addiction and harm the

[1] See ''Cigarettes vs. e-cigarettes: Passive exposure at home measured by means of airborne marker and biomarkers'' (*http://www.sciencedirect.com/science/article/pii/S0013935114003089*). See ''Secondhand Exposure to Vapors From Electronic Cigarettes'' (*https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4565991*).

[2] See *http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6_10-en.pdf.*

[3] See *http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm499234.htm.*

[4] See ''Cigarettes vs. e-cigarettes: Passive exposure at home measured by means of airborne marker and biomarkers'' (*http://www.sciencedirect.com/science/article/pii/S0013935114003089*).

[5] See *http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6_10-en.pdf.*

[6] See *http://www.fda.gov/downloads/drugs/scienceresearch/ucm173250.pdf.*

[7] See *http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm499234.htm.*

[8] See *http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm499234.htm.*

[9] See *http://www.surgeongeneral.gov/library/reports/50-years-of-progress/.*

[10] See *https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Full_Report_non-508.pdf.*

developing adolescent brain. The Report stated that the use of products containing nicotine, including ENDS, poses dangers to youth, pregnant women, and fetuses. In a report released August 26, 2014, the WHO called for a ban on the indoor use of ENDS, especially in those spaces where smoking is banned.[11] (See Item #41, page 11.)

On May 5, 2016, the FDA finalized a rule (81 FR 28973) extending its authority to ENDS under the Family Smoking Prevention and Tobacco Control Act (Pub. L. 111–31; 123 Stat. 1776). The rule brings ENDS in line with regulations that have governed tobacco products since 2009. The rule prohibits the sale of ENDS to minors, requires ENDS to meet applicable product standards and receive marketing authorization from the FDA, requires the reporting of ingredients, and places health warnings on product packages and advertisements. The FDA expressed concerns about the increasing use of ENDS, especially among middle and high school students, and explained that the rule will ''help protect Americans from the dangers of tobacco and nicotine.'' [12] The FDA stated that nicotine is dangerous and highly addictive, even when it comes from ENDS use, and that research has clearly demonstrated that exposure to nicotine at a young age increases the chance that kids will become addicted. In addition to nicotine exposure, the FDA stated there are numerous other chemicals present in ENDS that can cause disease.[13]

The General Services Administration (GSA) has advised the managers of all GSA-occupied space—which includes space rented by GSA on behalf of NPS—that ENDS are subject to the same restrictions imposed on smoking tobacco products. The U.S. Fish and Wildlife Service's (FWS) policy found at 242 FW 13 goes even further, and prohibits ''vaping''—another name for ENDS use—in all interior spaces of FWS facilities, whether Government owned or leased.[14] In addition, vaping is also prohibited ''in motor vehicles, heavy equipment, aircraft, and most watercraft'' owned, leased, or controlled by the FWS. Similarly, on August 14, 2014, the U.S. Geological Survey (USGS) banned the use of ENDS ''in all interior space, courtyards, atriums, balconies and bus stops.'' See, USGS Manual 370.792.3.[15]

In addition to public health risks from the inhalation of vapor, ENDS also pose a risk of explosion and fire. A 2014 Federal Emergency Management Agency (FEMA) report stated that fires or explosions caused by the failure of lithium-ion batteries in ENDS are rare, but possible.[16] Between 2009 and August 2014, 25 incidents of explosion and fire involving e-cigarettes were reported in the U.S. Most of the incidents occurred while the battery was charging, but serious burn injuries were also reported from explosions when the device was in the user's mouth. FEMA stated that the shape and construction of e-cigarettes can make them more likely than other products with lithium-ion batteries to behave like ''flaming rockets'' when a battery fails. FEMA concluded that the number of fires and explosions will likely increase as the number of lithium-ion batteries in use continues to grow.

Acting out of an abundance of caution in light of the scientific findings and uncertainty to date, and in the interest of equity, the purpose of this proposed rule (similar to the purpose of Policy Memorandum 15–03) is to afford all NPS employees and park visitors the same protections from exposure to nicotine and other harmful substances that may be found in ENDS vapor that are currently in place for exposure to tobacco smoke.

The proposed rule would add a new definition to 36 CFR 1.4 that defines ''Electronic nicotine delivery system'' as an electronic device, such as an electronic cigarette, that a person uses to simulate smoking by inhaling vapor from the device. The proposed rule would revise the definition of ''Smoking'' in 36 CFR 1.4 to include the direct inhalation of vapor from an electronic nicotine delivery system. The NPS also proposes to add a new basis for which a superintendent may close an area or building, structure, or facility to smoking in 36 CFR 2.21—when necessary to maintain public health and safety. This reflects the health risks associated with smoking tobacco products and using ENDS. An existing basis in the regulations for restricting tobacco smoking—to reduce the risk of fire—also would apply to the use of ENDS for the reasons explained above. After these changes are made, the smoking regulation at 2.21 would apply to the smoking of tobacco and the use of ENDS, consistent with NPS policy.

Compliance With Other Laws, Executive Orders, and Department Policy Regulatory Planning and Review (Executive Orders 12866 and 13563)

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

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (RFA)

This rule will not have a significant economic effect on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*). This certification is based on information contained in the economic analyses found in the report entitled ''Benefit-Cost and Regulatory Flexibility Analyses: Proposed Regulation Revisions for Electronic Nicotine Delivery Systems'' which is available online on the NPS Office of Policy Web site at *http://www.nps.gov/applications/npspolicy/index.cfm* by clicking on the drop-down menu and selecting ''E-cigarettes'' from the list of policy subjects.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

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

(a) Does not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or

[11] See *http://apps.who.int/gb/fctc/PDF/cop6/FCTC_COP6_10-en.pdf.*

[12] See *http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm499234.htm.*

[13] See *http://www.fda.gov/TobaccoProducts/NewsEvents/ucm499383.htm.*

[14] See *http://www.fws.gov/policy/242fw13.html.*

[15] See *http://www.usgs.gov/usgs-manual/370-600/370-7923.html.*

[16] See *https://www.usfa.fema.gov/downloads/pdf/publications/electronic_cigarettes.pdf.*

the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act (UMRA)

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. It addresses public use of national park lands, and imposes no requirements on other agencies or governments. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630)

This rule does not effect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

Federalism (Executive Order 13132)

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

Civil Justice Reform (Executive Order 12988)

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

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

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

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

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the criteria in Executive Order 13175 and under the Department's consultation policy and have determined that tribal consultation is not required because the rule will have no substantial direct effect on federally recognized Indian tribes.

Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the Paperwork Reduction Act is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act of 1969 (NEPA)

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the NEPA is not required because the rule is covered by a categorical exclusion. This rule is excluded from the requirement to prepare a detailed statement because it is a regulation of administrative, legal, and technical nature (43 CFR 46.210(i)). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

Effects on the Energy Supply (Executive Order 13211)

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

Clarity of This Rule

We are required by Executive Orders 12866 (section 1(b)(12)) and 12988 (section 3(b)(1)(B)) and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

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

(c) Use clear language rather than jargon;

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

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Drafting Information: The primary authors of this rule are Jay Calhoun and Russel J. Wilson, Division of Regulations, Jurisdiction, and Special Park Uses, and Michael M. Shelton, Program Analyst, Office of Policy, National Park Service, Washington, DC.

Public Participation

It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments regarding this proposed rule by one of the methods listed in the **ADDRESSES** section. All comments must be received by midnight of the close of the comment period. We will not accept comments by fax, email or by any other methods. Bulk comments in any format (hard copy or electronic) submitted on behalf of others will not be accepted.

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.

List of Subjects in 36 CFR Part 1

National parks, Penalties, Reporting and recordkeeping requirements, Signs and symbols.

In consideration of the foregoing, the National Park Service proposes to amend 36 CFR part 1 as set forth below:

PART 1—GENERAL PROVISIONS

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

Authority: 54 U.S.C. 100101, 100751, 320102.

■ 2. In § 1.4 amend paragraph (a) by adding, in alphabetical order, the term ''Electronic nicotine delivery system'' and revising the term ''Smoking'' to read as follows:

§ 1.4 What terms do I need to know?

(a) * * *

Electronic nicotine delivery system means an electronic device, such as an electronic cigarette, that a person uses to simulate smoking by inhaling vapor from the device.

* * * * *

Smoking means the carrying of lighted cigarettes, cigars or pipes; or the

intentional and direct inhalation of smoke from these objects; or the direct inhalation of vapor from an electronic nicotine delivery system.

* * * * *

■ 3. In § 2.21, revise paragraph (a) to read as follows:

§ 2.21 Smoking

(a) The superintendent may designate a portion of a park area, or all or a portion of a building, structure or facility as closed to smoking when necessary to maintain public health and safety, to protect park resources, reduce the risk of fire, or prevent conflicts among visitor use activities. Smoking in an area or location so designated is prohibited.

* * * * *

Dated: December 20, 2016.

Michael Bean,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2016–31957 Filed 1–5–17; 8:45 am]

BILLING CODE 4312–52–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[EPA–HQ–TRI–2016–0390; FRL–9953–68]

RIN 2070–AK16

Addition of Natural Gas Processing Facilities to the Toxics Release Inventory (TRI)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to add natural gas processing (NGP) facilities (also known as natural gas liquid extraction facilities) to the scope of the industrial sectors covered by the reporting requirements of section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), commonly known as the Toxics Release Inventory (TRI) and section 6607 of the Pollution Prevention Act (PPA). Adding these facilities would meaningfully increase the information available to the public on releases and other waste management of listed chemicals from the natural gas processing sector and further the purposes of EPCRA section 313. EPA estimates that at least 282 NGP facilities in the U.S. would meet the TRI employee threshold (10 full-time employees or equivalent) and manufacture, process, or otherwise use (threshold activities) at least one TRI-listed chemical in excess of applicable threshold quantities. NGP facilities in the U.S. manufacture, process, or otherwise use more than 21 different TRI-listed chemicals, including n-hexane, hydrogen sulfide, toluene, benzene, xylene, and methanol. EPA expects that TRI reporting by U.S. NGP facilities would provide significant release and waste management data on these chemicals to the public.

DATES: Comments must be received on or before March 7, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–TRI–2016–0390, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. 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. 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 (*e.g.,* mail or hand delivery), 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 docket contains supporting information used in developing the proposed rule, comments on the proposed rule, and additional supporting information. A public version of the docket is available for inspection and copying between 8:30 a.m. and 4:30 p.m., Monday through Friday, excluding federal holidays, at the U.S. Environmental Protection Agency, EPA Docket Center Reading Room, WJC West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* David Turk, Regulatory Development Branch, Office of Pollution Prevention and Toxics (7410M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; 202–566–1527; email address: *turk.david@epa.gov,* for specific information on this notice.

For general information contact: The Emergency Planning and Community Right-to-Know Act (EPCRA) Hotline; telephone numbers: toll free at (800) 424–9346 (select menu option 3) or (703) 412–9810 in the Washington, DC Area and International; or toll free, TDD (800) 553–7672; or go to *http://www.epa.gov/superfund/contacts/infocenter.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially regulated by this proposed action are those facilities that primarily engage in the recovery of liquid hydrocarbons from oil and gas field gases, including facilities that engage in sulfur recovery from natural gas, and which manufacture, process, or otherwise use chemicals listed at 40 CFR 372.65 and meet the reporting requirements of EPCRA section 313, 42 U.S.C. 11023, and PPA section 6607, 42 U.S.C. 13106. These facilities are categorized under Standard Industrial Classification (SIC) code 1321 and North American Industry Classification System (NAICS) code 211112. Note that the TRI regulations currently use the 2012 set of NAICS codes, as discussed further in Units II.D. and IV.C.

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

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

II. Introduction

A. What is the statutory authority for this proposed rule?

This action is taken under EPCRA sections 313(b) and 328, 42 U.S.C. 11023(b) and 11048.

Specifically, EPCRA section 313(b)(1)(B), 42 U.S.C. 11023(b)(1)(B), states that the Agency may ''add or

delete Standard Industrial Codes for purposes of subparagraph (A), but only to the extent necessary to provide that each Standard Industrial Code is relevant to the purposes of this section.'' In addition, Congress granted EPA broad rulemaking authority under EPCRA section 328, 28 U.S.C. 11048, which provides that the ''Administrator may prescribe such regulations as may be necessary to carry out this chapter.''

B. What are the toxics release inventory reporting requirements and whom do they affect?

EPCRA section 313, 42 U.S.C. 11023, requires certain facilities that manufacture, process, or otherwise use listed toxic chemicals in amounts above reporting threshold levels to report their environmental releases and other waste management quantities of such chemicals annually. These facilities must also report pollution prevention and recycling data for such chemicals, pursuant to PPA section 6607, 42 U.S.C. 13106. Congress established the original scope of TRI sectors subject to EPCRA section 313 reporting, requiring reporting by facilities in the manufacturing sectors covered by SIC codes 20 through 39. In 1997, EPA exercised its statutory authority under EPCRA to add SIC Codes to the scope of TRI, adding (with some limitations) metal mining, coal mining, electric utilities, commercial hazardous waste treatment, chemicals and allied products-wholesale, petroleum bulk plants and terminals-wholesale, and solvent recovery services. (62 FR 23834, May 1, 1997).

Regulations at 40 CFR part 372, subpart B, require facilities that meet all of the following criteria to report:

- The facility has 10 or more full-time employee equivalents (*i.e.,* a total of 20,000 hours worked per year or greater; see 40 CFR 372.3); and
- The facility is included in a NAICS Code listed at 40 CFR 372.23, or under Executive Order 13148, Federal facilities regardless of their industry classification; and
- The facility manufactures (defined by statute to include importing), processes, or otherwise uses any EPCRA section 313 (TRI) chemical in quantities greater than the established thresholds for the specific chemical in the course of a calendar year.

Facilities that meet the criteria must file a Form R report or, in some cases, may submit a Form A Certification Statement, for each listed toxic chemical for which the criteria are met. As specified in EPCRA section 313(a), the report for any calendar year must be submitted on or before July 1 of the following year. For example, reporting year 2015 data should have been postmarked on or before July 1, 2016.

The list of toxic chemicals subject to TRI reporting can be found at 40 CFR 372.65. This list is also published every year as Table II in the current version of the Toxics Release Inventory Reporting Forms and Instructions. The current TRI chemical list contains 594 individually listed chemicals and 31 chemical categories.

C. How does EPA decide to propose adding industry sectors to the coverage of TRI?

As described in Units II.A. and II.B., Congress provided EPA with explicit statutory authority to expand the categories of facilities required to report under EPCRA section 313, and EPA exercised that authority to add sectors in 1997. (62 FR 23834, May 1, 1997). When adding these seven sectors, EPA considered three factors:

- *Chemical Factor*—Whether one or more toxic chemicals are reasonably anticipated to be present at facilities within the candidate industry group.
- *Activity Factor*—Whether facilities within the candidate industry group ''manufacture,'' ''process,'' or ''otherwise use'' these toxic chemicals.
- *Information Factor*—Whether facilities within the candidate industry group can reasonably be anticipated to increase the information made available pursuant to EPCRA section 313, or otherwise further the purposes of EPCRA section 313. This factor may include consideration of: (1) Whether the addition of the candidate industry group would lead to reporting by facilities within that candidate industry group (*e.g.,* whether facilities within the candidate industry group would conduct activities that exceed the reporting thresholds in EPCRA section 313(f)); (2) whether facilities within the candidate industry group are likely to be subject to an existing statutory or regulatory exemption from the requirement to file a Form R; (3) whether submitted Form R reports from that industry group could be expected to contain release and waste management data; or (4) whether a significant portion of the facilities in the industry group would be expected to file a Form A. (*See* 61 FR 33588, 33594, June 27, 1996).

As explained in Units II.D. and III.A. of the 1997 Final Rule, EPA identified these three factors in determining whether the statutory standard in EPCRA section 313(b)(1)(B) would be met by addition of the candidate facilities.

D. What are North American Industry Classification System (NAICS) codes?

On April 9, 1997, the Office of Management and Budget (OMB) published in the **Federal Register** a final decision to adopt the NAICS for the U.S. (62 FR 17288.) The NAICS industry classification system replaced the SIC system that government agencies had used for collecting statistical data and for other administrative and regulatory purposes. EPA transitioned to NAICS codes for TRI reporting purposes when it amended its regulations on June 6, 2006, to include NAICS codes in addition to SIC codes. (71 FR 32464.) The list of TRI NAICS codes that appeared in the final rule was developed from the OMB 2002 NAICS revision. OMB revises NAICS Codes every 5 years. Accordingly, EPA updated the list of TRI NAICS codes in 2008 (73 FR 32466, June 9, 2008) (FRL–8577–1) to incorporate changes to the TRI NAICS codes resulting from the OMB 2007 NAICS revision. In 2013, EPA updated the list of TRI NAICS codes to conform to the OMB 2012 NAICS revision (78 FR 42875, July 18, 2013) (FRL–9825–8). On August 8, 2016, OMB published a notice to adopt, with one minor exception, the recommended NAICS revisions for 2017 (81 FR 52584). EPA anticipates promulgating a separate rule to align the list of NAICS codes TRI uses to the OMB NAICS revisions for 2017. An alignment of the NAICS codes used by TRI would not alter the scope of this proposed addition of NGP facilities. Because TRI currently uses the set of NAICS codes for 2012, this action refers to the set of NAICS codes for 2012 unless otherwise stated, as further discussed in Unit IV.C.

E. Why do some natural gas processing facilities already submit TRI reporting forms to EPA?

Some NGP facilities are already subject to TRI reporting requirements because NGP facilities that primarily recover sulfur from natural gas are part of a manufacturing sector that was originally subjected to reporting by Congress.

Specifically, the scope of TRI sectors subject to reporting includes SIC code 2819 (Industrial Inorganic Chemicals, Not Elsewhere Classified), which was one of the manufacturing sectors in SIC 20–39 originally required to report to TRI by Congress. SIC code 2819 crosswalks to several manufacturing sector NAICS codes, including 211112 (Natural Gas Liquid Extraction), but only to the extent that it includes facilities that primarily engage in sulfur recovery from natural gas.

Thus, when EPA began to use NAICS codes for TRI reporting purposes, the Agency listed NAICS 211112 with a qualifier to limit TRI coverage of the sector to facilities that fit SIC code 2819. *See* 40 CFR 372.23(b) (211112—Natural Gas Liquid Extraction): ''Limited to facilities that recover sulfur from natural gas (previously classified under SIC 2819, Industrial Inorganic chemicals, NEC (recovering sulfur from natural gas)).''

III. Background

By a letter dated October 24, 2012, the Environmental Integrity Project (EIP), together with 16 other organizations, and later joined by two additional organizations (collectively, Petitioners), submitted a Petition to EPA pursuant to section 553(e) of the Administrative Procedure Act (APA) to add the Oil and Gas Extraction industrial sector (SIC code 13) to the scope of industrial sectors covered by the reporting requirements of the TRI. The Petition and related documents can be found in Docket ID No. EPA–HQ–TRI–2013–0281 at *http://www.regulations.gov.*

A. What did the petition request?

The Petitioners requested that EPA exercise its discretionary TRI sector addition authority to add the Oil and Gas Extraction sector, as defined by SIC code 13. SIC 13 is broad in scope, comprising the following subsectors:

- Crude Petroleum and Natural Gas (SIC 1311);
- Natural Gas Liquids (SIC 1321);
- Drilling Oil and Gas Wells (SIC 1381);
- Oil and Gas Field Exploration Services (SIC 1382); and
- Oil and Gas Field Services, Not Elsewhere Classified (SIC 1389).

These SIC-defined subsectors correspond to the following NAICS sectors, in whole or in part:

- Crude Petroleum and Natural Gas Extraction (NAICS 211111);
- Natural Gas Liquid Extraction (NAICS 211112);
- Drilling Oil and Gas Wells (NAICS 213111);
- Support Activities for Oil and Gas Operations (NAICS 213112);
- Oil and Gas Pipeline and Related Structures Construction (NAICS 237120);
- Site Preparation Contractors (NAICS 238910); and
- Geophysical Surveying and Mapping Services (NAICS 541360).

By requesting that EPA extend the TRI reporting requirements to SIC 13, the Petition requested that EPA add to TRI the SIC codes 1311, 1321, 1381, 1382, and 1389, along with the relevant portion of each corresponding NAICS code.

B. How did EPA respond?

On October 22, 2015, EPA granted, in part, the Petition insofar as it requested that EPA commence the rulemaking process to propose adding NGP facilities to the scope of TRI. EPA denied the remainder of the Petition. EPA's response to the Petition, including a full explanation of the Agency's rationale, can be found in Docket ID No. EPA–HQ–TRI–2013–0281 and as a reference in the docket for this proposal in Docket ID No. EPA–HQ–TRI–2016–0390 (Reference (Ref.) 1).

IV. Proposed Addition of Natural Gas Processing Facilities to the Toxics Release Inventory

A. Why is EPA proposing to add NGP facilities to the scope of TRI?

According to a triennial survey of NGP facilities by the U.S. Energy Information Administration (EIA–757 survey), described further in an economic analysis EPA prepared for this rulemaking, there were 517 NGP facilities in the lower 48 states as of 2012 (Ref. 2). As explained more fully later in this document, EPA estimates that over half of these facilities would annually meet TRI reporting thresholds for at least one of more than 21 different TRI-listed chemicals and, if covered by the reporting requirements of TRI, would be required to submit TRI information to EPA (Ref. 2). The information likely to be obtained from these facilities is not readily available elsewhere.

As discussed previously, EPA generally considers three factors when deciding whether to add an industrial sector to the scope of the industrial sectors covered by TRI:

1. *Chemical Factor*—Whether one or more toxic chemicals are reasonably anticipated to be present at facilities within the candidate industry group.
2. *Activity Factor*—Whether facilities within the candidate industry group ''manufacture,'' ''process,'' or ''otherwise use'' these toxic chemicals.
3. *Information Factor*—Whether facilities within the candidate industry group can reasonably be anticipated to increase the information made available pursuant to EPCRA section 313, or otherwise further the purposes of EPCRA section 313.

NGP facilities meet these three factors:

- *Chemical and Activity factors:* TRI-listed chemicals are present at NGP facilities (Ref. 2). Using information from Canada's National Pollutant Release Inventory (NPRI), a program analogous to TRI that already covers NGP facilities, EPA estimates that NGP facilities in the U.S. manufacture, process, or otherwise use more than 21 different TRI-listed chemicals (Ref. 2). These chemicals include n-hexane, hydrogen sulfide, toluene, benzene, xylene, and methanol (Ref. 2).
- *Information factor:* EPA estimates that between 282 and 444 NGP facilities in the U.S. would meet the TRI employee threshold (10 full-time employees or equivalent) and manufacture, process, or otherwise use at least one TRI-listed chemical in excess of applicable threshold quantities (Ref. 2). Furthermore, based upon information submitted to Canada's NPRI and the 2012 EIA–757 survey of NGP facilities, EPA expects that TRI reporting by U.S. NGP facilities would provide significant release and waste management data (Ref. 2). Therefore, the addition of NGP facilities to TRI would meaningfully increase the information available to the public and further the purposes of EPCRA section 313.

B. Scope of Proposed Addition

NGP facilities are stationary surface facilities that receive gas from a gathering system that supplies raw natural gas from many nearby wells. These facilities prepare natural gas (composed primarily of methane) to industrial or pipeline specifications and extract heavier liquid hydrocarbons from the raw or field natural gas. During this process, natural gas liquids (NGLs) (*i.e.,* heavier hydrocarbons than methane) and contaminants (*e.g.,* hydrogen sulfide, carbon dioxide, and nitrogen) are separated from the natural gas stream, resulting in processed pipeline quality natural gas. NGLs are fractionated on-site into isolated streams (*e.g.,* ethane, propane, butanes, natural gasoline) or shipped off-site for subsequent fractionation or other processing. Hydrogen sulfide is often either disposed through underground injection or reacted into sulfuric acid or elemental sulfur, while carbon dioxide and nitrogen may be emitted to the atmosphere. The processed pipeline-quality natural gas is then transferred to consumers via intra- and inter-state pipeline networks. NGLs are primarily used as feedstocks by petrochemical manufacturers or refineries.

SIC 1321 (Natural Gas Liquids) and NAICS 211112 (Natural Gas Liquid Extraction) comprise establishments that recover liquid hydrocarbons from oil and gas field gases (see discussion in Unit II.E.). NAICS 211112 includes facilities that primarily recover sulfur from natural gas—such facilities already

report TRI data to EPA because they are in SIC 2819 (Industrial Inorganic Chemicals, Not Otherwise Classified), which is a manufacturing sector already covered by TRI.

Current regulations only require NAICS 211112 facilities that recover sulfur from natural gas to report TRI data (*i.e.,* facilities in SIC 2819). Specifically, 40 CFR 372.23(b), which covers NAICS codes that correspond to SIC codes 20 through 39, lists NAICS 211112, but states: ''Limited to facilities that recover sulfur from natural gas (previously classified under SIC 2819, Industrial Inorganic chemicals, NEC (recovering sulfur from natural gas)).'' Removing that limitation and adding SIC 1321 to the scope of industry sectors covered by TRI would expand TRI coverage to include all NGP facilities that meet TRI-reporting thresholds.

To add the facilities contemplated by this proposed rule to the scope of industrial sectors that TRI covers, EPA is proposing to:

- Add SIC code 1321 to 40 CFR 372.23(a);
- Remove the ''Exceptions and/or limitations'' language from the Code of Federal Regulations (CFR) text for NAICS code 211112 for NAICs codes that correspond to SIC codes 20 through 39 in 40 CFR 372.23(b); and
- Add NAICS code 211112 to the CFR text for NAICS codes that correspond to SIC codes other than SIC codes 20 through 39 in 40 CFR 372.23(c).

It would be necessary to list NAICS 211112 in both subsections (b) and (c) of 40 CFR 372.23 for two reasons: (1) 40 CFR 372.23(b) lists NAICS codes that crosswalk to SIC codes within the original scope of TRI sectors subject to Section 313 reporting (SIC Codes 20–39), and (2) 40 CFR 372.23(c) lists NAICS codes that crosswalk to SIC codes not within the original scope of TRI sectors. Because NAICS 211112 includes a SIC code in the original scope of TRI sectors (SIC 2819) and a SIC code not in the original scope of TRI sectors (SIC 1321), EPA proposes that NAICS 211112 be listed under both subsections to provide additional clarity for the crosswalk.

This proposal does not seek to add to TRI coverage natural gas field facilities that only recover condensate from a stream of natural gas, lease separation facilities that separate condensate from natural gas, or natural gas pipeline compressor stations that supply energy to move gas through transmission or distribution lines into storage. Additional examples of operations that this proposal does not intend to add to TRI coverage include Joule-Thompson valves, dew point depression valves, and isolated or standalone Joule-Thompson skids. The industrial operations described in this paragraph often occur at or close to extraction sites and are typically classified under NAICS codes other than 211112 (*e.g.,* NAICS 211111 (Crude Petroleum and Natural Gas Extraction)), and thus are not within the scope of the proposed NAICS code addition.

However, the term ''facility'' is defined by EPCRA section 329(4) as ''all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person).'' 42 U.S.C. 11049(4). Accordingly, operations described in the previous paragraph could be part of a single ''facility'' with TRI reporting and recordkeeping requirements if they are contiguous or adjacent to ''buildings, equipment, structures, and other stationary items'' with a common owner or operator that are in a covered TRI industrial sector.

C. How do recent updates to NAICS codes impact this proposal?

Every 5 years the OMB updates the NAICS codes to ''clarify existing industry definitions and content, recognize new and emerging industries, and correct errors and omissions.'' (80 FR 46480, August 4, 2015). EPA updates its TRI regulations to align with OMB revisions to the NAICS codes (*see, e.g.,* 78 FR 42875, July 18, 2013). OMB published a ''Notice of Solicitation of Comments on the Economic Classification Policy Committee's Recommendations for the 2017 Revision of the North American Industry Classification System'' on August 4, 2015 (80 FR 46480), and published a Notice of Final Decision revising the NAICS codes ''for reference years beginning on or after January 1, 2017'' on August 8, 2016 (81 FR 52584). As noted in Unit II.D., EPA anticipates promulgating a separate rule to align the list of NAICS codes TRI uses to the OMB NAICS revisions for 2017.

In OMB's revisions for the 2017 NAICS codes, facilities performing activities involving natural gas that currently classify under NAICS 211111 (Crude Petroleum and Natural Gas Extraction) and NAICS 211112 (Natural Gas Liquid Extraction) will classify under a new NAICS code: 211130 (Natural Gas Extraction).

This proposed rule to add NGP facilities to the scope of the TRI proposes to add facilities that primarily engage in the recovery of liquid hydrocarbons from oil and gas field gases (and to retain facilities that primarily engage in sulfur recovery from natural gas, which are already covered facilities), as described in Unit IV.A. This proposed rule would accomplish this, based on the 2012 NAICS codes currently used by the TRI regulations, by adding SIC code 1321 to 40 CFR 372.23(a), removing the ''exceptions and/or limitations'' from NAICS code 211112 currently found in 40 CFR 372.23(b), and adding NAICS code 211112 to 40 CFR 372.23(c). If EPA updates the NAICS codes used for TRI reporting purposes to align with the OMB revisions for 2017 before EPA issues a final rule adding NGP facilities to TRI, then if EPA issues a final rule adding NGP facilities to TRI, that final rule will reflect the appropriate new NAICS code (*i.e.,* NAICS 211130), qualified by any appropriate ''exceptions and/or limitations,'' to add NGP facilities, as described in Unit IV.A., and would incorporate changes, if any, to the proposed scope of the addition, as appropriate in light of comments received on the proposal. That is, the actual scope of the addition to TRI here being proposed would not be affected by the 2017 OMB NAICS revision, or by any EPA update of its TRI regulations to align with the 2017 OMB revision.

V. References

The following is a listing of the documents that are specifically referenced in this document. For assistance in locating reference documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

1. USEPA. Formal Response to October, 24, 2012, Petition to Add the Oil and Gas Extraction Industry, Standard Industrial Classification Code 13, to the List of Facilities Required to Report under Section 313 of the Emergency Planning and Community Right-to-Know Act. October 22, 2015.

2. USEPA, OPPT. Economic Analysis of the Proposed Addition of Natural Gas Processing Facilities to the Toxics Release Inventory. August 11, 2016.

3. USEPA, OPPT. Supporting Statement for an Information Collection Request (ICR) Under the Paperwork Reduction Act (PRA). Proposed Rule ICR; Addition of Natural Gas Processing Facilities to the Toxics Release Inventory (TRI). EPA ICR No. 2560.01; OMB Control No. 2070–[NEW]. November 2016.

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 under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). EPA prepared an economic analysis of the potential costs and benefits associated with this action, which is available in the docket (Ref. 2).

B. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rule have been submitted for approval to OMB under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR No. 2560.01; OMB Control No. 2070–[NEW] (Ref. 3). You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

This action would impose an incremental information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2025–0009 and 2050–0078. This proposal would not alter the reporting and recordkeeping requirements for facilities that currently have regulatory requirements related to TRI reporting. However, this proposal would require all facilities that classify under NAICS 211112 to consider TRI reporting requirements regardless of whether or not they primarily recover sulfur from natural gas. Accordingly, if EPA adds this industrial sector to the scope of industries covered by TRI, these facilities would need to adhere to reporting and recordkeeping requirements should they trigger TRI reporting.

Currently, the facilities subject to the reporting requirements under EPCRA 313 and PPA 6607 may use either the EPA Toxic Chemicals Release Inventory Form R (EPA Form 1B9350- 1), or the EPA Toxic Chemicals Release Inventory Form A (EPA Form 1B9350- 2). The Form R must be completed if a facility manufactures, processes, or otherwise uses any listed chemical above threshold quantities and meets certain other criteria. For the Form A, EPA established an alternative threshold for facilities with low annual reportable amounts of a listed toxic chemical. A facility that meets the appropriate reporting thresholds, but estimates that the total annual reportable amount of the chemical does not exceed 500 pounds per year, can take advantage of an alternative manufacture, process, or otherwise use threshold of 1 million pounds per year of the chemical, provided that certain conditions are met, and submit the Form A instead of the Form R. In addition, respondents may designate the specific chemical identity of a substance as a trade secret pursuant to EPCRA section 322, 42 U.S.C. 11042, 40 CFR part 350.

OMB has approved the reporting and recordkeeping requirements related to Forms A and R, supplier notification, and petitions under OMB Control number 2025–0009 (EPA Information Collection Request (ICR) No. 1363) and those related to trade secret designations under OMB Control number 2050–0078 (EPA ICR No. 1428). As provided in 5 CFR 1320.5(b) and 1320.6(a), an Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers relevant to EPA's regulations are listed in 40 CFR part 9, and displayed on the information collection instruments (*e.g.,* forms, instructions).

Respondents/affected entities: Entities potentially affected by this ICR include facilities primarily engaged in natural gas processing.

Respondent's obligation to respond: Respondents are obligated to respond or report to EPA (42 U.S.C. 11023).

Estimated number of respondents: 282–444.

Frequency of response: Annually.

Total estimated burden: Up to 250,034 hours in the first year and up to 119,064 hours every subsequent year. Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: Up to $13,584,347 in the first year and up to $6,468,747 every subsequent year, includes $0 annualized capital or operation & maintenance costs.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *OIRA_submission@omb.eop.gov,* Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than February 6, 2017.

EPA will respond to any ICR-related comments in the final rule.

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, 5 U.S.C. 601 *et seq.* The small entities subject to the requirements of this action are natural gas processing facilities. The Agency has linked the 282–444 facilities estimated to be impacted by this action to 76–90 parent entities, 32–41 of which qualify as small businesses as defined by the RFA (Ref. 2). No small governments or small organizations are expected to be affected by this action. All 32–41 small businesses that would be affected by this action are estimated to incur annualized cost impacts of less than 1%. EPA's detailed analysis of the impacts on small entities is located in the EPA economic analysis (Ref. 2).

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. EPA's economic analysis indicates that the total industry reporting and recordkeeping burden for collecting this information would be between $8,624,018 and $13,584,347 in the first year (Ref. 2). In subsequent years, the total industry reporting and recordkeeping burden for collecting this information is estimated to be between $4,106,642 and $6,468,747 (Ref. 2). The total annualized cost of the proposed rule to industry and EPA is estimated to be approximately $4,634,000 to $7,300,000 with a 3% discount rate and approximately $4,721,000 to $7,437,000 with a 7% discount rate (Ref. 2). EPA's analysis shows that no small government owns or operates an NGP facility that would report under EPCRA section 313.

E. Executive Order 13132: Federalism

This action does not have federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because 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 (65 FR 67249, November 9, 2000), because this action relates to toxic chemical reporting under EPCRA section 313, which primarily affects private sector facilities. No facilities owned or operated by tribal governments are expected to classify under SIC 1321 or NAICS 211112.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern environmental health or safety risks that 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 concern an environmental health risk or safety risk.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. NGP facilities would be subject to the requirements of this proposal; however, this proposal would not impact how these facilities operate but rather would require facilities that trigger TRI reporting requirements to submit annual reports on chemicals for which they trigger reporting requirements. Moreover, the impact this action could cause is minor. EPA's economic analysis for this action indicates that all entities that would be impacted are estimated to incur annualized cost impacts of less than 1% (Ref. 2).

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve any technical standards, and is therefore not subject to considerations under NTTAA section 12(d), 15 U.S.C. 272 note.

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

This action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). This action does not address any human health or environmental risks and does not affect the level of protection provided to human health or the environment. This action adds an industry sector to the EPCRA section 313 reporting requirements. By adding an industry to the list of industry sectors subject to reporting under EPCRA section 313, EPA would be providing communities across the U.S. (including minority populations and low income populations) with access to data which they may use to seek lower exposures and consequently reductions in chemical risks for themselves and their children. This information can also be used by government agencies and others to identify potential problems, set priorities, and take appropriate steps to reduce any potential risks to human health and the environment. Therefore, the informational benefits of the action will have a positive impact on the human health and environmental impacts of minority populations, low-income populations, and indigenous peoples.

List of Subjects in 40 CFR Part 372

Environmental protection, Community right-to-know, reporting and recordkeeping requirements, and Toxic chemicals.

Dated: December 27, 2016.

Gina McCarthy,

Administrator.

Therefore, it is proposed that 40 CFR part 372, be amended as follows:

PART 372—[AMENDED]

■ 1. The authority citation for part 372 continues to read as follows:

Authority: 42 U.S.C. 11023 and 11048.

■ 2. Amend § 372.23 by:

■ a. In paragraph (a) adding alphabetically an entry for ''1321'';

■ b. In paragraph (b) removing ''211112—Natural Gas Liquid Extraction'' from the table;

■ c. In paragraph (c) adding alphabetically an entry for ''211112-Natural Gas Liquid Extraction''.

The additions to read as follows:

§ 372.23 SIC and NAICS codes to which this Part applies.

(a) * * *

Major group or industry code	Exceptions and/or limitations
* * * * * * *	
1321.	
* * * * * * *	

* * * * * (c) * * *

Subsector code or industry code	Exceptions and/or limitations
* * * * * * *	
211112—Natural Gas Liquid Extraction.	
* * * * * * *	

* * * * *

[FR Doc. 2016–31921 Filed 1–5–17; 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–2016–0119; FXES11130900000 178 FF09E42000]

RIN 1018–BB87

Endangered and Threatened Wildlife and Plants; Removing *Eriogonum gypsophilum* From the Federal List of Endangered and Threatened Plants

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule and 12-month petition finding; request for comments.

SUMMARY: Under the authority of the Endangered Species Act of 1973, as amended (Act), we, the U.S. Fish and Wildlife Service (Service), propose to remove *Eriogonum gypsophilum* (gypsum wild-buckwheat) from the Federal List of Endangered and Threatened Plants (List) due to recovery. This determination is based on thoroughly reviewing the best scientific and commercial data available, which indicates the species has recovered and no longer meets the Act's endangered or threatened definitions. We are seeking information, data and public comments on this proposed rule. This document also serves as our 12-month finding on a petition to remove *Eriogonum gypsophilum* (gypsum wild-buckwheat) from the Federal List of Endangered and Threatened Plants.

DATES: To ensure we can consider your comments on this proposed rule, they must be received or postmarked on or before March 7, 2017. Please note that if you are using the Federal eRulemaking Portal (see *ADDRESSES*), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Time on this date. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by February 21, 2017.

ADDRESSES: You may submit comments by one of the following methods:

(1) Electronically: Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2016–0119, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. 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–2016–0119; Division of Policy, Performance, and Management Programs; U.S. Fish and Wildlife Service, MS: BPHC; 5275 Leesburg Pike; Falls Church, VA 220411–3803.

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 Information Requested, below, for more information).

Copies of Documents: This proposed rule and supporting documents are available on *http://www.regulations.gov.* In addition, the supporting file for this proposed rule will be available for public inspection, by appointment, during normal business hours, at the New Mexico Ecological Services Field Office, 2105 Osuna Road NE., Albuquerque, NM 87113; telephone 505–346–2525.

FOR FURTHER INFORMATION CONTACT: Wally Murphy, Field Supervisor, New Mexico Ecological Services Field Office (see **ADDRESSES**); telephone 505–346–2525; facsimile 505–346–2542. If you use a telecommunications device for the deaf (TDD), please call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Requested

Any final action resulting from this proposed rule will be based on the best scientific and commercial data available and will be as accurate as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American Tribes, the scientific community, industry, or other interested parties concerning this proposed rule. The comments that will be most useful and likely to influence our decisions are those supported by data or peer-reviewed studies and those that include citations to, and analyses of, applicable laws and regulations. Please make your comments as specific as possible and explain their basis. In addition, please include sufficient information with your comments to allow us to authenticate any scientific or commercial data you reference or provide. In particular, we seek comments concerning the following:

(1) New information concerning *Eriogonum gypsophilum's* general conservation status;

(2) New information on historical and current *Eriogonum gypsophilum* status, range, distribution, and population size, including any additional population locations, and;

(3) New information regarding *Eriogonum gypsophilum* life history, ecology and habitat use.

Please note that submissions merely stating support for, or opposition to, the action being considered, without providing supporting information, although noted, will not be considered in making a determination, as the Act (16 U.S.C. 1531 *et seq.*) section 4(b)(1)(A) directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

Prior to issuing a final rule on this proposed action, we will consider all comments and any additional information we receive. Such information may lead to a final rule that differs from this proposal. All comments and recommendations, including names and addresses, will become part of the administrative record.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We will not consider comments sent by email, fax, or to an address not listed 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. Please note that comments posted to this Web site are not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publicly viewable until we post it, which might not occur until several days after submission.

If you mail or hand-deliver hardcopy comments that include 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. To ensure that the electronic docket for this rulemaking is complete and all comments we receive are publicly available, we will post all hardcopy submissions on *http://www.regulations.gov.*

In addition, comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection in two ways:

(1) You can view them on *http://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2016–0119, which is the docket number for this rulemaking.

(2) You can make an appointment, during normal business hours, to view the comments and materials in person at

the U.S. Fish and Wildlife Service's New Mexico Ecological Services Field Office (see **ADDRESSES**).

Public Hearing

The Act, Section 4(b)(5)(E) enables one or more public hearings on this proposed rule, if requested. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by the date shown in **DATES**. We will schedule public hearings on this proposal, if any are requested, and hearing locations, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before the first hearing.

Background

Section 4(b)(3)(B) (16 U.S.C. 1531 *et seq.*) of the Act requires that any petition to revise the Federal Lists of Endangered and Threatened Wildlife and Plants must contain substantial scientific or commercial information that the petitioned action may be warranted. We must make a finding within 12 months of petition receipt. In this finding, we will determine that the petitioned action is: (1) Not warranted, (2) warranted, or (3) warranted, but immediate regulation proposal implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants.

Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register**. This document: (1) Serves as our 12-month warranted finding on a July 16, 2012, petition dated July 12, 2012, from New Mexico Cattle Growers' Association, Jim Chilton, New Mexico Farm and Livestock Bureau, New Mexico Federal Lands Council, and Texas Farm Bureau requesting that we ''delist'' *Eriogonum gypsophilum* (that is, remove *Eriogonum gypsophilum* from the List of Endangered and Threatened Plants (List)) under the Act; and (2) proposes to remove *Eriogonum gypsophilum* from the List due to recovery.

Previous Federal Actions

Eriogonum gypsophilum was listed on January 19, 1981, as a threatened species (46 FR 5730). When the species was listed, an area that covered 95 percent of the only known population, now known as the Seven Rivers Hills population, was designated as critical habitat (46 FR 5730; January 19, 1981). The written critical habitat description listed two section numbers in the correct township but incorrect ranges. The accompanying map correctly demonstrated the designated lands. On December 21, 1984, we published a correction to the written critical habitat description (49 FR 49639). However, that correction was also incorrect because the range descriptions did not accurately describe the designated critical habitat displayed on the accompanying map. The correct written description should read T20S R25E Section 24: N½ NE¼, N½ S½ NE¼, NE¼ NW¼, N½ SE¼ NW¼;; and T20S R26E Section 19: N½, N½ NE¼ SE¼, N½ NW¼ SE¼; gypsum soils.

On February 2, 2005, we initiated a *Eriogonum gypsophilum* 5-year review (70 FR 5460). On November 9, 2007, we completed a 5-year review, which recommended *Eriogonum gypsophilum* be delisted. The 2007 5-year review noted that *Eriogonum gypsophilum* threats identified at the time of listing and in the recovery plan were no longer deemed significant and that two new populations, of between 11,000 and 18,000 plants each, were discovered.

On July 16, 2012, we received a petition dated July 12, 2012, from New Mexico Cattle Growers' Association, Jim Chilton, New Mexico Farm and Livestock Bureau, New Mexico Federal Lands Council, and Texas Farm Bureau requesting that we delist *Eriogonum gypsophilum* and other species, under the Act. The petitioners' request to delist *Eriogonum gypsophilum* was based entirely upon the scientific and commercial information contained within our 2007 5-year review.

On May 31, 2013, we received a complaint from the same petitioners alleging we failed to make a 90-day finding on the petition.

On September 9, 2013, we published a 90-day finding (78 FR 55046) that delisting *Eriogonum gypsophilum* may be warranted. This 90-day finding also announced our initiation of an *Eriogonum gypsophilum* 5-year review. Following this 90-day finding, the parties agreed to a stipulated dismissal of the pending lawsuit.

On November 20, 2015, the petitioners filed a second lawsuit. This lawsuit sought to compel the Service to complete a 12-month finding regarding *Eriogonum gypsophilum,* and other species.

On November 4, 2016, we completed our second *Eriogonum gypsophilum* 5-year review, which also recommended delisting due to recovery. The 2016 five-year review supports this proposed rule. The review concluded that the threats identified at the time of listing and in the recovery plan are no longer deemed significant. In addition, two new populations have been discovered since the listing, thus exceeding the recovery plan's population goals.

Species Information

Species Description

Eriogonum gypsophilum is a rare, regionally endemic plant species presently known to occur in three populations in Eddy County in southeastern New Mexico. *Eriogonum gypsophilum* was first collected by Wooten and Standley in 1909, on a hill southwest of Lakewood, New Mexico (Wooten and Standley, 1913). It is a small, erect herbaceous perennial, a member of the knotweed family, and measures about 8 inches high.

Distribution

Three *Eriogonum gypsophilum* populations are known and all are located in Eddy County, southeastern New Mexico. Only one population (Seven Rivers Hills) was known at the time of listing and recovery plan development. After *Eriogonum gypsophilum* was listed as threatened, other suitable habitats were surveyed and two additional populations were found in 1985. *Eriogonum gypsophilum* distribution within its populations is patchy and follows suitable gypsum outcrops geographic patterns, which are generally elongated and narrow. The occupied outcrops are approximately 2.7 kilometers (km) (1.7 miles (mi)) long for the Seven Rivers Hills population, 1.6 km (1 mi) long for the Black River population, and 3.5 km (2.2 mi) long for the Ben Slaughter Draw population. *Eriogonum gypsophilum* patches within populations are also relatively small. The occupied habitat is only 16.3 hectares (ha) (40.3 acres (ac)) at Seven Rivers Hills, little more than 11.9 ha (29.5 ac) at Black River, and 66.4 ha (164.1 acres) at Ben Slaughter Draw (including Hay Hollow). Therefore, this species occupies an approximate total range wide habitat of 94.7 ha (233.9 ac) (Sivinski 2005, p. 6; Sivinski 2013, p. 1).

A population of *Eriogonum gypsophilum* was previously reported near Hay Hollow by Knight (1993, p. 34) and then discounted following negative surveys (Sivinski 2000; pp. 2–3). In 2013, Sivinski rediscovered this population, considered an extension of the Ben Slaughter population, and he estimated 1,000 to 1,500 plants across

less than 4 ha (10 ac) (Sivinski 2013, p. 1).

Habitat

Eriogonum gypsophilum occupies Permian-age Castile Formation gypsum soils and gypsum outcrops. These habitats are dry and nearly barren except for common of gypsophilic (gypsum-loving) plant species, including *Eriogonum gypsophilum,* hairy crinklemat (*Tiquilia hispidissima*), gypsum blazingstar (*Mentzelia humilis*), and Pecos gypsum ringstem (*Anulocaulis leiosolenus* var. *gypsogenus*) (NMRPTC 2015, *http://nmrareplants.unm.edu*).

Biology

Eriogonum gypsophilum is a perennial species that reproduces both by producing seed and asexually by producing clone rosettes from rhizomes or root-sprouts. Seed production has been observed (Spellenberg 1977, p. 22), but seedlings are rarely seen and most propagation occurs by asexual reproduction, or during infrequent climatic episodes suitable for seed germination and seedling establishment (Spellenberg 1977, p. 31; Knight 1993, p. 25). Densities within *Eriogonum gypsophilum* patches range from 0.03 to 2.04 individual rosettes per square meter (m^2) (0.003 to 0.19 per square feet (ft^2)) (Knight 1993, pp. 28–32). Plant densities within three monitoring plots at the Seven Rivers Hills population indicated a slight increase from 1987 to 1993 (Knight 1993, p. 28).

Five Factors Information Summary

Section 4 (16 U.S.C. 1533) of the Act and implementing regulations (50 CFR part 424) set forth procedures to add species to, removing species from, or reclassifying species on the Federal Lists of Endangered and Threatened Wildlife and Plants. Under Section 4(a)(1) of the Act, a species may be determined endangered or threatened based on any of the following five factors, acting alone or in combination:

(A) The present or threatened habitat or range destruction, modification or curtailment;

(B) Commercial, recreational, scientific, or educational overutilization;

(C) Disease or predation;

(D) Inadequate regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

When delisting a species, we must consider both these five factors and how conservation actions have removed or reduced the threats. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate the species is neither endangered nor threatened for the following reasons:

(1) The species is extinct;

(2) The species has recovered and is no longer endangered or threatened; or

(3) The original scientific data used at the time the species was classified were erroneous.

In making this finding, *Eriogonum gypsophilum* five factors information provided in the Act, Section 4(a)(1), is discussed below. In considering what factors might constitute threats, we must look beyond mere species exposure to the factor to determine whether the species responds to the factor in a way that causes actual species impacts. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine if that factor rises to threat level, meaning that it may drive or contribute to species extinction risk such that the species warrants listing as an endangered or threatened species as the Act defines those terms. This does not necessarily require empirical threat proof. Combining exposure and some corroborating evidence indicating how the species is likely impacted could suffice. Merely identifying factors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of an endangered or threatened species under the Act.

In making our 12-month finding on the petition, we considered and evaluated the best available scientific and commercial information.

The 1981 *Eriogonum gypsophilum* threatened status listing determination (46 FR 5730; January 19, 1981) cited off-road vehicles (ORVs), grazing, and Brantley Dam project impacts as potential species threats. At the time of listing, the Seven Rivers Hills population was the only known *Eriogonum gypsophilum* population. Losing any plants or habitat from the only known population would have been considered a significant loss at that time, making the species vulnerable to extinction in the near future. However, two additional *Eriogonum gypsophilum* populations have since been documented at Black River and Ben Slaughter Draw, and have been included in this species reassessment. With the discovery of two additional populations and subsequent increase in species redundancy, combined with the Federal resource management practices implemented since the time of listing (see discussion below), the threats identified at the time of listing and in the recovery plan are no longer considered significant for *Eriogonum gypsophilum.*

Factor A. The Present or Threatened Habitat or Range Destruction, Modification or Curtailment

All *Eriogonum gypsophilum* habitat occurs in areas with high potential for mineral extraction and associated development, especially oil and gas. Although the three populations of *Eriogonum gypsophilum* comprise a small geographic area, making the species vulnerable to such land use changes, the majority of remaining suitable habitat is located on Federal lands managed by the Bureau of Land Management (BLM), and significant portions of each *Eriogonum gypsophilum* population have been designated by BLM as Special Management Areas (SMAs). By definition, SMAs are areas where specific management attention is required and can be designated to protect important resources, including special status species like *Eriogonum gypsophilum.* The Seven Rivers Hills SMA includes 95 percent of the Seven River Hills population of *Eriogonum gypsophilum,* the Black River SMA includes 50 percent of the Black River population, and the Ben Slaughter SMA includes 50 percent of the Ben Slaughter population. Potential threats to *Eriogonum gypsophilum* as a result of mineral extraction and oil and gas associated development, such as directly removing occupied habitat during construction or pipeline leaks impacts, have been offset by BLM's designation of significant portions of each *Eriogonum gypsophilum* population as an SMA. Specifically, these SMAs provide management guidance, and in the case of *Eriogonum gypsophilum,* do not allow surface occupancy for most surface-disturbing activities. The Bureau of Land Management has committed to keeping similar protections for special status species and sensitive soil outcrops through a revised resource management plan, which will include specific land designations and the implementation of best management practices. The Service has participated in the development of this resource management plan, and will continue to work closely with BLM throughout the implementation phase. A final resource management plan is expected to be signed by BLM in 2017. As a BLM special status species,

conservation of *Eriogonum gypsophilum* is expected to continue into the foreseeable future as BLM manual 6840, titled Special Status Species Management, directs. BLM special status species are federally listed or proposed and Bureau sensitive species, which include both Federal candidate species and delisted species (BLM 2008, entire).

The area designated as *Eriogonum gypsophilum* critical habitat at Seven Rivers Hills was given BLM SMA status in 1988 (BLM 1988, p. C–2) and protects about 95 percent of the habitat this population occupies. A few hectares of occupied habitat fall outside the SMA boundaries on adjacent BLM and Bureau of Reclamation (BOR) lands. The 1988 BLM Resource Management Plan also created a Springs Riparian Habitat SMA to restrict land use in critical riparian habitat within the Chihuahuan Desert Ecosystem. This SMA includes lands occupied by the Ben Slaughter Draw *Eriogonum gypsophilum* population (BLM 1988, p. C–14). The 1997 BLM Resource Management Plan Amendment included the Black River SMA that covers the Black River *Eriogonum gypsophilum* population (BLM 1997, pp. AP4:9, AP4:15–17). SMA management prescriptions at the three populations on public lands include:

- Apply no surface occupancy stipulation to all future oil and gas leases.
- Avoid future right-of-way actions through SMA area.
- Withdraw from mining claim location, and close to mineral material disposal and solid material leasing.
- Complete limited ORV designation and implementation plan to restrict vehicles to designated routes.
- Restrict fire suppression and geophysical operations to comply with ORV designation.
- Restrict surface disturbance, including plant collections and camping within the area.

Proposed actions related to lease rights acquired prior to the SMA designations are analyzed for impacts and designed to reduce or remove the impacts under BLM Manual 6840 directions, and using conditions-of-approval on the permit. SMA guidance can also affect actions that cross both public lands and adjacent non-Federal lands (*e.g.,* pipelines, power lines), due to the actions being connected through a Federal nexus, thus affording species conservation. The occupied habitats are relatively small in acreage and can typically be avoided by surface disturbing activities.

Mineral Extraction and Related Activities

All *Eriogonum gypsophilum* habitats are within areas with high potential for fluid minerals leasing and extraction. Oil and gas well pads, roads, and pipelines are proliferating in this region of New Mexico. The BLM SMA where the Seven Rivers Hills population's designated critical habitat occurs presently eliminates this threat by requiring ''no surface occupancy'' for mineral leases within the designated critical habitat. If the critical habitat designation were removed, no land use change is expected to occur as BLM has committed to continue protecting sensitive gypsum soils and the special status species that occur there, including *Eriogonum gypsophilum.* Roads and pipelines associated with mineral development also must avoid this area. The Seven Rivers Hills SMA protects about 95 percent of the occupied habitat from this land use. SMAs with ''no surface occupancy'' stipulations for oil and gas leases were also administratively placed on BLM jurisdictions containing *Eriogonum gypsophilum* habitats at the Black River and Ben Slaughter Draw populations in 1997 (BLM 1988, pp. C–15; BLM 1997, pp. AP4:9, AP4:15–17). These SMAs protect approximately 50 percent of the total habitat at Black River and Ben Slaughter Draw from oil and gas development (Sivinski 2005, p. 6). Approximately 65 percent of total habitat area in all three *Eriogonum gypsophilum* populations is presently protected from surface impacts associated with oil and gas development and these impacts would be avoided into the foreseeable future under BLM manual 6840 direction.

Knight (1993, p. 57) concluded that oil and gas mineral development, and possibly gypsum, were the only serious potential threats to *Eriogonum gypsophilum.* At this time, surface disturbance associated with Federal mineral development is very unlikely to occur on *Eriogonum gypsophilum* habitats within the BLM SMAs. Mineral development could potentially affect nearly 50 percent of the Black River population that occurs on private or State lands. In fact, there is presently an active gas well established within 0.4 km (0.25 mi) of *Eriogonum gypsophilum* habitat on the State trust land portion of this population (Sivinski 2000, p. 2). The private land portion, approximately 20 percent of the Black River population, could also be impacted by future minerals development. However, approximately 50 percent of the Black River habitat, about 95 percent of the Seven Rivers Hills habitat, and approximately 50 percent of Ben Slaughter Draw habitats are protected by the BLM SMAs ''no surface occupancy'' stipulation (Sivinski 2005, p. 6). Oil and gas may be leased on these lands, but must be extracted by directional drilling from outside the SMAs. Directional drilling allows a company to develop fluid minerals without being directly above (vertical of) the target, meaning this technology affords greater avoidance options to conserve sensitive habitats. The SMAs require that road and pipeline rights-of-way associated with oil and gas development must also avoid SMA disturbance.

The Seven Rivers Hills and Ben Slaughter Draw SMAs also withdrew minerals, such as gypsum, sulfur, and salts, from claim and mine development, but mineral claims are not specifically withdrawn from the Black River SMA. Chemical analysis found the gypsum outcrops *Eriogonum gypsophilum* occupied to be from the Castile Formation, composed of 85 percent hydric gypsum, which is suitable quality for mining (Weber and Kottlowski 1959, p. 52; Knight 1993, p. 42). However, gypsum mining potential for the Castile formation is low because of large deposits of higher quality gypsum presently being mined elsewhere in New Mexico (Knight 1993, p. 42).

Other potential impacts to the Seven Rivers Hills *Eriogonum gypsophilum* population have not occurred, partly due to the Act's protections. Due to the species occurring in three geographically separate populations, there is a lesser potential of a single project affecting the entire population of *Eriogonum gypsophilum.* For example, U.S. Highway 285 widening was accomplished without impacting the plants in or near this right-of-way (Sivinski 2000, pp. 1–2) and would have only affected one of the three populations. Common land use activities, such as mineral development or livestock grazing, are addressed in the BLM resource management plan and would be managed through the BLM permitting process, which considers all sensitive species and their habitats.

Reservoir Development and Flooding

The populations at Black River and Ben Slaughter Draw are not near any existing or proposed reservoirs and, therefore, are not threatened by flooding. At the time of listing, we considered the possibility of flooding to the Seven Rivers Hills population from the Brantley Reservoir. However, this impact has not occurred because the dam spillway does not allow the water

level to rise to the level necessary to flood populations (BOR 2009, p. 2). The spillway elevation is 993.5 meters (m) (3,259.5 feet (ft)) mean sea level. Water level peaked on March 29, 2015 (U.S. Geological Survey 2016, *http://waterdata.usgs.gov*), at approximately 4.0 m (13 ft) above the spillway at 997.5 m (3,272.5 ft) elevation. Even at this highest level, the pool remained east of U.S. Highway 285 and the *Eriogonum gypsophilum* population. Knight (1993, pp. 53–54) analyzed potential Brantley Reservoir impacts reaching the maximum flood pool with the assumption that the water level would rise similarly across U.S. Highway 285. Under this assumption, the maximum flood event pool in Brantley Reservoir could temporarily flood a few hectares of *Eriogonum gypsophilum* habitat. He found eight *Eriogonum gypsophilum* plants at or below the 1,002.8 m (3,290 ft) level on the west side of U.S. Highway 285. The soils in this area would become saturated for a time after a flood and could potentially be invaded by salt cedar (*Tamarix* spp.), an invasive tree that often lines reservoir banks. Knight (1993, pp. 53–54) surveyed another 6 m (20 ft) vertical up to the 1,009 m (3,310 ft) level where salt cedar might become established and located an additional 44 *Eriogonum gypsophilum* plants. In 1993, 52 plants were in the hypothetical maximum flood impact zone. A flood event could potentially impact about 100 plants in this population of several thousand plants. However, at the highest water level recorded in 2015, which was at the maximum safe flood control level, the water did not reach U.S. Highway 285 and *Eriogonum gypsophilum* was not impacted. Therefore, flooding from the Brantley Reservoir is not a significant threat to *Eriogonum gypsophilum.*

Off-road Vehicle (ORV) Use

ORV traffic is not presently an *Eriogonum gypsophilum* threat. Little to no ORV traffic evidence has been observed in recent years in any of the three *Eriogonum gypsophilum* populations (Knight 1993, pp. 52–53; Sivinski 2000, p. 2; Chopp 2016, p. 1). ORV traffic absence at the Black River and Ben Slaughter Draw SMAs may be attributed to their remote locations and stands of thorny mesquite shrubs surrounding the *Eriogonum gypsophilum* populations (Knight 1993, p. 53). BLM has established SMA restrictions for ORV traffic that protect 95 percent of the Seven Rivers Hills habitat and 50 percent of the Ben Slaughter Draw habitat from this potential impact. These SMA restrictions cannot eliminate occasional ORV violations, but severe impacts from frequent ORV use will not likely be tolerated by BLM. These protections are likely to continue into the future due to protections described in the resource management plan and BLM manual 6840, which is the principal policy instrument detailing BLM management of special status species (BLM 2008, entire). To prevent unauthorized ORV traffic, in 2010, BLM installed pipe-rail fencing along portions of existing roads and trails at all three known populations, which will continue to be maintained as a condition of the revised resource management plan (BLM 2010, entire). Fencing was not installed at the Ben Slaughter Draw population Hay Hollow portion, but there are no easy access routes to this area (Chopp 2016, p. 1). Therefore, there is little to no ORV threat at this site now or in the foreseeable future.

Livestock Grazing

Livestock grazing is the predominant land use in all *Eriogonum gypsophilum* habitats. Cattle will not usually eat *Eriogonum gypsophilum* plants, and grazing does not appear to have a negative effect (Sivinski 2000, p. 2). Forage production on these gypsum outcrops is relatively low and does not attract or concentrate livestock. The *Eriogonum gypsophilum* recovery plan did not identify livestock grazing as a serious potential designated critical habitat threat at Seven Rivers Hills (Service 1984, entire).

Livestock using the habitat in the Black River population has little effect on *Eriogonum gypsophilum,* and the river is remote enough from the gypsum outcrop to preclude concentrated livestock activity (Knight 1993, p. 52; Sivinski 2000, p. 2).

The Brantley Dam conservation pool was anticipated to be in close proximity to the Seven Rivers Hills *Eriogonum gypsophilum* population such that it was expected to concentrate livestock that could trample plants and make erosion-prone trails through this habitat. Over the past 30 years, the actual conservation pool has remained more than 1.6 km (1 mi) away from this population, and livestock have not concentrated in this habitat.

The Ben Slaughter population is immediately adjacent to Ben Slaughter Spring and Jumping Spring, which are water sources that concentrate livestock use. Livestock trailing and trampling *Eriogonum gypsophilum* plants in this population has been reported by Knight (1993, p. 52), especially in the Ben Slaughter Spring immediate vicinity. Knight (1993, p. 54) observed that plants trampled by livestock tended to produce smaller rosettes than plants not affected, thus shifting that population portion towards higher juvenile form percentages. The Bureau of Land Management has partly mitigated this impact by erecting a livestock-proof fence that encloses 8 ha (20 ac) around Ben Slaughter Spring, including a few hectares of *Eriogonum gypsophilum* habitat with several hundred plants. This fenced enclosure occurs within the 146-ha (360-ac) BLM SMA that protects the spring and surrounding upland from land-use surface occupancy. The Bureau of Land Management enclosure gate is not always closed to livestock entry (Sivinski 2000, p. 2), but does give the opportunity to manage grazing effects.

All three *Eriogonum gypsophilum* populations occur near, or within a few kilometers, of permanent natural waters sources. Therefore, the habitats at these populations have experienced more than a century of livestock use that, at times, could have been very intense and aggressive. In fact, the recent heavy livestock concentrations within the Ben Slaughter Draw population have not likely exceeded the livestock amounts concentrated in this area for many decades. These gypsum outcrop habitats may have been modified by this long history of livestock use, but continue to support large species populations. More than 75 percent of the *Eriogonum gypsophilum* habitats occur on BLM lands. Currently, BLM livestock stocking rates appear to have little, or no, impact on the Seven Rivers Hills and Black River populations. It is also evident that heavy livestock concentrations at Ben Slaughter Draw have not caused the population to decline. It is unlikely that livestock grazing will become a serious species threat in most of its habitats, especially at the Seven Rivers Hills and Black River populations, now or in the foreseeable future.

Factor B. Commercial, Recreational, Scientific, or Educational Overutilization

There are no immediate threats from commercial or recreational *Eriogonum gypsophilum* collection . The species has no recreational value, and it is not offered for sale within the horticultural market at this time. It is a handsome plant, with early-season green stems that turn dark red after hoisting bright yellow flowers, which could attract rock garden hobbyists, but may not be suitable for non-gypseous garden soils. Scientific collection permits have been confined to a few vouchered specimens to document new species locations.

In addition to alleviating threats, positive steps have been taken to inform

and educate the public about *Eriogonum gypsophilum.* The New Mexico Rare Plants Web site was established in 1998 by the New Mexico Rare Plant Technical Council (NMRPTC) to provide information to the public on rare, threatened and endangered plant species (NMRPTC 2015, *http://nmrareplants.unm.edu*). This Web site prominently displays descriptive *Eriogonum gypsophilum* information and illustrations. This effort has helped fulfill the intent to provide information to the public and foster *Eriogonum gypsophilum* conservation support.

Factor C. Disease or Predation

There are no known documented or anecdotal *Eriogonum gypsophilum* disease or predation reports.

Factor D. Inadequate Existing Regulatory Mechanisms

Federal regulatory mechanisms have been effective in removing or managing many *Eriogonum gypsophilum* threats that could threaten extinction now or in the foreseeable future. The previously identified threats are nearly identical between the three populations, and all three populations include Federal and non-Federal lands. The SMAs afford conservation on Federal lands and adjacent non-Federal lands for linear projects such as roads and pipelines. Using the SMA designations, BLM has successfully protected the designated critical habitat at Seven Rivers Hills from mineral development and ORV traffic. BLM also regulates and manages livestock grazing on significant portions of all three of the known populations. These areas will continue to be conserved through implementation of BLM's revised resource management plan.

ORV traffic prohibitions are difficult to enforce because of sign vandalism, for which law enforcement officers cannot keep a continuous watch. However, BLM SMA restrictions on ORV traffic at the Seven Rivers Hills designated critical habitat area and Ben Slaughter Draw appear to be effective at diminishing ORV impacts. BLM further committed its authority by restricting access to the occupied *Eriogonum gypsophilum* habitat by installing protective pipe-rail fences above and beyond the SMA description's land use restrictions.

The Bureau of Land Management SMA at the Black River population requires a ''no surface occupancy'' stipulation for all oil and gas leases, but does not have prescriptions to protect this area from mineral claims or ORV traffic. All three *Eriogonum gypsophilum* SMA designations in the BLM Resource Management Plan will remain in effect for the life of that plan and are likely to continue for any future amendments.

The Carlsbad Resource Management Plan does not clearly state that future plan revisions shall continue to maintain *Eriogonum gypsophilum* SMA restrictions if this species is removed from the List. However, due to the species only occurring in gypsum outcrops, which are regarded as a unique resource by BLM, it is expected that BLM would continue to protect this habitat and, therefore, *Eriogonum gypsophilum* in their new resource management plan (BLM 2015, p. 1).

A few hectares of *Eriogonum gypsophilum* habitat in the Seven Rivers Hills population occur on BLM land outside the designated SMA and on Federal land in BOR jurisdiction, which is also not within the SMA. Land uses that may affect *Eriogonum gypsophilum* on these lands must presently be reviewed by the Service. Protections afforded by this review would cease if *Eriogonum gypsophilum* is removed from the List. However, BLM's current resource management plan would continue to provide species protections. The Bureau of Land Management has committed to continuing these land use restrictions in its revised resource management plan to provide species and habitat conservation in the foreseeable future.

There are no regulatory protections for federally listed endangered and threatened plant species from surface-disturbing land uses on private or State-owned lands, unless the activity is authorized, funded, or carried out by a Federal agency. Approximately 50 percent of the *Eriogonum gypsophilum* gypsum habitats at the Black River population occurs on private and State-owned land. About 10 percent of the occupied habitat in the Ben Slaughter Draw population is on private and State-owned land (Sivinski 2005, p. 6). The New Mexico State Land Office is aware of the *Eriogonum gypsophilum* habitats on its State trust lands, and Section 75–6–1 (New Mexico Statutes Annotated 1978 of the New Mexico Administrative Code directs New Mexico's Energy, Minerals and Natural Resources Department to investigate all plant species in the state for the purpose of establishing a list of State endangered plant species. It also authorizes that department to prohibit state endangered species take, with the exception of permitted scientific collections or propagation and transplantation activities that enhance endangered species survival. Should this rule be finalized as proposed, state protections for *Eriogonum gypsophilum* would remain in place until the state decides to remove the plant from the list of state endangered species.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Our previous reviews did not analyze climate change as a factor affecting the species. Based on the unequivocal evidence the earth's climate is warming from observing increasing average global air and ocean temperatures, widespread glacier and polar ice cap melting, and rising sea levels recorded by the Intergovernmental Panel on Climate Change (IPCC) Report (IPCC 2007a, entire; 2013, entire), climate change is now a factor in all Federal agency decision-making (Government Accounting Office 2007, entire). The Service has incorporated climate change into its decision-making under the Act (Service 2010, entire). Global climate information has been downscaled to our region of interest, and projected into the future under two different scenarios of possible emissions of greenhouse gases (Alder and Hostetler 2014: 2). Climate predictions for the *Eriogonum gypsophilum* area include a 5 to 6 percent increase in maximum temperature (up to 4 °C (7.2 °F)), 11 percent decrease in precipitation, and a 25 percent increase in evaporative deficit over the next 25 years (National Climate Change Viewer, Eddy County Data *http://www2.usgs.gov/climate_landuse/clu_rd/nccv/viewer.asp,* accessed May 15, 2016). In 11 of the last 15 years, moderate to severe drought conditions existed in the *Eriogonum gypsophilum* occupied area, with 11 percent of the time in exceptional drought (National Drought Mitigation Center 2015, Eddy County Data) with no obvious negative effects on the species.

Eriogonum is a highly derived taxon that has undergone rapid evolution in arid western North American regions (Reveal 2005, p. 1). We expect that due to its observable resistance to severe drought periods over the past 30 years, *Eriogonum gypsophilum* is adaptable to climate change, and there is no information to indicate that climate change will have a detrimental effect on the species.

Factors A through E Cumulative Effects

Eriogonum gypsophilum was known from only a single population on the Seven Rivers Hills when it was listed as a threatened species (46 FR 5730; January 19, 1981). An area covering 95 percent of this population was designated as critical habitat at the time of listing. Population monitoring at this

site from 1987 to 2005 did not reveal any significant increase or decrease in plant numbers since the recovery plan was finalized in 1984. No surface-disturbing activities have occurred in the designated critical habitat since 1984, and this habitat remains unchanged. The Seven Rivers Hills site remained as the only known extant population until 1984. The recovery plan concluded that this threatened species could be delisted (due to recovery) when the designated critical habitat area was designated an area of critical ecological concern (ACEC), or was provided a similar special use designation. The Bureau of Land Management designated the critical habitat as a SMA in 1988, thus fulfilling this recovery plan criterion.

Two additional populations were documented in Eddy County since this plant was listed in 1981. Plant numbers in those populations also appear relatively unchanged since their 1985 discovery; the Black River population has a minimum of 16,660 plants, and the Ben Slaughter Draw population is estimated at around 18,270 plants. Additionally, an estimated 1,000 to 1,500 plants in the Ben Slaughter Draw population were observed in 2013, at the nearby Hay Hollow location. These numbers are estimates, as it is difficult to estimate plant numbers in each population due to variable density and patchy distribution across occupied gypsum outcrops. All previous and current plant numbers estimates lack precision, but adequately demonstrate substantial populations at the three known locations. No *Eriogonum gypsophilum* population extirpations or obvious declines were reported since it was listed as a threatened species in 1981.

Based on extensive survey efforts in New Mexico, it is unlikely that other new populations will be discovered. Potentially suitable habitat exists in Texas on private land, but no surveys have been conducted.

Eriogonum gypsophilum is currently listed as threatened with designated critical habitat. Threats identified at the time of listing and in the recovery plan are no longer deemed significant. In addition, two new populations have been discovered which contain between 16,000 and 18,000 *Eriogonum gypsophilum* plants each. The entire known occupied habitat is distributed among three populations totaling 94 ha (239 ac). Because BLM's existing resource management plan provides protections for significant portions of all populations, that are expected to be extended in future versions, lessening the future threat of mineral and oil and gas development, there are no longer any threats that are expected to cause *Eriogonum gypsophilum* to be in danger of extinction now or in the foreseeable future.

Finding

As required by the Act, we considered the 5 factors in assessing whether *Eriogonum gypsophilum* is endangered or threatened throughout all of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats facing *Eriogonum gypsophilum.* We reviewed the petition, information available in our files, and other available published and unpublished information, in addition to consulting with recognized *Eriogonum gypsophilum* experts and other Federal, State, and tribal agencies. Threats identified at the time of listing and in the recovery plan are no longer significant, which can largely be attributed to current BLM land-use restrictions in occupied *Eriogonum gypsophilum* habitat. In addition, two new populations were discovered since the original listing decision. Each of these populations adds between 16,000 and 18,000 plants to the overall population estimate.

Based on our reviewing the best available scientific and commercial information pertaining to the 5 factors, we find that the petitioned action to delist *Eriogonum gypsophilum* is warranted. There is sufficient evidence to indicate that, with ongoing BLM land-use restrictions to avoid and minimize surface-disturbing activities in occupied *Eriogonum gypsophilum* habitat on public lands, which are expected to continue into the foreseeable future, and no information to indicate that there are threats occurring now or in the future on private and State-owned lands, *Eriogonum gypsophilum* should be removed from the Federal List of Endangered and Threatened Plants.

In making this finding, we have followed the procedures set forth in section 4(a)(1) of the Act and our regulations at 50 CFR part 424. We intend that any *Eriogonum gypsophilum* action be as accurate as possible. Therefore, we will continue to accept additional information and comments from all concerned governmental agencies, the scientific community, Native American Tribes, industry, or any other interested party concerning this finding.

Delisting Proposal

As noted earlier in this document, Section 4 of the Act and its implementing regulations at 50 CFR part 424, set forth the procedures for listing, reclassifying or removing species from the Federal Lists of Endangered and Threatened Wildlife and Plants. The Act defines ''species'' as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate fish or wildlife population segment that interbreeds when mature (16 U.S.C. 1532(16)). Once the ''species'' is determined, we then evaluate whether that species may be endangered or threatened because of one or more of the five factors described in Section 4(a)(1) of the Act. We must consider these same five factors in reclassifying or delisting a species. For species that are already listed as endangered or threatened, the threat analysis must evaluate both the threats currently facing the species and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting (*i.e.,* reclassifying a species from endangered to threatened) and removing or reducing the Act's protections. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate the species is neither endangered or threatened for the following reasons: (1) The species is extinct; (2) the species has recovered and is no longer endangered or threatened; and/or (3) the original scientific data used at the time the species was classified were erroneous. We determine that *Eriogonum gypsophilum* should be delisted due to recovery.

We have determined that none of the existing or potential threats is likely causing *Eriogonum gypsophilum* to be in danger of extinction throughout all or a significant portion of its range, nor is it likely to become endangered within the foreseeable future throughout all or a significant portion of its range. We published a final policy interpreting the phrase ''significant portion of its range'' (SPR) (79 FR 37578; July 1, 2014). The final policy states that: (1) If a species is found to be endangered or threatened throughout a significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the Act's protections apply to all individuals of the species wherever found; (2) a portion of the range of a species is ''significant'' if the species is not currently endangered or threatened throughout all of its range, but the portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable

future, throughout all of its range; (3) the range of a species is considered to be the general geographical area within which that species can be found at the time the Service makes any particular status determination; and (4) if a vertebrate species is endangered or threatened throughout a significant portion of its range, and the population in that significant portion is a valid distinct population segment (DPS), we will list the DPS rather than the entire taxonomic species or subspecies.

The procedure for analyzing whether any portion is an SPR is similar, regardless of the type of status determination we are making. The first step in our analysis of the status of a species is to determine its status throughout all of its range. If we determine that the species is in danger of extinction, or likely to become endangered in the foreseeable future, throughout all of its range, we list the species as an endangered species or threatened species, and no SPR analysis will be required. If the species is neither in danger of extinction, nor likely to become so throughout all of its range, as we have found here, we next determine whether the species is in danger of extinction or likely to become so throughout a significant portion of its range. If it is, we will continue to list the species as an endangered species or threatened species, respectively; if it is not, we conclude that listing the species is no longer warranted.

When we conduct an SPR analysis, we first identify any portions of the species' range that warrant further consideration. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose in analyzing portions of the range that have no reasonable potential to be significant or in analyzing portions of the range in which there is no reasonable potential for the species to be endangered or threatened. To identify only those portions that warrant further consideration, we determine whether substantial information indicates that: (1) The portions may be ''significant''; and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.'' In practice, a key part of the determination that a species is in danger of extinction in a significant portion of its range is whether the threats are geographically concentrated in some way. If the threats to the species are affecting it uniformly throughout its range, no portion is likely to have a greater risk of extinction, and thus would not warrant further consideration. Moreover, if any concentration of threats apply only to portions of the range that clearly do not meet the biologically based definition of ''significant'' (*i.e.,* the loss of that portion clearly would not be expected to increase the vulnerability to extinction of the entire species), those portions would not warrant further consideration. Our analysis indicates that there is no significant geographic portion of the range that is in danger of extinction or likely to become so in the foreseeable future. Therefore, based on the best scientific and commercial data available, no portion warrants further consideration to determine whether the species may be endangered or threatened in a significant portion of its range.

On the basis of our evaluation, we propose to remove *Eriogonum gypsophilum* from the Federal List of Endangered and Threatened Plants (50 CFR 17.12(h)).

Effects of This Proposed Rule

This proposal, if made final, would revise 50 CFR 17.12(h) by removing *Eriogonum gypsophilum* from the Federal List of Endangered and Threatened Plants. The Act's prohibitions and conservation measures, particularly through sections 7 and 9, would no longer apply to this species. Federal agencies would no longer be required to consult with the Service under section 7 of the Act, in the event that activities they authorize, fund or carry out may affect *Eriogonum gypsophilum.* Critical habitat for the species is designated; therefore, if made final, this rule would also remove this plant's critical habitat designation at 50 CFR 17.96(a).

Post-Delisting Monitoring

Section 4(g)(1) of the Act requires us, in cooperation with the States, to implement a monitoring program for not less than 5 years for all species that have been recovered and delisted. This requirement is to develop a program that detects delisted species failures to sustain itself without the Act's protective measures. If, at any time during the monitoring period, data indicate that protective Act status should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing.

We will coordinate with other Federal agencies, State resource agencies, interested scientific organizations, and others as appropriate to develop and implement an effective *Eriogonum gypsophilum* post-delisting monitoring (PDM) plan.

The PDM plan will build upon current monitoring practices. The PDM plan outlines the monitoring needed to verify that a species delisted due to recovery remains secure from extinction after the protections of the Act no longer apply. The goals of this PDM plan are to: (1) Outline the monitoring plan for species abundance and threats; and (2) identify circumstances that will trigger increased monitoring, or to identify when there are no longer concerns for *Eriogonum gypsophilum* and the PDM plan requirements have been fulfilled. The draft PDM plan will be made available for public comment in a **Federal Register** notice no later than June 30, 2017, and will be finalized concurrently with the final rule should we delist the species.

Peer Review

In accordance with our joint peer review policy with the National Marine Fisheries Service, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' was published in the **Federal Register** on July 1, 1994 (59 FR 34270), and the Office of Management and Budget's Final Information Quality Bulletin for Peer Review, dated December 16, 2004, we will seek expert opinions from at least three appropriate independent specialists regarding this proposed rule's science. Peer review's purpose is to ensure that our delisting decision is based on scientifically sound data, assumptions and analyses. We will send copies of this proposed rule to the peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions in this proposed *Eriogonum gypsophilum* delisting. We will summarize the opinions of these reviewers in the final decision document, and we will consider their input and any additional information we received as part of our final decision-making process for this proposal. Such communication may lead to a final decision that differs from this proposal.

Required Determinations

Clarity of the Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the section or paragraph numbers that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act

We have determined that environmental assessments and environmental impact statements, as defined under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) authority, need not be prepared in connection with regulations pursuant to the Act, Section 4(a). We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited in this final rule is available at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2016–0119, or upon request from the New Mexico Ecological Services Field Office (see **ADDRESSES**).

Authors

The primary authors of this notice are the staff members of the New Mexico Ecological Services Field Office, U.S. Fish and Wildlife Service (see **ADDRESSES**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

■ 2. Amend § 17.12(h) by removing the entry for ''*Eriogonum gypsophilum*'' from the List of Endangered and Threatened Plants.

■ 3. Amend § 17.96(a) by removing the critical habitat entry for ''Family Polygonaceae: *Eriogonum gypsophilum* (Gypsum Wild Buckwheat).''

Dated: December 22, 2016.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–31764 Filed 1–5–17; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2016–0138; FXES11130900000 178 FF09E42000]

RIN 1018–BB91

Endangered and Threatened Wildlife and Plants; Removal of the Lesser Long-Nosed Bat From the Federal List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule and 12-month petition finding; request for comments.

SUMMARY: Under the authority of the Endangered Species Act of 1973, as amended (Act), we, the U.S. Fish and Wildlife Service (Service), propose to remove the lesser long-nosed bat *(Leptonycteris curasoae yerbabuenae)* from the Federal List of Endangered and Threatened Wildlife (List) due to recovery. This determination is based on a thorough review of the best available scientific and commercial information, which indicates that the threats to this subspecies have been eliminated or reduced to the point that the subspecies has recovered and no longer meets the definition of endangered or threatened under the Act. This document also serves as the 12-month finding on a petition to reclassify this subspecies from endangered to threatened on the List. We are seeking information, data, and comments from the public on the proposed rule to remove the lesser long-nosed bat from the List.

DATES: We will accept comments received or postmarked on or before March 7, 2017. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES**), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Time on this date. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section below by February 21, 2017.

ADDRESSES: *Written comments:* You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2016–0138, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. 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–2016–0138, U.S. Fish and Wildlife Service, 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 *Public Comments,* below, for more information).

Copies of documents: This proposed rule and supporting documents, including the Species Status Assessment, are available on *http://www.regulations.gov.* In addition, the supporting file for this proposed rule will be available for public inspection, by appointment, during normal business hours, at the Arizona Ecological Services Field Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, AZ 85021.

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, AZ 85021; by telephone (602–242–0210); or by facsimile (602–242–2513). If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Requested

Public Comments

Any final action resulting from this proposed rule will be based on the best

scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American Tribes, the scientific community, industry, or other interested parties concerning this proposed rule. The comments that will be most useful and likely to influence our decisions are those supported by data or peer-reviewed studies and those that include citations to, and analyses of, applicable laws and regulations. Please make your comments as specific as possible and explain the basis for them. In addition, please include sufficient information with your comments to allow us to authenticate any scientific or commercial data you reference or provide. In particular, we seek comments concerning the following:

(1) New information on the historical and current status, range, distribution, and population size of lesser long-nosed bats, including the locations of any additional populations;

(2) New information regarding the life history, ecology, and habitat use of the lesser long-nosed bat;

(3) New information concerning the taxonomic classification and conservation status of the lesser long-nosed bat in general; and

(4) New information related to any of the risk factors or threats to the lesser long-nosed bat identified in the Species Status Assessment or the proposed action.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*) directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

Prior to issuing a final rule on this proposed action, we will take into consideration all comments and any additional information we receive. Such information may lead to a final rule that differs from this proposal. All comments and recommendations, including names and addresses, will become part of the administrative record.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We will not consider comments sent by email, fax, or to an address not listed in **ADDRESSES**. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked by the date specified in **DATES**. If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. Please note that comments posted to this Web site are not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publicly viewable until we post it, which might not occur until several days after submission.

If you mail or hand-deliver hardcopy comments 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. To ensure that the electronic docket for this rulemaking is complete and all comments we receive are publicly available, we will post all hardcopy submissions on *http://www.regulations.gov.*

In addition, comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection in two ways:

(1) You can view them on *http://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2016–0138, which is the docket number for this rulemaking.

(2) You can make an appointment, during normal business hours, to view the comments and materials in person at the U.S. Fish and Wildlife Service's Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5)(E) of the Act provides for one or more public hearings on this proposed rule, if requested. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by the date shown in **DATES**, above. We will schedule at least one public hearing on this proposal, if any are requested, and announce the location(s) of any of hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before any hearing.

Background

Previous Federal Actions

On September 30, 1988, we published a final rule in the **Federal Register** (53 FR 38456) to list the Mexican long-nosed bat (*Leptonycteris nivalis*) and Sanborn's long-nosed bat (*Leptonycteris sanborni* (=*L. yerbabuenae*)) as endangered species. That rule became effective on October 31, 1988, and did not include a critical habitat designation for either bat. In 1993, we amended the List by revising the entry for the Sanborn's long-nosed bat to ''Bat, lesser (=Sanborn's) long-nosed'' with the scientific name ''*Leptonycteris curasoae yerbabuenae.*'' We issued a recovery plan for the lesser long-nosed bat on March 4, 1997. The recovery plan has not been revised. In 2001, we again amended the List by revising the entry for the lesser long-nosed bat to remove the synonym of ''Sanborn's''; the listing reads, ''Bat, lesser long-nosed'' and retains the scientific name ''*Leptonycteris curasoae yerbabuenae.*'' Cole and Wilson (2006) recommended that *L. c. yerbabuenae* be recognized as *Leptonycteris yerbabuenae.* Additionally, Wilson and Reeder's (2005) ''Mammal Species of the World (Third Edition), an accepted standard for mammalian taxonomy, also indicates that *L. yerbabuenae* is a species distinct from *L. curasoae.* Currently, the most accepted and currently used classification for the lesser long-nosed bat is *L. yerbabuenae,* however, the Service continues to classify the listed entity as *Leptonycteris curasoae yerbabuenae.* We recommended, as part of the status review, that the Service recognize and change the taxonomic nomenclature for the lesser long-nosed bat to be consistent with the most recent classification of this species, *L. yerbabuenae.* However, throughout this proposed rule, we will refer to the lesser long-nosed bat as a subspecies. On August 30, 2007, we completed a 5-year review, in which the Service recommended reclassifying the species from endangered to threatened status (*i.e.,* ''downlisting'') under the Act (USFWS 2007; available online at *http://www.regulations.gov* or *https://www.fws.gov/southwest/es/arizona/Lesser.htm*). The reclassification recommendation was made because information generated since the listing of the lesser long-nosed bat indicated that the subspecies is not in imminent danger of extinction throughout all or a significant portion of its range (higher population numbers, increased number of known roosts, reduced impacts from known threats, and improved protection status) and thus, does not meet the definition of endangered. On July 16, 2012, the Service received a petition from The Pacific Legal Foundation and others requesting that the Service downlist the lesser long-nosed bat as recommended in the 5-year review (as well as delist one species and downlist three other listed species). On September 9, 2013, the Service

published a 90-day petition finding stating that the petition contained substantial scientific or commercial information indicating the petitioned action for the lesser long-nosed bat may be warranted (78 FR 55046). On November 28, 2014, the Service received a ''60-day Notice of Intent to Bring Citizen Suit,'' and on November 20, 2015, the New Mexico Cattle Growers Association and others filed a complaint challenging the Service's failure to complete in a timely manner the 12-month findings on five species, including the lesser long-nosed bat (*New Mexico Cattle Growers Association, et al.* v. *United States Department of the Interior, et al.,* No. 1:15–cv–01065–PJK–LF (D.N.M)), asking the Court to compel the Service to make 12-month findings on the five species. On September 29, 2016, the parties settled the lawsuit with the requirement that the Service submit a 12-month finding for the lesser long-nosed bat to the **Federal Register** for publication on or before December 30, 2016, among other obligations. This document fulfills the portion of the settlement agreement that concerns the lesser long-nosed bat.

Species Information

A thorough review of the taxonomy, life history, ecology, and overall viability of the lesser long-nosed bat is presented in the Species Status Assessment (SSA) report for the lesser long-nosed bat (USFWS 2016), which is available online at *http://www.regulations.gov* or *https://www.fws.gov/southwest/es/arizona/Lesser.htm,* or in person at the Arizona Ecological Services Field Office (see **ADDRESSES**, above). The SSA report documents the results of the biological status review for the lesser long-nosed bat and provides an account of the subspecies' overall viability through forecasting of the subspecies' condition in the future (USFWS 2016; entire). In the SSA report, we summarize the relevant biological data and a description of past, present, and likely future stressors to the subspecies, and conduct an analysis of the viability of the subspecies. The SSA report provides the scientific basis that informs our regulatory determination regarding whether this subspecies should be listed as an endangered or a threatened species under the Act. This determination involves the application of standards within the Act, its implementing regulations, and Service policies (see Delisting Proposal, below) to the scientific information and analysis in the SSA. The following discussion is a summary of the results and conclusions from the SSA report.

We solicited expert review of the draft SSA report from lesser long-nosed bat experts, as well as experts in climate change modeling and plant phenology (the scientific study of periodic biological phenomena, such as flowering, in relation to climatic conditions). Additionally, and in compliance with our policy, ''Notice of Interagency Cooperative Policy for Peer Review of Endangered Species Act Activities,'' which was published on July 1, 1994 (59 FR 34270), we solicited peer reviews on the draft SSA report from four objective and independent scientific experts in November 2016.

The lesser long-nosed bat (*Leptonycteris curasoae yerbabuenae)* is one of three nectar-feeding bats in the United States; the others are the Mexican long-nosed bat (*L. nivalis*) and the Mexican long-tongued bat (*Choeronycteris mexicana*). The lesser long-nosed bat is a migratory pollinator and seed disperser that provides important ecosystem services in arid forest, desert, and grassland systems throughout its range in the United States and Mexico, contributing to healthy soils, diverse vegetation communities, and sustainable economic benefits for communities. The range of the lesser long-nosed bat extends from the southwestern United States southward through Mexico.

The Service has assigned a recovery priority number of 8 to the lesser long-nosed bat. This recovery priority number means that the lesser long-nosed bat was considered to have a moderate degree of threat and a high recovery potential. Because the lesser long-nosed bat is a colonial roosting species known to occur at a limited number of roosts across its range in Mexico and the United States (Arizona and New Mexico), impacts at roost locations could have a significant impact on the population, particularly if the impacts occur at maternity roosts. However, because approximately 60 percent (eight out of fourteen) of the roost locations known at the time of listing were on ''protected'' lands in both the United States and Mexico, the degree of threat was determined to be moderate. The primary recovery actions outlined in the recovery plan were to monitor and protect known roost sites and foraging habitats. Because both of these actions could be potentially be accomplished through management at all of the known roost sites known at that time, the recovery potential for the lesser long-nosed bat was determined to be high. A U.S. recovery plan was completed for the lesser long-nosed bat in 1997 (USFWS 1997, entire) and the Program for the Conservation of Migratory Bats in Mexico was formed in 1994 (Bats 1995, p. 1–6).

The Service completed a 5-year review of the status of the lesser long-nosed bat in 2007. This review recommended downlisting this bat from endangered to threatened status under the Act (USFWS 2007; available at *http://www.regulations.gov* or *https://www.fws.gov/southwest/es/arizona/Lesser.htm*). In Mexico, the lesser long-nosed bat was recently removed from that nation's equivalent of the endangered species list (SEMARNAT 2010, entire; Medellin and Knoop 2013, entire). According to SEMARNAT (2010), over the last twenty years, Mexican researchers have carried out a wide range of studies that have demonstrated that the lesser long-nosed bat is no longer in the critical condition that led it to be listed as in danger of extinction in Mexico. Specifically, the evaluation to delist in Mexico showed 1) the distribution of lesser long-nosed bats is extensive within Mexico, covering more than 40 percent of the country; 2) the extent and condition of lesser long-nosed bat habitat is only moderately limiting and this species has demonstrated that it is adaptable to varying environmental conditions; 3) the species does not exhibit any particular characteristics that make it especially vulnerable; and 4) the extent of human impacts is average and increased education, outreach, and research have reduced the occurrence of human impacts and disturbance.

Subspecies Description and Needs

The lesser long-nosed bat is a migratory bat characterized by a resident subpopulation that remains year round in central and southern Mexico to mate and give birth, and a migratory subpopulation that winters and mates in central and southern Mexico, but that migrates north in the spring to give birth in northern Mexico and the southwestern United States (Arizona). This migratory subpopulation then obtains the necessary resources (in Arizona and New Mexico in the United States) to be able to migrate south in the fall back to central and southern Mexico. The lesser long-nosed bat is a nectar, pollen, and fruit-eating bat that depends on a variety of flowering plants as food resources. These plants include columnar cacti, agaves, and a variety of flowering deciduous trees. The lesser long-nosed bat is a colonial roosting species that roosts in groups ranging from a few hundred to over 100,000. Roost sites are primarily caves, mines, and large crevices with appropriate temperatures and humidity; reduced access to predators; free of the disease-

causing organisms (fungus that causes white-nose syndrome, etc.); limited human disturbance; structural integrity maintained; in a diversity of locations to provide for maternity, mating, migration, and transition roost sites.

The primary life-history needs of this subspecies include appropriate and adequately distributed roosting sites; adequate forage resources for life-history events such as mating and birthing; and adequate roosting and forage resources in an appropriate configuration (a ''nectar trail'') to complete migration between central and southern Mexico and northern Mexico and the United States.

For more information on this topic, see chapter 2 of the SSA Report (USFWS 2016), which is available online at *http://www.regulations.gov* or *https://www.fws.gov/southwest/es/arizona/Lesser.htm,* or in person at the Arizona Ecological Services Field Office (see **ADDRESSES**, above).

Current Conditions

For the last 20 years following the completion of the lesser long-nosed bat recovery plan, there has been a steadily increasing effort related to the conservation of this subspecies. Better methods of monitoring have been developed, including the use of infrared videography and radio telemetry. These monitoring efforts have led to an increase in the number of known roosts throughout its range, from approximately 14 known at the time of listing to approximately 75 currently known roost sites, as well as more accurate assessments of the numbers of lesser long-nosed bats using these roosts. The 1988 listing rule emphasized low populations numbers along with an apparent declining population trend. At this time, we have documented increased lesser long-nosed bat numbers and positive trends (stable or increasing numbers of bats documented over the past 20 years) at most roosts. There is no question that current population numbers of lesser long-nosed bats exceed the levels known and recorded at the time of listing in 1988. A number of publications have documented numbers of lesser long-nosed bats throughout its range that far exceed the numbers used in the listing analysis (Fleming et al. 2003; Sidner and Davis 1988). For example, although numbers fluctuate from year to year, the numbers of lesser long-nosed bats estimated from 2010–2015 in the three known maternity roosts in the U.S. were an average of two and a half times higher than numbers presented in the Recovery Plan (USFWS 2016; p. 10). Furthermore, protection measures have been implemented at over half the roosts in both the United States and Mexico (approximately 40 roosts), including gating, road closures, fencing, implementation of management plans, public education, monitoring, and enforcement of access limitations. Generally, roosts on Federal lands benefit from monitoring by agency personnel and a law enforcement presence resulting in these roosts being exposed to fewer potential impacts than they otherwise would be. Efforts to physically protect roosts through the use of gates or barriers have been implemented at six roost sites in Arizona. The experimental fence at one roost (a mine site) worked initially, but was subsequently vandalized resulting in roost abandonment. The fencing was repaired and there have been no subsequent breeches and the bats have recolonized the site (USFWS 2016; p. 11).

In addition, since the 1988 listing rule, increased public and academic interest, along with additional funding, has resulted in additional research leading to a better understanding of the life history of the lesser long-nosed bat. At the time of listing, we believed livestock grazing and fire were impacting the viability of this subspecies. We now know that livestock grazing and fire have less of an impact on the viability of this subspecies than previously thought. Other threats have been reduced such as reducing the killing of non-target bat species during vampire bat control activities in Mexico (*i.e.,* poisoning, dynamiting, burning, shooting, anticoagulants, roost destruction, etc.) because of outreach and education and reducing human disturbance at roosts through the use of fencing, monitoring, and the use of gates. However, roost disturbance, particularly in the border region between the United States and Mexico; habitat loss due to various land uses; and, to an unknown extent, effects due to climate change continue to be threats to this subspecies. Nonetheless, these threats are being addressed or ongoing research is developing management strategies such that we have determined that the effects of these threats will not affect the future viability of the lesser long-nosed bat.

The lesser long-nosed bat's conservation status in Mexico has been determined to be secure enough that Mexico removed the subspecies from its endangered species list in 2013 because of the factors described above. The species has a greater distribution in Mexico than in the United States, but most of the same reasoning for the subspecies' removal from Mexico's endangered species list applies to our proposal to remove the lesser long-nosed bat from the U.S. List of Endangered and Threatened Wildlife. Much of the range of this species in the United States is on federally managed lands (≤75 percent). Federal agencies have guidelines and requirements in place to protect lesser long-nosed bats and their habitats, particularly roost sites. As described above, roosts on Federal lands benefit from monitoring by agency personnel and a law enforcement presence resulting in these roosts being exposed to fewer potential impacts than they otherwise would be. Gating of roosts on Federal lands is being implemented and evaluated. If the lesser long-nosed bat is delisted, protection of their roost sites and forage resources will continue on Federal lands. Agency land-use plans and general management plans contain objectives to protect cave resources and restrict access to abandoned mines, both of which can be enforced by law enforcement officers. In addition, guidelines in these plans for grazing, recreation, off-road use, fire, etc. will continue to prevent or minimize impacts to lesser long-nosed bat forage resources. Examples of these agency plans include the Fort Huachuca Integrated Natural Resources Management Plan, the Coronado National Forest Land Use and Resource Management Plan, and the Safford District Resource Management Plan (DOD 2001, entire; USFS 2005, entire; BLM 1991, entire). As described above, roosts on Federal lands benefit from monitoring by agency personnel and a law enforcement presence resulting in these roosts being exposed to fewer potential impacts than they otherwise would be. Gating of roosts on Federal lands is being implemented and evaluated and, while the best design for such gates is still being developed, these gates do provide long-term protection of the sites. Further, outreach and education, particularly with regard to pollinator conservation, has increased and human attitudes regarding bats are more positive now than in the past; and the lesser long-nosed bat has demonstrated adaptability to potential adverse environmental conditions, such as changes in plant flowering phenology (see discussion under *Factor E,* below).

Because of the occurrence of both resident and migratory subpopulations within the lesser long-nosed bat population, it is important for all of the necessary habitat elements to be appropriately distributed across the range of this species such that roost sites, forage resources, and migration

pathways are in the appropriate locations during the appropriate season. Currently, the distribution of the lesser long-nosed bat extends from southern Mexico into the southwestern United States. In Mexico, the distribution of the lesser long-nosed bat covers approximately 40 percent of the country when considering resident areas, migration pathways, and seasonally-occupied roosts within the range of this subspecies. Within both the United States and Mexico, the current distribution of the lesser long-nosed bat has not decreased or changed substantially from that described in the literature. It is important to note, however, that, as discussed in the SSA report, any given area within the range of the lesser long-nosed bat may be used in an ephemeral manner dictated by the availability of resources that can change on an annual and seasonal basis. Roost switching occurs in response to changing resources and areas that may be used during one year or season may not be used in subsequent years until resources are again adequate to support occupancy of the area. This affects if and how maternity and mating roosts, migration pathways, and transition roosts are all used during any given year or season. However, while the distribution of the lesser long-nosed bat within its range may be fluid, the overall distribution of this species has remained similar over time (USFWS 2016, Chapters 1 through 3).

For more information on this topic, see chapter 5 of the SSA Report (USFWS 2016), which is available online at *http://www.regulations.gov* or *https://www.fws.gov/southwest/es/arizona/Lesser.htm,* or in person at the Arizona Ecological Services Field Office (see **ADDRESSES**, above).

Recovery Planning and Recovery Criteria

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. Recovery plans identify site-specific management actions that will achieve recovery of the species and objective, measurable criteria that set a trigger for review of the species' status. Methods for monitoring recovery progress may also be included in recovery plans.

Recovery plans are not regulatory documents; instead they are intended to establish goals for long-term conservation of listed species and define criteria that are designed to indicate when the threats facing a species have been removed or reduced to such an extent that the species may no longer need the protections of the Act. They also identify suites of actions that are expected to facilitate achieving this goal of recovery. While recovery plans are not regulatory, they provide guidance regarding what recovery may look like and possible paths to achieve it. However, there are many paths to accomplishing recovery of a species, and recovery may be achieved without all recovery actions being implemented or criteria being fully met. Recovery of a species is a dynamic process requiring adaptive management that may, or may not, fully follow the guidance provided in a recovery plan.

The 1997 lesser long-nosed bat recovery plan objective is to downlist the species to threatened (USFWS 1997, entire). The recovery plan does not explain why delisting was not considered as the objective for the recovery plan. The existing recovery plan does not explicitly tie the recovery criteria to the five listing factors at section 4(a)(1) of the Act or contain explicit discussion of those five listing factors. In addition, the reasons for listing discussed in the recovery plan do not actually correspond with the five listing factors set forth in section 4(a)(1) of the Act. The recovery plan lists four criteria that should be considered for downlisting the subspecies, which are summarized below. A detailed review of the recovery criteria for the lesser long-nosed bat is presented in the 5-year Review for the Lesser Long-Nosed Bat (USFWS 2007; available online at *http://www.regulations.gov* or *https://www.fws.gov/southwest/es/arizona/Lesser.htm*).

Recovery Criterion 1 (Monitor Major Roosts for 5 Years)

Significant efforts have been made to implement a regular schedule of monitoring at the known roost sites in Arizona. All thirteen of the roost sites identified in the recovery plan have had some degree of monitoring over the past 20 years. In the United States, all of the six roosts identified in the recovery plan for monitoring (Copper Mountain, Bluebird, Old Mammon, Patagonia Bat Cave, State of Texas, and Hilltop) have been monitored since 2001. This recovery criterion has been satisfied for roosts in Arizona. None of the New Mexico roosts were identified for monitoring in the recovery plan, but these roosts have been monitored sporadically since the completion of the recovery plan (USFWS 2007; p. 6–9). The seven roost sites in Mexico have been regularly monitored since the development of the recovery plan (Medellín and Torres 2013, p. 11–13). For more information, see chapter 2 of the SSA Report (USFWS 2016).

Recovery Criterion 2 (Roost Numbers Stable or Increasing)

Nearly all of the lesser long-nosed bat experts and researchers who provided input to the 5-year review indicated that they observed that the number of lesser long-nosed bats at most of the roost sites in both the United States and Mexico is stable or increasing. As discussed in the SSA report, current expert opinion supports this same conclusion (see chapter 2 of the SSA Report (USFWS 2016). The lesser long-nosed bat's conservation status in Mexico has been determined to be secure enough that Mexico removed the subspecies from its endangered species list in 2013 based on the factors discussed above.

Recovery Criterion 3 (Protect Roost and Forage Plant Habitats)

More lesser long-nosed bat roost locations are currently known, and are being more consistently monitored, than at the time of listing in 1988 (an increase from approximately 14 to approximately 75 currently known roosts). In related efforts, a number of studies have been completed that provide us with better information related to the forage requirements of the lesser long-nosed bat when compared to the time of listing and recovery plan completion. Because of improved information, land management agencies are doing a better job of protecting lesser long-nosed bat roost sites and foraging areas. For more information, see chapter 2 of the SSA Report (USFWS 2016).

Recovery Criterion 4 (Status of New and Known Threats)

Our current state of knowledge with regard to threats to this subspecies has changed since the development of the recovery plan. Threats to the lesser long-nosed bat from grazing on food plants, the tequila industry, and prescribed fire, identified in the recovery plan, are likely not as severe as once thought. Effects from illegal border activity and the associated enforcement activities are a new and continuing threat to roost sites in the border region. Potential effects to forage species and their phenology as a result of climate change have been identified, but are characterized by uncertainty and lack of data specifically addressing those issues. Nonetheless, lesser long-nosed bats have shown the ability to adapt to adverse forage conditions and we find that the lesser long-nosed bat is characterized by flexible and adaptive behaviors that will allow it to remain

viable under changing climatic conditions. Some progress has been made toward protecting known lesser long-nosed bat roost sites; while the ultimate level of effectiveness of gates as a protection measure is still being evaluated and improved, they do provide long-term protection of roost sites. Gates are being currently being tested at a few additional lesser long-nosed bat roost sites. For more information, see chapter 4 of the SSA Report (USFWS 2016).

As discussed in the SSA report and 5-year review, data relied upon to develop the 1988 listing rule and the recovery plan were incomplete. Subsequent to the completion of the listing rule and recovery plan, considerable additional data regarding the life history and status of the lesser long-nosed bat have been gathered and, as discussed above, have documented an increase in the number of known roost sites and the number of lesser long-nosed bats occupying those roosts. During the 2007 5-year review of the status of this subspecies, it was determined that the 1997 recovery plan was outdated and did not reflect the best available information on the biology of this subspecies and its needs (USFWS 2007; p. 30; available online at *http://www.regulations.gov* or *https://www.fws.gov/southwest/es/arizona/Lesser.htm*). Therefore, rather than use the existing outdated recovery criteria, the Service assessed the species' viability, as summarized in the SSA report (USFWS 2016), in making the determination of whether or not the lesser long-nosed bat has recovered as defined by the Act.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing species, reclassifying species, or removing species from listed status. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. A species may be reclassified or delisted on the same basis. Consideration of these factors was included in the SSA report in the discussion on ''threats'' or ''risk factors,'' and threats were projected into the future using scenarios to evaluate the current and future viability of the lesser long-nosed bat. The effects of conservation measures currently in place were also assessed in the SSA report as part of the current condition of the subspecies, and those effects were projected in future scenarios. The evaluation of the five factors as described in the SSA report is summarized below.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The primary threat to this subspecies continues to be roost site disturbance or loss. The colonial roosting behavior of this subspecies, where high percentages of the population can congregate at a limited number of roost sites, increases the likelihood of significant declines or extinction due to impacts at roost sites. However, as discussed above, increased lesser long-nosed bat numbers and positive trends at most roosts have reduced concerns expressed in the 1988 listing rule with regard to low population numbers and an apparent declining population trend. Known roosts have had protective measures implemented, previously unknown roosts have been identified and agencies and conservation partners are implementing protective measures, and outreach and education has been effective in increasing the understanding of the general public, as well as conservation partners, with regard to the need to prevent disturbance at lesser long-nosed bat roosts while the bats are present (USFWS 2016, p. 45–48). As discussed in the SSA report, we have determined that the current lesser long-nosed bat population is currently viable and is likely to remain so into the future based on the documentation of higher numbers of lesser long-nosed bats, increased numbers of known and protected roost sites, improved outreach and education, and a decrease in the effects of known threats and plans to assess and address known threats in the future (USFWS 2016, entire). We have determined that roost sites have and will be protected to the extent that roost disturbance is no longer a sufficient threat to warrant listing under the Act.

In general, while actual numbers of bats observed at roost sites may not support a statistically valid population trend, the overall numbers of bats observed at roost sites can be used as an index of population status. Although most data related to lesser long-nosed bat roost counts and monitoring have not been collected in a way that is statistically rigorous enough to draw statistically-valid conclusions about the trend of the population, in the professional judgment of biologists and others involved in these efforts, the total numbers of bats observed at roost sites across the range of the lesser long-nosed bat are considered stable or increasing at nearly all roost sites being monitored. With a documented increase from an estimated 500 lesser long-nosed bats in the U.S. at the time of listing to over 100,000 currently documented, the total number of bats currently being documented is many times greater than those numbers upon which the listing of this species relied, and while this may, in large part, reflect a better approach to survey and monitoring in subsequent years, it gives us better information upon which to evaluate the status of the lesser long-nosed bat population.

Significant information regarding the relationship of lesser long-nosed bats to their forage resources has been gathered over the past decade. Because lesser long-nosed bats are highly specialized nectar-, pollen-, and fruit-eaters, they have potential to be extremely vulnerable to loss of or impacts to forage species. However, lesser long-nosed bats are also highly effective at locating food resources, and their nomadic nature allows them to adapt to local conditions. For example, the resiliency of lesser long-nosed bats became evident in 2004, when a widespread failure of saguaro and organ pipe bloom occurred. The failure was first noted in Organ Pipe Cactus National Monument, and such a failure had not been noted in the recorded history of the Monument (Billings 2005). The failure extended from Cabeza Prieta NWR on the west to Tucson on the east, and south into central Sonora, Mexico. The large-scale loss of this lesser long-nosed bat food resource was somewhat offset by the fact that small numbers of both saguaro and organ pipe flowers continued to bloom into August and September. Such a failure would have been expected to result in fewer lesser long-nosed bats using roosts in this area or reduced productivity at these roosts. However, this was not the case. Maternity roost numbers remained as high as or higher than previous years, with some 25,000 adult females counted during 2004 monitoring (Billings 2005). Ultimately, it appears lesser long-nosed bats were able to subsist and raise young in southwestern Arizona in this atypical year. Other observations over the past 20 years, including some years of significantly reduced agave availability, have indicated that the lesser long-nosed bat is more adaptable than previously believed to changing forage resource availability. This adaptability

leads us to a determination that forage availability will not significantly affect the viability of the lesser long-nosed bat population.

Additionally, the effects of livestock grazing and prescribed fire on long-nosed bat food sources are also not as significant as originally thought. For example, Widmer (2002) found that livestock were not responsible for all of the utilization of agave flower stalks their study area. Wildlife such as javelina, white-tailed deer, and small mammals also utilized agave flower stalks as a food resource. The extent of livestock use of agave flower stalks appears to be related to standing biomass and distance from water. Further, Bowers and McLaughlin (2000) found that the proportion of agave flower stalks broken by cattle did not differ significantly between grazed and ungrazed areas. All of which indicate that livestock do not have a significant effect on lesser long-nosed bat food sources, over and above native grazers. Thomas and Goodson (1992) and Johnson (2001, p. 37) reported 14% and 19% mortality of agaves following burns. Some agency monitoring has occurred post-fire for both wildfires and prescribed burns. This monitoring indicates that agave mortality in burned areas is generally less than 10% (USFS 2015, p. 82–83; USFS 2013, p. 10–11). Contributing to this relatively low mortality rate is the fact that most fires burn in a mosaic, where portions of the area do not burn. Impacts of fire on agave as a food source for lesser long-nosed bats may not be a significant concern for the following reasons: Fire-caused mortality of agaves appears to be low; alternative foraging areas typically occur within the foraging distance from lesser long-nosed bat roosts; and most agave concentrations occur on steep, rocky slopes with low fuel loads (Warren 1996). In addition, Johnson (2001, p. 35–36) reported that recruitment of new agaves occurred at higher rates in burned plots than in unburned plots, indicating that there may be an increased availability over time of agaves in areas that have burned, if the return rate of fire is greater than seven years. The effects of agave harvesting are limited to bootleggers, which is likely occurring at the same levels as when the species was listed in 1988, however, this is not considered significant. In addition, increased outreach and education are being provided to tequila producers in an effort to reduce the effects of agave harvesting on lesser long-nosed bats.

While not currently a threat affecting the viability of the lesser long-nosed bat population, the potential for migration corridors to be truncated or interrupted is a concern. Significant gaps in the presence of important roosts and forage species along migration routes would affect the population dynamics of this subspecies. While the lesser long-nosed bat continues to be faced with loss and modification of its habitat throughout its range, the habitats used by this subspecies occur over an extensive range that covers a wide diversity of vegetation and ecological communities. These are habitat characteristics that would not make this subspecies intrinsically vulnerable with regard to habitat limitations. That is to say, the wide variety of ecosystems that this subspecies uses, over a relatively expansive range, results in available areas characterized by the asynchronous flowering of forage resources making up the diet of the lesser long-nosed bat and buffers this subspecies from potential loss or reduction of habitats as a result of stochastic events, including the effects of climate change, among others.

There is no question that current population numbers of lesser long-nosed bats exceed the levels known and recorded at the time of listing in 1988. A number of publications have documented numbers of lesser long-nosed bats throughout its range that far exceed the numbers used in the listing analysis with an estimated increase from fewer than 1,000 bats to approximately 200,000 bats (Fleming et al. 2003, pp. 64–65; Sidner and Davis 1988, p. 494). Also, in general, the trend in overall numbers of lesser long-nosed bats estimated at roost sites has been stable or increasing in both the United States and Mexico (Medellín and Knoop 2013, p. 13; USFWS 2016). Increased roost occupancy and the positive trend in numbers of lesser long-nosed bats occupying these roosts appear to be supported by adequate forage resources. The adaptability of the lesser long-nosed bat to changing forage conditions seems to allow the lesser long-nosed bat to sustain a positive population status under current environmental conditions.

While some threats are ongoing with regard to lesser long-nosed bat habitat, in general, we find that threats to this species' habitat have been reduced or are being addressed in such a way that lesser long-nosed bat habitat is being enhanced and protected at a level that has increased since the 1988 listing of this species. In particular, areas that were vulnerable to threats have been protected or are now managed such that those threats have been reduced. Outreach and education have increased the understanding of what needs to be done to protect lesser long-nosed bat habitat. Therefore, based on the analysis completed in the SSA report (USFWS 2016; p. 54–61), we have determined that threats to the habitat of this species are currently reduced and will continue to be addressed in the foreseeable future, or are not as significant as previously thought. We find that threats to the habitat of this species have been eliminated, reduced, or mitigated to the extent that the subspecies no longer is an endangered or threatened species under the Act. Lesser long-nosed bat habitat conditions are currently, and are predicted to remain at levels that have and will improve the viability of the lesser long-nosed bat to the point that the species is no longer endangered.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Lesser long-nosed bats are not known to be taken for commercial purposes, and scientific collecting is not thought to be a problem (USFWS 1988, p. 38459). Caves and mines continue to attract recreational users interested in exploring these features but this threat has probably not increased since the listing. For example, Pima County, in southeastern Arizona, is implementing mine closures on lands that they have acquired for conservation purposes. Other land management agencies also carry out abandoned mine closures for public recreational safety purposes. A positive aspect of these mine closure processes is that most agencies and landowners now understand the value of these features to bats and other wildlife and are implementing measures to maintain those values while still addressing public health and safety concerns. The 1988 listing rule stated that bats were often killed by vandals (USFWS 1988, p. 38459). However, significant changes in the public perception of bats are occurring. Educational efforts are beginning to make a difference.

In both the U.S. and Mexico, public education, in the form of radio and television spots, and educational materials have been implemented. Agencies now receive calls for assistance in nonlethal solutions to bat issues. Often, the general public does take the time to understand or differentiate when it comes to emotional issues such as rabies or vampire bats, but outreach and education are improving the understanding and knowledge of facts when it comes to the reality of the extent of these issues. There has been a focused effort in Mexico to reduce the mortality of non-target species in relation to vampire bat

control (see chapter 4 of the SSA Report (USFWS 2016).

In summary, we determine that the viability of the lesser long-nosed bat is not being significantly affected by threats from scientific research or public recreational activities.

Factor C. Disease or Predation

Disease does not currently appear to be a significant risk factor for the lesser long-nosed bat. Emerging disease issues, such as those associated with white-nose syndrome, may become more significant, however our current scientific assessment indicates that white-nose syndrome will not affect this non-hibernating species. Therefore, because lesser long-nosed bats do not hibernate, we do not anticipate that white-nose syndrome will be a significant risk factor for lesser long-nosed bats (see chapter 4 of the SSA Report (USFWS 2016).

Predation does contribute to the mortality of lesser long-nosed bats at roost sites. Likely predators include snakes, raccoons, skunks, ringtails, bobcats, coyotes, barn owls, great-horned owls, and screech owls. Specifically, barn owls have been observed preying on lesser long-nosed bats at the maternity roost at Organ Pipe Cactus National Monument for many years and snakes have been observed preying on lesser long-nosed bats in Baja California Sur, Mexico. However, at large aggregations, such as bat roosts, predation is an insignificant impact on the population. Therefore, we find that neither disease nor predation are currently or is likely in the future to affect the viability of the lesser long-nosed bat.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

The current listing of the lesser long-nosed bat in the United States and the former listing of the bat in Mexico as an endangered species have provided this species with some level of protection. Outside of this, there are no laws or regulations protecting this species in Mexico. In fact, the lack of regulation related to control of vampire bats in Mexico is continuing to result in the mortality of the lesser long-nosed bat due to the lack of requirements to properly identify the target species. However, increased education and outreach is improving this situation in Mexico. In the United States, State laws and regulations provide some additional level of protection. For example, Arizona State Law in ARS Title 17 prohibits the taking of bats outside of a prescribed hunting season and, per Commission Order 14, there is no open hunting season on bats, meaning it is always illegal to take them. Provisions for special licenses to take bats and other restricted live wildlife are found in Arizona Game and Fish Commission Rule 12, Article 4 and are administered by the Arizona Game and Fish Department. However, this protection is for individual animals only, and does not apply to the loss or destruction of habitat. As discussed in the SSA report (USFWS 2016; p. 14), there is one Federal Act and one State Statute in the United States that provide some measure of protection at cave roosts. The Federal Cave Protection Act of 1988 prohibits persons from activities that ''destroy, disturb, deface, mar, alter, remove, or harm any significant cave or alters free movement of any animal or plant life into or out of any significant cave located on Federal lands, or enters a significant cave with the intent of committing any act described . . .'' Arizona Revised Statute 13–3702 makes it a class 2 misdemeanor to ''deface or damage petroglyphs, pictographs, caves, or caverns.'' Activities covered under ARS 13–3702 include ''kill, harm, or disturb plant or animal life found in any cave or cavern, except for safety reasons.''

The above laws and regulations will continue to protect lesser long-nosed bats and their habitats after delisting. We have determined that these existing regulations address the most important threats to the lesser long-nosed bat as discussed in the SSA report (USFWS 2016; p. 54–61).

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Ecosystems within the southwestern United States are thought to be particularly susceptible to the effects of climate change and variability (Strittholt et al. 2012, p. 104–152; Munson et al. 2012, p. 1–2; Archer and Predick 2008). Documented trends and model projections most often show changes in two variables: Temperature and precipitation. Recent warming in the southwest is among the most rapid in the nation, significantly more than the global average in some areas (Garfin et al. 2014, p. 463; Strittholt et al. 2012, p. 104–152; Munson et al. 2012, p. 1–2; Guido et al. 2009). Precipitation predictions have a larger degree of uncertainty than predictions for temperature, especially in the Southwest (Sheppard et al. 2002), but indicate reduced winter precipitation with more intense precipitation events (Global Climate Change 2009, p. 129–134; Archer and Predick 2008, p. 24). Further, some models predict dramatic changes in Southwestern vegetation communities as a result of the effects of climate change (Garfin et al. 2014, p. 468; Munson et al. 2012, p. 9–12; Archer and Predick 2008, p. 24). In the most recent assessment of climate change impacts by the Intergovernmental Panel on Climate Change (IPCC), the IPCC indicated that there would be a decrease in the number of cold days and nights and an increase in the number of warm days and warm nights which would favor frost-intolerant lesser long-nosed bat forage species like saguaro and organ pipe cacti, but may also affect the blooming phenology of those same species (IPCC 2014, p. 53). They also indicted that precipitation events would likely become more intense and that we are more likely to see climate-related extremes such as heat waves, droughts, floods, wildfires, etc. (IPCC 2014, p. 53).

The U.S. Geological Survey produced a mapping tool that allows climate change projections to be downscaled to local areas including states, counties, and watershed units. We used this National Climate Change Viewer (U.S. Geological Survey 2016) to compare past and projected future climate conditions for Pima, Santa Cruz, and Cochise counties, Arizona. The baseline for comparison was the observed mean values from 1950 through 2005, and 30 climate models were used to project future conditions for 2050 through 2074. We selected the climate parameters of April maximum temperature and August and December mean precipitation to evaluate potential effects on lesser long-nosed bat forage resources. These particular parameters were selected from those available because they represented those most likely to impact the survival and flowering phenology of individual forage species.

Similar to the more general climate change effects discussed above, the downscaled analysis also showed warming spring temperatures which could result in an early blooming period for lesser long-nosed bat forage species (USGS 2016). Precipitation changes were evaluated for changes to monsoon and winter precipitation. In line with the general climate projections, changes during the evaluated time periods were greater for winter precipitation than for monsoon precipitation. Changes projected for monsoon precipitation were minimal, but projected to be reduced by approximately one inch per 100 days for winter precipitation (USGS 2016).

The best available information indicates that ongoing climate change will probably have some effect on lesser long-nosed bat forage resources. Such

effects will occur as a result of changes in the phenology (periodic biological phenomena, such as flowering, in relation to climatic conditions) and distribution of lesser long-nosed bat's forage resources. How this affects the viability of the lesser long-nosed bat population is not clear. There is much uncertainty and a lack of information regarding the effects of climate change and specific impacts to forage for this subspecies. The biggest effect to the lesser long-nosed bat will occur if forage availability gets out of sync along the ''nectar trail'' such that bats arrive at the portion of the range they need to meet life-history requirements (migration, mating, birthing) and there are inadequate forage resources to support that activity. If the timing of forage availability changes, but changes consistently in a way that maintains the nectar trail, this subspecies is expected to adapt to those timing changes as stated above (see chapter 4 of the SSA Report (USFWS 2016). For example, as noted earlier, the resiliency of lesser long-nosed bats became evident in 2004, when a widespread failure of saguaro and organ pipe bloom occurred and lesser long-nosed bats were still, ultimately, able to subsist and raise young in southwestern Arizona in this atypical year. It is likely they did so by feeding more heavily on agaves (evident by agave pollen found on captured lesser long-nosed bats) than they typically do (see additional discussion under Factor A above). Although we are still not sure to what extent the environmental conditions described in climate change predictions will affect lesser long-nosed bat forage resource distribution and phenology, we have documented that lesser long-nosed bats have the ability to change their foraging patterns and food sources in response to a unique situation, providing evidence that this species is more resourceful and resilient than may have been previously thought. We find that the lesser long-nosed bat is characterized by flexible and adaptive behaviors that will allow it to remain viable under changing climatic conditions.

Species Future Conditions and Viability

We evaluated overall viability of the lesser long-nosed bat in the SSA report (USFWS 2016) in the context of resiliency, redundancy, and representation. Species viability, or the ability to survive long term, is related to the species' ability to withstand catastrophic population and species-level events (redundancy); the ability to adapt to changing environmental conditions (representation); and the ability to withstand disturbances of varying magnitude and duration (resiliency). The viability of this species is also dependent on the likelihood of new threats or risk factors or the continuation of existing threats now and in the future that act to reduce a species' redundancy, resiliency, and representation.

As described in the SSA report, we evaluated the viability of the lesser long-nosed bat population at two timeframes, 15 years and 50 years. The 15-year timeframe represents the time it generally takes to document the effectiveness of various research, monitoring, and management approaches that have been or are implemented related to lesser long-nosed bat conservation. Therefore, the 15-year timeframe is a reasonable period of time within which we can predict outcomes of these activities in relation to the viability of the lesser long-nosed bat population. The 50-year timeframe is related primarily to the ability of various climate change models to reasonably and consistently predict or assess likely affects to lesser long-nosed bats and their forage resources. For each of these timeframes, we evaluated three future scenarios, a best-case scenario, a moderate-case scenario, and a worst-case scenario with respect to the extent and degree to which threats will affect the future viability of the lesser long-nosed bat population. We also determined how likely it would be that each of these three scenarios would actually occur. The SSA report details these scenarios and our analysis of the effects of these scenarios, over the two timeframes, on redundancy, resiliency, and representation of the lesser long-nosed bat population.

During our decision-making process, we evaluated our level of comfort making predictions at each of the two timeframes. Ultimately, while the SSA report evaluates both timeframes, there was some discomfort expressed by decision makers for extending predictions of the future viability of the lesser long-nosed bat out to 50 years due to the uncertainty of climate change models and the difficulty of predicting what will happen in Mexico where the majority of this species' habitat occurs, but where we have less information with regard to the threats affecting the lesser long-nosed bats. In the SSA report, all three scenarios were evaluated over both time frames (USFWS 2016, p. 52–56). The evaluation results of future viability in the SSA report were identical for both timeframes (high viability), except in the worst-case scenario where, unlike the moderate- and best-case scenarios, the viability was moderate for the 15-year timeframe and low for the 50-year timeframe. For each future scenario, we describe how confident we are that that particular scenario will occur. This confidence is based on the following confidence categories: Highly likely (greater than 90 percent sure of the scenario occurring); moderately likely (70 to 90 percent sure); somewhat likely (50 to 70 percent sure); moderately unlikely (30 to 50 percent sure); unlikely (10 to 30 percent sure); and highly unlikely (less than 10 percent sure). The SSA report concluded that it is unlikely that the worst-case scenario will actually occur. The worst case scenario describes a drastic increase in negative public attitudes towards bats and lesser long-nosed bat conservation, a greater influence from white-nose syndrome, and the worst possible effects from climate change. Based on our experience and the past and ongoing actions of the public and the commitment of management agencies in their land-use planning documents to address lesser long-nosed bat conservation issues, both now and in the future in both the United States and Mexico, such drastic impacts are unlikely to occur (10 to 30 percent sure this scenario will occur). In fact, for the conditions outlined in the worst-case scenario, we find that certainty of the worst-case scenario occurring is closer to 10 percent than to 30 percent sure that this scenario would actually occur based on the commitment to conservation of this species and the adaptability of the lesser long-nosed bat. If the lesser long-nosed bat is delisted and prior to the final rule, we will confirm with our public and agency conservation partners that they will continue to coordinate and implement existing and future conservation actions related to the lesser long-nosed bat. For additional discussion related to the worst-case scenario, see the SSA report (USFWS 2016; p. 51–53). Such ongoing commitment to lesser long-nosed bat conservation has already been seen subsequent to the delisting of this bat in Mexico and our experience has been that it will also continue in the U.S. after delisting.

Although the worst-case scenario was evaluated in the SSA report, because we found that it was unlikely to actually occur, the focus of our consideration was on the scenarios that had the greatest likelihood of occurring, the best- and moderate-case scenarios, where redundancy, resiliency, and representation remain high regardless of the timeframe or scenario considered. Under the current condition for the lesser long-nosed bat, as well as in both

the best-case (somewhat likely to occur) and moderate-case (moderately likely to occur) future scenarios, redundancy, resiliency, and representation of the lesser long-nosed bat population remain high and the viability of the subspecies is maintained (USFWS 2016, p. 64–66).

Delisting Proposal

Section 4 of the Act and its implementing regulations, 50 CFR part 424, set forth the procedures for listing, reclassifying, or removing species from the Federal Lists of Endangered and Threatened Wildlife and Plants. ''Species'' is defined by the Act as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Once the ''species'' is determined, we then evaluate whether that species may be endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act. We must consider these same five factors in reclassifying or delisting a species. For species that are already listed as endangered or threatened, the analysis of threats must include an evaluation of both the threats currently facing the species, and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting and the removal or reduction of the Act's protections. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate that the species is neither endangered or threatened for the following reasons: (1) The species is extinct; (2) the species has recovered and is no longer endangered or threatened; and/or (3) the original scientific data used at the time the species was classified were in error. We conclude that the lesser-long nosed bat has recovered and no longer meets the definition of endangered or threatened under the Act.

Although most data related to lesser long-nosed bat roost counts and monitoring have not been collected in a way that is rigorous enough to draw statistically calculable conclusions about the trend of the population, the total numbers of bats observed at roost sites across the range of the lesser long-nosed bat are considered stable or increasing at nearly all roost sites being monitored based on the professional judgment of biologists and others involved in these efforts. The total number of bats currently documented is many times greater than the total number of bats documented at the time of listing in 1988. At the time of listing, there were estimated to be less than 500 lesser long-nosed bats in the United States; current estimates are greater than 100,000. Rangewide, at the time of listing, it was estimated that there were less than 1,000 lesser long-nosed bats. Current rangewide estimates are approximately 200,000 lesser long-nosed bats. While this may, in large part, reflect a better approach to survey and monitoring in subsequent years, it gives us better information upon which to evaluate the status of the lesser long-nosed bat population. This better information is related to the species' population and the number of roosts, and its distribution. Better information and increased efforts related to habitat protection (identification of roost sites and forage resources in planning efforts, implementation of protective measures for roosts and forage resources, increased awareness of habitat needs, etc.) have occurred and are planned to be implemented in the future, regardless of the listing status of this subspecies. This increased level of information and conservation, combined with the current state of its threats allow us to conclude that the subspecies is not in danger of extinction and is not expected to become endangered in the foreseeable future. Our thorough evaluation of the available data for occupancy, distribution, and threat factors, as well as the opinions of experts familiar with this subspecies, indicates a currently viable population status with a stable to increasing trend.

Predicting the future viability of the lesser long-nosed bat is somewhat more difficult than for species that occur in discrete, mostly consistent habitats (ponds, springs, specific soil types, etc.). The lesser long-nosed bat population is fluid and constantly adapts to changing environmental conditions over a large, bi-national range. Lesser long-nosed bat roost sites are discrete and consistent, but the lesser long-nosed bat may use these roost sites in a changing and adaptable manner to take advantage of ephemeral and constantly changing forage resources with both seasonal and annual differences of occurrence. Therefore, observations of occupancy and numbers of bats using these roosts may not be a complete or accurate representation of the status of the subspecies across its range. However, the information regarding the status of the lesser long-nosed bat population is much more accurate and complete than it was as the time of the 1988 listing rule.

The future viability of this subspecies is dependent on a number of factors. First, an adequate number of roosts in the appropriate locations is needed. As detailed in the SSA report, adequate roosts of all types (maternity, mating, transition, and migratory) currently exist and are likely to exist into the foreseeable future (USFWS 2016; p. 8–14). Second, sufficient available forage resources are located in appropriate areas, including in proximity to maternity roosts and along the ''nectar trail'' used during migration. The discussion above and the SSA report detail our analysis and determination that forage resources are adequate and that the lesser long-nosed bat is likely to adapt to any changes in forage availability in the future (USFWS 2016; p. 15–20). In addition, the SSA report analyses the contribution of current and future management of threats to the subspecies' long-term viability. The future viability of the lesser long-nosed bat will also depend on continued positive human attitudes towards the conservation of bats, implementation of conservation actions protecting roost sites and forage and migration resources, and implementation of needed research and monitoring will inform adaptive management that will contribute to the future viability of the lesser long-nosed bat population. The SSA report discusses the improved status of these issues across the range of the lesser long-nosed bat in much more detail (USFWS 2016; p. 43–46). The results of the SSA also indicate that the status of the lesser long-nosed bat has further improved in the years since the 2007 5-Year Review (FWS 2007).

Based on the analysis in the SSA report for the lesser long-nosed bat (USFWS 2016 and summarized above, the lesser long-nosed bat does not currently meet the Act's definition of endangered because it is not in danger of extinction throughout all of its range. Additionally, the lesser long-nosed bat is not a threatened species because it is not likely to become endangered in the foreseeable future throughout all of its range.

Significant Portion of the Range Analysis

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so throughout all or a significant portion of its range. Having determined that the lesser long-nosed bat is not endangered or threatened throughout all of its range, we next consider whether there are any significant portions of its range in which the lesser long-nosed bat is in danger of extinction or likely to become so. We published a final policy interpreting the phrase ''significant portion of its range'' (SPR) (79 FR 37578; July 1, 2014). The

final policy states that: (1) If a species is found to be endangered or threatened throughout a significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the Act's protections apply to all individuals of the species wherever found; (2) a portion of the range of a species is ''significant'' if the species is not currently endangered or threatened throughout all of its range, but the portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range; (3) the range of a species is considered to be the general geographical area within which that species can be found at the time the Service makes any particular status determination; and (4) if a vertebrate species is endangered or threatened throughout a significant portion of its range, and the population in that significant portion is a valid distinct population segment (DPS), we will list the DPS rather than the entire taxonomic species or subspecies.

The procedure for analyzing whether any portion is an SPR is similar, regardless of the type of status determination we are making. The first step in our analysis of the status of a species is to determine its status throughout all of its range. If we determine that the species is in danger of extinction, or likely to become endangered in the foreseeable future, throughout all of its range, we list the species as an endangered species or threatened species, and no SPR analysis will be required. If the species is neither in danger of extinction, nor likely to become so throughout all of its range, as we have found here, we next determine whether the species is in danger of extinction or likely to become so throughout a significant portion of its range. If it is, we will continue to list the species as an endangered species or threatened species, respectively; if it is not, we conclude that listing the species is no longer warranted.

When we conduct an SPR analysis, we first identify any portions of the species' range that warrant further consideration. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose in analyzing portions of the range that have no reasonable potential to be significant or in analyzing portions of the range in which there is no reasonable potential for the species to be endangered or threatened. To identify only those portions that warrant further consideration, we determine whether substantial information indicates that: (1) The portions may be ''significant''; and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.'' In practice, a key part of the determination that a species is in danger of extinction in a significant portion of its range is whether the threats are geographically concentrated in some way. If the threats to the species are affecting it uniformly throughout its range, no portion is likely to have a greater risk of extinction, and thus would not warrant further consideration. Moreover, if any concentration of threats apply only to portions of the range that clearly do not meet the biologically based definition of ''significant'' (*i.e.,* the loss of that portion clearly would not be expected to increase the vulnerability to extinction of the entire species), those portions would not warrant further consideration.

We identified portions of the lesser long-nosed bat's range that may be significant, and examined whether any threats are geographically concentrated in some way that would indicate that those portions of the range may be in danger of extinction, or likely to become so in the foreseeable future. Within the current range of the lesser long-nosed bat, some distinctions can be made between Mexico and the United States (international border, vegetation communities, etc.). While these geographic distinctions may be significant, our analysis indicates that the species is unlikely to be in danger of extinction or to become so in the foreseeable future in any geographic region within the range of the lesser long-nosed bat given that factors such as roost sites, forage resources, and migration pathways are well distributed across the entire range and that the status of the species is stable or increasing in both the United States and Mexico, with conservation actions being implemented to address ongoing threats. Therefore, we have not identified any portion of the range that warrants further consideration to determine whether they are a significant portion of its range.

We also evaluated representation across the lesser long-nosed bat's range to determine if certain areas were in danger of extinction, or likely to become so, due to isolation from the larger range. Ramirez (2011) investigated population structure of the lesser long-nosed bat through DNA sampling and analysis and reported that combined results indicated sampled individuals belong to single population including both the United States and Mexico. Consequently, individuals found in the northern migratory range (United States) and in Mexico should be managed as a single population.

Our analysis indicates that there is no significant geographic portion of the range that is in danger of extinction or likely to become so in the foreseeable future. Therefore, based on the best scientific and commercial data available, no portion warrants further consideration to determine whether the species may be endangered or threatened in a significant portion of its range.

Conclusion

We have determined that none of the existing or potential threats cause the lesser long-nosed bat to be in danger of extinction throughout all or a significant portion of its range, nor is the subspecies likely to become endangered within the foreseeable future throughout all or a significant portion of its range. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate that: (1) The species is extinct; (2) the species has recovered and is no longer endangered or threatened; or (3) the original scientific data used at the time the species was classified were in error. On the basis of our evaluation, we conclude that, due to recovery, the lesser long-nosed bat is not an endangered or threatened species. We therefore propose to remove the lesser long-nosed bat from the Federal List of Endangered and Threatened Wildlife at 50 CFR 17.11(h).

Effects of This Proposed Rule

This proposed rule, if made final, would revise our regulations at 50 CFR 17.11(h) by removing the lesser long-nosed bat from the Federal List of Endangered and Threatened Wildlife. The prohibitions and conservation measures provided by the Act, particularly through sections 7 and 9, would no longer apply to this subspecies. Federal agencies would no longer be required to consult with the Service under section 7 of the Act in the

event that activities they authorize, fund, or carry out may affect the lesser long-nosed bat. Because no critical habitat was ever designated for the lesser long-nosed bat, this rule would not affect 50 CFR 17.95. State laws related to the lesser long-nosed bat would remain in place and be enforced and would continue to provide protection for this subspecies. State and Federal laws related to protection of habitat for the lesser long-nosed bat, such as those addressing effects to caves and abandoned mines, as well as protected plant species such as columnar cacti and agaves, would remain in place and afford lesser long-nosed bat habitat some level of protection.

Post-Delisting Monitoring

Section 4(g)(1) of the Act requires the Secretary of Interior, through the Service and in cooperation with the States, to implement a system to monitor for not less than 5 years for all species that have been recovered and delisted. The purpose of this requirement is to develop a program that detects the failure of any delisted species to sustain populations without the protective measures provided by the Act. If, at any time during the monitoring period, data indicate that protective status under the Act should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing.

We will coordinate with other Federal agencies, State resource agencies, interested scientific organizations, and others as appropriate to develop and implement an effective post-delisting monitoring (PDM) plan for the lesser long-nosed bat. The PDM plan will build upon current monitoring techniques and research, as well as emerging technology and techniques. Monitoring will assess the species numbers, distribution, and threats status, as well as ongoing management and conservation efforts that have improved the status of this subspecies since listing. The PDM plan will identify, to the extent practicable and in accordance with our current understanding of the subspecies' life history measurable thresholds and responses for detecting and reacting to significant changes in the lesser long-nosed bat's populations, distribution, and persistence. If declines are detected equaling or exceeding these thresholds, the Service, in combination with other PDM participants, will investigate causes of these declines, including considerations of habitat changes, substantial human persecution, stochastic events, or any other significant evidence. The result of the investigation will be to determine if the lesser long-nosed bat warrants expanded monitoring, additional research, additional habitat protection, or resumption of Federal protection under the Act. The draft PDM plan will be made available for public comment in a future publication in the **Federal Register** and will be finalized concurrent with finalization of this rule.

Required Determinations

Clarity of the Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

If you feel we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. Therefore, we have and will solicit information from Native American Tribes during the comment period to determine potential effects on them or their resources that may result from the proposed delisting of the lesser long-nosed bat, and we will fully consider their comments on the proposed rule submitted during the public comment period.

References Cited

A complete list of all references cited in this rule is available on *http://www.regulations.gov,* or upon request from the Field Supervisor, Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this document are the staff members of the Arizona Ecological Services Field Office, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

§ 17.11 [Amended]

■ 2. Amend § 17.11(h) by removing the entry for ''Bat, lesser long-nosed'' under MAMMALS from the List of Endangered and Threatened Wildlife.

Dated: December 16, 2016.

Marty J. Kodis.

Acting Director, Fish and Wildlife Service

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[FR Doc. 2016–31408 Filed 1–5–17; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2016–0137; FXES11130900000 178 FF09E42000]

RIN 1018–BB89

Endangered and Threatened Wildlife and Plants; Reclassifying *Echinocereus fendleri* var. *kuenzleri* From Endangered to Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule and 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to reclassify *Echinocereus fendleri* var. *kuenzleri* (Kuenzler hedgehog cactus) from endangered to threatened under the Endangered Species Act of 1973, as amended (Act). After review of the best available scientific and commercial information, we find that reclassifying *E. fendleri* var. *kuenzleri* as threatened is warranted. This document also serves as our 12-month finding on a petition to reclassify *E. fendleri* var. *kuenzleri* as threatened. We request information and comments from the public regarding this proposed rule and our 12-month finding.

DATES: To ensure that we are able to consider your comments on this proposed rule, they must be received or postmarked on or before March 7, 2017. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by February 21, 2017.

ADDRESSES: *Written comments:* You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

http://www.regulations.gov. In the Search box, enter FWS–R2–ES–2016–0137, which is the docket number for this proposed rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. 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–2016–0137; Division of Policy, Performance, and Management Programs; U.S. Fish and Wildlife Service, MS: BPHC; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

We request that you send comments only by one of 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 Information Requested, below, for more information).

Copies of documents: This proposed rule and supporting documents are available on *http://www.regulations.gov.* In addition, the supporting file for this proposed rule will be available for public inspection, by appointment, during normal business hours, at the New Mexico Ecological Services Field Office, 2105 Osuna Road NE., Albuquerque, NM 87113; telephone 505–346–2525.

FOR FURTHER INFORMATION CONTACT: Wally Murphy, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Road NE., Albuquerque, NM 87113; telephone 505–761–2525; facsimile 505–346–2542. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Requested

Any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American Tribes, the scientific community, industry, or other interested parties concerning this proposed rule. The comments that will be most useful and likely to influence our decisions are those supported by data or peer-reviewed studies and those that include citations to, and analyses of, applicable laws and regulations. Please make your comments as specific as possible and explain the basis for them. In addition, please include sufficient information with your comments to allow us to authenticate any scientific or commercial data you reference or provide. In particular, we seek comments concerning the following:

(1) Reasons why we should or should not reclassify *Echinocereus fendleri* var. *kuenzleri* under the Act (16 U.S.C. 1531 *et seq.*).

(2) New biological or other relevant data concerning any threat (or lack thereof) to this plant and existing regulations that may be addressing these or any of the below threats.

(3) New information concerning the population size or trends of *E. fendleri* var. *kuenzleri.*

(4) New information on how *E. fendleri* var. *kuenzleri* responds to wildland and prescribed fire.

(5) New information on the current or planned activities within the range of *E. fendleri* var. *kuenzleri* that may adversely affect or benefit the plant.

(6) New information or data on the projected and reasonably likely impacts to *E. fendleri* var. *kuenzleri* or its habitat associated with climate change.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

Prior to issuing a final rule on this proposed action, we will take into consideration all comments and any additional information we receive. Such information may lead to a final rule that differs from this proposal. All comments and recommendations, including names and addresses, will become part of the administrative record.

You may submit your comments and materials concerning the proposed rule by one of the methods listed in **ADDRESSES**. Comments must be submitted to *http://www.regulations.gov* before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in **DATES**. Please note that comments posted to this Web site are not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publicly viewable until we post it, which might not occur until several days after submission.

If you mail or hand-deliver hardcopy comments that include 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. To ensure that the electronic docket for this rulemaking is complete and all comments we receive are publicly available, we will post all hardcopy submissions on *http://www.regulations.gov.*

In addition, comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection in two ways:

(1) You can view them on *http://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2016–0137, which is the docket number for this rulemaking.

(2) You can make an appointment, during normal business hours, to view the comments and materials in person at the U.S. Fish and Wildlife Service's New Mexico Ecological Services Field Office (see **ADDRESSES**).

Public Hearing

Section 4(b)(5)(E) of the Act provides for one or more public hearings on this proposed rule, if requested. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by the date shown in **DATES**. We will schedule public hearings on this proposal, if any are requested, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before the first hearing.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. A thorough review of information that we relied on in preparing this proposed rule—including information on taxonomy, genetics, life-history, ecology, population distribution and abundance, and potential threats from our recent 5-year review (Service 2016)—is available at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0137. The purpose of peer review is to ensure that decisions are based on scientifically sound data, assumptions, and analyses. A peer review panel will conduct an assessment of the proposed rule, and the specific assumptions and conclusions regarding the proposed reclassification from endangered to threatened (*i.e.,* ''downlisting''). This assessment will be completed during the public comment period.

We will consider all comments and information we receive during the comment period on this proposed rule as we prepare the final determination. Prior to issuing a final rule on this proposed action, we will take into consideration all additional information and comments that we receive. Such information may lead to a final rule that differs from this proposal.

Background

Found on slopes of sandy gravel and amid rocky outcrops in southern New Mexico, *Echinocereus fendleri* var. *kuenzleri* is a very small member of the cactus family (Cactaceae) that grows in Great Plains grassland, oak woodland, or pinon-juniper woodland within elevations of 1,600 to 2,000 meters (5,200 to 6,600 feet). Individuals may be single stemmed or branched; when branched, the stems are usually fewer than four, but may number as many as eight (Service 1985, p. 3). Stems are normally short-conical, about 15 centimeters (cm) (6 inches (in)) long and 10 cm (4 in) wide, with 9 to 12 ribs with prominent tubercles from which the spine clusters originate, and central spines are usually absent (Castetter *et al.* 1976, pp. 76–82, Service 1985, p. 3). Useful characteristics to distinguish the taxon from other cacti within its range are its few, contorted, white, chalky-textured spines and large, magenta flowers (Service 1985, p. 4). Fruits are bright red when mature, with black seeds. The cactus flowers in late May and fruits ripen in July, with flowering occurring after only when a cactus reaches 4 to 5 years of age. Like other rare cacti related to this genus, it is believed that *E. fendleri* var. *kuenzleri* is an obligate outcrosser (self-incompatible) that requires pollination for sexual reproduction (Tepedino 1998). Little is known about the pollinators of this cactus, but it most likely involves a range of nectar- seeking insects (Ferguson 1989, pp. 217–224).

When we originally listed this cactus in 1979, we were aware of only a single population of approximately 200 plants located on the east slope of the Sacramento Mountains in New Mexico (Chaves and Otero Counties) (44 FR 61924; October 26, 1979). When the recovery plan was adopted in 1985, the plant was known to exist in two locations with a total of fewer than 500 plants. It is now reasonable to estimate, based on recent surveys, that several thousand cacti exist within the known range of this taxon, with approximately 3,300 individuals observed within 11 known population centers since 1981, when more intensive surveys were initiated (Service 2005, entire; 2016, entire). Since 1979, the range of this plant has also been extended 10 miles to the west in Otero County, 40 miles north in Lincoln County (DeBruin 1993), and approximately 100 miles to the southeast (from its northwestern-most location in Lincoln County) into the Guadalupe Mountains of Eddy County. Numerous new locations within this range place it within the U.S. Department of Agriculture (USDA) -Forest Service and U.S. Department of the Interior (USDI)- Bureau of Land Management (BLM) jurisdictions as well on private and State lands. It has also been found on the west side of the Sacramento Mountains in Lincoln County (Knight 1999), and on USDA-Forest Service and USDI–BLM lands in the northern Guadalupe Mountains in Eddy and Otero Counties (Chauvin et al. 2001, Sivinski 1996). Populations are not continuous within this range, but are patchy, scattered, and rare.

Some have questioned the taxonomic status of *Echinocereus fendleri* var. *kuenzleri,* by considering it to be a synonym of the common and widespread *E. fendleri* var. *fendleri* (Anderson 2001, Zimmerman and Parfitt 2003). However, other assessments by local experts acknowledged that at the northwest edge of the cactus' range, within one of the 11 known populations, *E. fendleri* var. *kuenzleri* individuals occur along with the variety *E. fendleri* var. *fendleri* and intergradations between both varieties can be found (Rare Plant Technical Council of New Mexico 2005, Marron Associates 2000, entire; Baker 2007, entire). However, because the remaining 10 populations located more toward the center of *E. fendleri* var. *kuenzleri*'s known distribution exhibit consistently reliable traits unique to this variety, the cactus warrants future study to verify a change in its taxonomic status (Rare Plant Technical Council of New Mexico 2005). The full taxonomic history can be found in the recovery plan (Service 1985) with the most recent updates in the 5-year review (Service 2016, entire). Recent taxonomic review of the varieties of *Echinocereus fendleri* retained *kuenzleri* as a variety (Felix et al. 2014). Because of the limited area of introgression and the identification of consistently reliable traits unique to this variety, we do not believe a taxonomic change is warranted at this time.

For a detailed discussion of *Echinocereus fendleri* var. *kuenzleri*'s description, taxonomy, life history, habitat, soils, distribution, and abundance, and a discussion of the role of fire in the taxon's regeneration, please see the recovery plan (Service 1985, entire) and the 5-year reviews (Service 2005, entire; 2016, entire) available for review at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0137.

Previous Federal Actions

We proposed to list this plant, with the scientific name *Echinocereus hempelli,* as an endangered species under the Act on June 16, 1976 (41 FR 24524), because of threats from the great demand by private and commercial collectors, road maintenance and improvements, cattle grazing, and real

estate development. We published a final rule listing the plant, with the scientific name *Echinocereus kuenzleri,* as an endangered species in the **Federal Register** on October 26, 1979 (44 FR 61924). We finalized a recovery plan for the plant, with the scientific name *Echinocereus fendleri* var. *kuenzleri,* in March 1985 (Service 1985).

Under the Act, we maintain the Lists of Endangered and Threatened Wildlife and Plants at 50 CFR 17.11 (for wildlife) and 17.12 (for plants) (Lists). We amend the Lists by publishing final rules in the **Federal Register**. Section 4(c)(2)(A) of the Act requires that we conduct a review of listed species at least once every 5 years. Section 4(c)(2)(B) requires that we determine: (1) Whether a species no longer meets the definition of endangered or threatened and should be removed from the Lists (delisted), (2) whether a species listed as endangered more properly meets the definition of threatened and should be reclassified to threatened (''downlisted''), or (3) whether a species listed as threatened more properly meets the definition of endangered and should be reclassified to endangered (''uplisted''). In accordance with 50 CFR 424.11(d), using the best scientific and commercial data available, we will delist a species if the data substantiate that the species is neither endangered nor threatened for one or more of the following reasons: (1) The species is considered extinct; (2) the species is considered recovered; or (3) the original data available when the species was listed, or the interpretation of such data, were in error. On July 21, 2004, we published a notice (69 FR 43621) announcing that we were conducting a 5-year review of the status of *E. fendleri* var. *kuenzleri* under section 4(c)(2) of the Act. In that notice, we requested that the public provide us any new information concerning this plant. The 5-year review, completed on June 7, 2005 (Service 2005), resulted in a recommendation to change the status of this cactus from endangered to threatened. The 2005 and 2016 5-year reviews for *E. fendleri* var. *kuenzleri* are available on the Service's Environmental Conservation Online System (ECOS) (*https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=Q1VW*).

On July 16, 2012, we received a petition dated July 11, 2012, from The Pacific Legal Foundation, Jim Chilton, the New Mexico Cattle Growers' Association, New Mexico Farm & Livestock Bureau, New Mexico Federal Lands Council, and Texas Farm Bureau requesting the Service to reclassify *Echinocereus fendleri* var. *kuenzleri* from endangered to threatened. The petition was based on the analysis and recommendations contained in the most recent 5-year review for this taxon. On September 9, 2013 (78 FR 55046), we published in the **Federal Register** a 90-day finding for the 2012 petition to reclassify *E. fendleri* var. *kuenzleri.* In our 90-day finding, we determined the 2012 petition provided substantial information indicating the petitioned actions may be warranted, and we initiated a status review for *E. fendleri* var. *kuenzleri.* This proposed downlisting rule constitutes the 12-month finding and our 5-year status review for *E. fendleri* var. *kuenzleri.*

Recovery and Recovery Plan Implementation

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. Under section 4(f)(1)(B)(ii), recovery plans must, to the maximum extent practicable, include objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of section 4 of the Act, that the species be removed from the List. However, revisions to the List (adding, removing, or reclassifying a species) must reflect determinations made in accordance with sections 4(a)(1) and 4(b) of the Act. Section 4(a)(1) requires that the Secretary determine whether a species is endangered or threatened (or not) because of one or more of five threat factors. Section 4(b) of the Act requires that the determination be made ''solely on the basis of the best scientific and commercial data available.'' Therefore, recovery criteria should indicate when a species is no longer an endangered species or threatened species because of any of the five statutory factors.

Thus, while recovery plans provide important guidance to the Service, States, and other partners on methods of minimizing threats to listed species and measurable objectives against which to measure progress towards recovery, they are not regulatory documents and cannot substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. A decision to revise the status of or remove a species from the Federal List of Endangered and Threatened Plants (50 CFR 17.12) is ultimately based on an analysis of the best scientific and commercial data then available to determine whether a species is no longer an endangered species or a threatened species, regardless of whether that information differs from the recovery plan.

In 1985, we finalized a recovery plan for *E. fendleri* var. *kuenzleri* but it provides no delisting criteria (Service 1985). The recovery plan states that *E. fendleri* var. *kuenzleri* could be reclassified to threatened status when existing natural populations are increased to approximately 5,000 individual plants and when that population level is maintained for a period of 5 consecutive years (downlisting criterion 1) (Service 1985, p. iii). The second downlisting criterion is based on the need for the Service to develop policy for propagated cacti and the introduction of 10,000 artificially propagated *E. fendleri* var. *kuenzleri* into the commercial market to counter the threat at that time of collection.

The first criterion was intended to address the point at which imminent threats to the plant had been ameliorated so that the populations were no longer in immediate risk of extirpation. Estimated abundance of individuals in all populations has changed over time, from approximately 200 individuals at the time of listing in 1979, to multiple populations with more than 3,300 individuals (Service 2005, p. 4; Service 2016, pp. 3–4). We believe there are likely more than 3,300 individuals across the range of *E. fendleri* var. *kuenzleri* because the difficulty in locating nonflowering plants and the lack of survey efforts in the entire suitable habitat limit the ability to observe many of these cacti potentially growing in areas of suitable habitat.

Currently, *E. fendleri* var. *kuenzleri* occurs in 11 unique population clusters defined by occupied locations separated by several miles of unsuitable or unoccupied habitats. According to data maintained by Natural Heritage New Mexico, approximately 97 percent of known *E. fendleri* var. *kuenzleri* individuals occur on lands managed by either the USDA-Forest Service (FS) or USDI–BLM (2016). There are two populations in the Guadalupe Mountains (mid-range and north range), eight populations in the Sacramento Mountains (north of Carrizozo), and one population in the lower hills of the Guadalupe Mountains, east of the Sacramento range (Service 2005, p. 5; Service 2016, pp. 3–4). Based on this information, this plant is much more numerous than originally determined and is distributed over a broader area.

The second criterion is for the Service to develop policy for commercial propagation and to introduce 10,000 propagated individuals into the commercial market. *Echinocereus*

fendleri var. *kuenzleri* is now readily available on the open market from commercial growers with Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) certificates (see *https://www.cites.org* for additional information on CITES). Local populations, especially near the type locality (location where the species was first identified), may continue to be impacted by occasional poaching from growers and hobbyists; however, at this time, this taxon is unlikely to be seriously threatened in most of its range by cactus collectors, because of availability from commercial growers. Thus, collection is no longer considered a major threat to this cactus and this second criterion is no longer relevant.

Various studies have occurred since development of the recovery plan that aid in our understanding of the status of *Echinocereus fendleri* var. *kuenzleri.* For example:

- Recent surveys indicate that *E. fendleri* var. *kuenzleri* is broadly distributed within its range, plant density can vary from location to location, and populations may be more dynamic than they were expected to be. For example, at Ft. Stanton, the population demonstrated a shift from inside of the survey plot to establishment outside of the survey plot. (Chauvin et al. 2012, entire; Muldavin et al. 2013, entire).
- May et al. (2008, p. 170) found *E. fendleri* var. *kuenzleri* was distributed randomly with respect to other vegetation and did not support the hypothesis that it is associated with vegetation that provides thermal protection.
- Both Baker (2007, entire) and Felix et al. (2014, p. 64) found morphological characters than differentiate this taxon from other similar taxa.
- Sivinski (2007, p. 93) found that wildfire can cause high mortality in this cactus, and it was slow to recover, with first flowering occurring at between four to five years after seedlings germinated.
- May (2006, entire) and Wester and Britton (2007, p. 11) found that prescribed fire had little effect on *E. fendleri* var. *kuenzleri* under low fuel loads and that prescribed, low intensity fire could be used to lower fuel loads, reducing the risk of catastrophic wildfires.

These and other data that we have analyzed indicate that most threats identified at listing and during the development of the recovery plan are reduced in areas occupied by *E. fendleri* var. *kuenzleri* and that the status of the cactus has improved, primarily due to finding additional populations over a broader range. However, more recent threats associated with fire regime alteration, the lack of a comprehensive habitat management plan, drought, and climate change effects may impede the plant's ability to recover.

Summary of Factors Affecting *E. fendleri var. kuenzleri*

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing species on, reclassifying species on, or removing species from the Lists of Endangered and Threatened Wildlife and Plants. The term ''species'' includes ''any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16)). A species may be determined to be an endangered species or threatened species because of any one or a combination of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or man-made factors affecting its continued existence. A species may be reclassified on the same basis.

Determining whether the status of a species has improved to the point that it can be reclassified from endangered to threatened (''downlisted'') requires consideration of whether the species is endangered or threatened because of the same five categories of threats specified in section 4(a)(1) of the Act. For species that are already listed as endangered or threatened, this analysis of threats is an evaluation of both the threats currently facing the species and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting and the removal of the Act's protections.

A species is an ''endangered species'' for purposes of the Act if it is in danger of extinction throughout all or a significant portion of its range and is a ''threatened species'' if it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The word ''range'' in the significant portion of its range phrase refers to the range in which the species currently exists. For the purposes of this analysis, we first evaluate the status of *Echinocereus fendleri* var. *kuenzleri* throughout all of its range, then consider whether this cactus is in danger of extinction or likely to become so in any significant portion of its range.

At the time of listing, the primary threats to *E. f.* var. *kuenzleri* were private and commercial collection, road improvement and maintenance, real estate development, and livestock grazing (44 FR 61924; October 26, 1979). By the time the recovery plan was developed in 1985, the same threats were still considered relevant (Service 1985, pp. 8–12). Subsequently, we conducted 5-year status reviews that included an analysis of factors that affect the plant (Service 2005, pp. 12–14; Service 2016, p. 5). The 2005 5-year status review found that the threat of habitat loss from road improvement and maintenance and real estate development (Factor A), and a direct threat from commercial collection (Factor B) have decreased since the time of listing, and are no longer considered significant threats. Livestock grazing (Factor C), continues to be a threat by trampling, only if areas are improperly managed and cattle are aggregated in areas where the cacti are growing. The 2005 review also identified an additional threat of fire based on the alteration of the natural fire regime (Service 2005). The 2016 5-year status review added the threats of drought and effects due to climate change because drought has impacted several populations and the long-term trend in the range of the cactus is one of increased temperatures and drying (Service 2016).

Recommendations to address the impacts of these emerging threats, including a long-term monitoring plan for *Echinocereus fendleri* var. *kuenzleri,* should be developed to further understand how these threats affect the long-term viability of the taxon.

Habitat Loss—Road Construction and Maintenance, Residential Development

Habitat loss by road construction and maintenance and through residential development is negligible in the area occupied by *Echinocereus fendleri* var. *kuenzleri.* Where road construction has occurred in occupied areas, individual cacti have been avoided or mitigation has been provided (Marron Associates 2013, entire). If this proposed rule is adopted, this avoidance would likely continue because *Echinocereus fendleri* var. *kuenzleri* would remain listed as threatened. Residential development has not been a threat due to the preference of the plant to grow in dry, rugged locations not favored for development. More importantly, the majority of the populations discovered after the recovery plan was written are

found on federally managed lands that are not likely to be developed.

Livestock Grazing

Grazing at low intensity stocking rates can be compatible with the presence of *Echinocereus fendleri* var. *kuenzleri,* primarily because the cactus tends to be found in rocky outcrops amid rugged locations, although minimal trampling can occur. Areas on USDA-Forest Service and USDI–BLM lands have fenced out livestock to effectively protect the cactus in strategic locations. Additionally, federal grazing allotment permits are evaluated for renewal at least every 10 years and grazing impacts analysis is part of the permit review. Permits can be reviewed sooner to meet management goals. During this review, livestock numbers can be adjusted to achieve conservation goals. Each range improvement (*e.g.,* water pipeline, fence, livestock water) on Federal surface is evaluated for impacts to special status species including endangered and threatened species. Each agency uses project-specific conservation measures to avoid impacts to *E. fendleri* var. *kuenzleri.*

Private and Commercial Collection

As mentioned previously, the collection of *Echinocereus fendleri* var. *kuenzleri* is uncommon at this time, due to the legal availability of the cactus in the commercial market. Certified commercial growers have *Echinocereus fendleri* var. *kuenzleri* readily available on the open market in accordance with CITES.

The following sections provide a summary of the current threats impacting *Echinocereus fendleri* var. *kuenzleri* now and those that may occur in the foreseeable future. These threats include alteration of the fire regime (Factors A and E), drought (Factors A and E), effects due to climate change (Factors A and E), and the effect of any existing regulatory mechanisms (Factor D) or conservation efforts that are ameliorating these impacts.

Fire Regime Alteration

Both arid grasslands and pinyon-juniper savanna, where *E. f.* var. *kuenzleri* occurs, had short-interval fire frequency historically (Payson et al. 2000, p. 122; Gebow and Halverson 2005, p. 4). The fire frequency interval has been extended by fire suppression and grazing (Payson et al. 2000, pp. 126, 132; Gebow and Halverson 2005, p. 4). Livestock grazing reduces the total amount of fine fuels (grasses) that would otherwise carry wild fire across a landscape, thus, extending the period between hotter, more damaging fire events. Use of prescribed fire as a management tool has been growing and is currently implemented to restore grasslands and savannas that have been impacted by historical fire suppression and grazing (Knapp et al. 2009, p. 1). Fires, whether wild or prescribed, within the grassland habitats of *Echinocereus fendleri* var. *kuenzleri* can have impacts to the cactus (Sivinski 2007, entire), such as slowing recovery and lessening the cactus' ability to withstand a short-interval fire frequency. The cactus typically undergoes about four to five years of slow growth before individuals are able to flower and set seed, so recolonization after a fire can take many years (Sivinski 2007, p. 4). However, Wester and Britton (2007, p. 11) found no evidence that the plant was negatively affected by prescribed fire, although high fuel loads did increase individual mortality. This suggests that prescribed burns in *Echinocereus fendleri* var. *kuenzleri* habitat could be designed to remove fuel loads without causing direct mortality associated with wildfire (May 2006, p. 44). While we originally believed that fire would negatively impact the *Echinocereus fendleri* var. *kuenzleri,* we now believe that active management, including the use of low intensity prescribed fire at longer frequencies, could restore the landscape to a natural fire frequency interval, reducing the likelihood of catastrophic wild fires, and thus, reducing impacts on the cactus when fire does occur. Because the cactus is capable of reproducing from seed, but reestablishment of populations may take considerable time, fire frequencies between 25 and 50 years have been recommended (Sivinski 2007, Muldavin 2012) to achieve the best population sustainability. A comprehensive habitat management plan should be developed to ensure that the use of fire is coordinated to optimize conditions for *Echinocereus fendleri* var. *kuenzleri.*

Drought

During 11 of the last 15 years (2001–2015), there has been moderate to exceptional drought conditions in the area where *Echinocereus fendleri* var. *kuenzleri* occurs, with 10 percent of the time in exceptional drought (National Drought Mitigation Center 2015, Four County Data). The 2002–2003 drought spanned all of southwestern North America and was anomalously dry with unusually high temperatures (Breshears et al. 2005, pp. 15, 144); similar conditions occurred in 2011–2013.

Echinocereus fendleri var. *kuenzleri* has likely experienced and rebounded from periods of drought in the past. However, should substantial effects due to climate change materialize with increased severity and frequency of drought, it would likely reduce the long-term survivorship of this cactus. Drought is also directly related to *Echinocereus fendleri* var. *kuenzleri* population health with regard to reproduction and establishment. As with many cactus species, seed germination and seedling survival is dependent on precipitation (Jordan and Nobel 1981, p. 905). Little is known about the *Echinocereus fendleri* var. *kuenzleri* seedbank. Even if seedbanks exist and persist, adequate precipitation during the seedling's first year of growth is essential for survival (Roller 1996a, p. 38). In studies of seed germination in similar cacti, Roller (1996a, p. 77) found that on average 88 percent of all seed produced during the summer monsoon season germinated; however, only a small portion of the seedlings survived. Surveys show few seedlings and young juvenile plants among the *Echinocereus fendleri* var. *kuenzleri* population survive (*e.g.* Ecosphere Environmental Services Inc. 1995, pp. 17–21; Schmalzel 2000d, p. 5; Baker 2011, pp. 5–7). Heat stress in adult cacti is minimal compared to other plant species, as they are able to survive heat stress due to both morphology and metabolism (Smith et al. 1984, pp. 647, 650; Wahid et al. 2007, p. 199). Extreme temperatures can, however, negatively impact seedling survival in many desert-adapted plants, and drought coupled with high temperatures lessens temperature tolerance in seedlings (Nobel 1984, pp. 310, 316). Finally, plants that are already stressed from prolonged drought are more susceptible to insect attack and disease. Without sufficient monitoring in place to assess *Echinocereus fendleri* var. *kuenzleri's* demographic responses and population trends, the severity of the threat of drought can only be surmised based on other cacti and other drought research.

Climate Change

Based on the unequivocal evidence of warming of the earth's climate from observations of increases in average global air and ocean temperatures, widespread melting of glaciers and polar ice caps, and rising sea levels recorded in the Intergovernmental Panel on Climate Change Report (IPCC 2007a, entire; 2013, entire), effects due to climate change are now a consideration for Federal agency analysis (Government Accounting Office 2007, entire). The Service will incorporate climate change into our decision making under the Act (Service 2010, entire). The earth's surface has warmed by an

average of 0.74 degrees Celsius (°C) (1.3 degrees Fahrenheit (°F)) during the 20th century (IPCC 2007b, p. 30). The IPCC (2013, p. 7) projects that there will very likely be an increase in the frequency of hot extremes, heat waves, and heavy precipitation events as a result of climate change.

This global climate information has been downscaled to our region of interest, and projected into the future under two different scenarios of possible emissions of greenhouse gases (Alder and Hostetler 2014, p. 2). Climate projections for the cactus area include a 5 to 6 percent increase in maximum temperature (up to 4 °C (7.2 °F)), an 11 percent decrease in precipitation, and a 25 percent increase in evaporative deficit over the next 25 years (National Climate Change Viewer, Four County Data, *http://www2.usgs.gov/climate_landuse/clu_rd/nccv/viewer.asp,* accessed May 15, 2016).

Effects due to climate change also include an increase in atmospheric carbon dioxide, which is commonly associated with increased temperatures and the greenhouse effect. This increased carbon dioxide directly affects plant photosynthesis (Huxman and Scott 2007, p. 28). At the plant level, adapting to drought involves the ability to balance carbon sequestration (the uptake and storage of carbon) and carbon respiration (efflux back into the atmosphere), while also maintaining sustainable evapotranspiration rates (Huxman and Scott 2007, p. 28). Adaptation would also require a plant to change its phenology (timing of life cycle events) to coincide successfully with extreme shifts in temperature, precipitation, and soil moisture (Walther et al. 2002, p. 389), which are all part of the evapotranspiration equation. The potential for rapid climate change, which is predicted for the future, could pose significant challenges for plants because they may not be able to adjust their phenology or photosynthetic mechanisms quickly enough.

Cacti have a unique photosynthetic pathway referred to as crassulacean acid metabolism (CAM), which is most effective in low soil moisture, intense sunlight, and high daytime temperature conditions, and is considered to be a desert adaptation (Nefzaoui et al. 2014, p. 121). CAM plants may have an advantage under these drier condition scenarios due to the effects of climate change (Reyes-Garcia and Andrade 2009, p. 755). If atypical cactus mortality occurs, this could be evidence that a climatic severity threshold may have been crossed even for this well-adapted CAM plant.

Munson et al. (2013, p. 2,030) forecasts declines in vegetative cover including cacti in Chihuahuan Desert habitats due to climate change. This is because growing seasons are becoming longer and warmer and in many regions (Kunkel 2013, p. 1) including the Southwest (Cayan et al. 2001, p. 399; Easterling 2002, p. 1329) due to the effects of climate change. This trend of longer and warmer growing seasons is projected to continue in the current climate change assessments. Earlier soil moisture stress would result in decreased flowering and reproduction for *Echinocereus fendleri* var. *kuenzleri.* Based on the limited distribution of this cactus, we consider drought and climate change an ongoing, yet not imminent, threat to *Echinocereus fendleri* var. *kuenzleri.*

Combination of Threats

When stressors occur together, one may exacerbate the effects of another, causing effects not accounted for when stressors are analyzed individually. Synergistic or cumulative effects may be observed in a short amount of time or may not be noticeable for years into the future, and could affect the long-term viability of *Echinocereus fendleri* var. *kuenzleri* populations. Livestock grazing interacts with the effect of natural fire frequency within *Echinocereus fendleri* var. *kuenzleri* habitats. Removal of fine fuels by grazing animals reduces the ability of a fire to start and carry through the landscape. Land managers have in the past followed an aggressive wildfire suppression program. The result is a disruption of the natural fire regime and an increase of woody vegetation in grassland and savanna habitats. Land managers presently see the need to reintroduce low intensity fire into these habitats for the purpose of restoring grasslands and increasing forage for livestock production. Impacts of these interacting processes to *E. fendleri* var. *kuenzleri* can be variable, and will need to be studied and management will be needed to provide the best outcome for the cactus.

Another threat combination can occur between drought, climate change effects, and predation. Although predation has not been a monitored factor for *Echinocereus fendleri* var. *kuenzleri,* in the case of other native small cacti, evidence of increased herbivory of adult cacti and seedlings by insect and mammalian predators has been observed during drought, most likely due to increases in thirst and decreases in other available forage. Rodents consume cacti for water, especially in times of drought (Riegel 1941, p. 96; Orr et al. 2015, p. 1058). Herbivory of cacti can also increase following damage to protective spines, such as post-fire. The rate of insect herbivory may increase due to warmer winters in recent decades (Rutman 2007, p. 6). Cacti already stressed from prolonged drought are more susceptible to insect attack and disease, which can cause declines in cactus populations.

Overall Summary of Factors Affecting E. fendleri var. kuenzleri

Alterations to the fire regime, including implementation of agency guidance to suppress wildland fires and changes to livestock grazing strategies, are likely the most immediate threatening factors to *Echinocereus fendleri* var. *kuenzleri* at this time. Staff at BLM and Fort Stanton are actively managing to keep fire from directly impacting *Echinocereus fendleri* var. *kuenzleri* individuals during prescribed burns. They are also implementing projects to remove pinyon and juniper trees thereby reducing heavy fuel loads. This management is expected to continue into the future. Increased emphasis on prescribed fire could mimic the natural historical fire regime and reduce the likelihood of damaging wildland fire in heavy fuel load areas. A comprehensive management plan that would guide standardized monitoring and address protection of the cactus for future prescribed fire programs may best be implemented after a species status assessment is conducted for *E. f.* var. *kuenzleri,* when more collaborators combine ideas of best adaptive management. This management plan will prove useful in addressing the remaining threats to the cactus.

The effects of climate change may cause extended periods of drought and alter blooming seasons, thus reducing the chances of successful reproduction cycles. Due to the rugged locations of occupied habitats, impacts from surface development (road building and maintenance, urban development) are not considered major threats to the existence of *Echinocereus fendleri* var. *kuenzleri.* Collection of *Echinocereus fendleri* var. *kuenzleri* is no longer considered a major threat due to successful propagation in legal cactus trade and commercial availability of this cactus. In addition, taxonomic uncertainties have been resolved at a regional level.

Finding

The determination of whether a species is endangered or threatened under the Act is based on whether a species is in danger of extinction or likely to become so because of any of five factors: (A) The present or

threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. As required by section 4(a)(1) of the Act, we conducted a review of the status of this plant and assessed the five factors to evaluate whether *Echinocereus fendleri* var. *kuenzleri* is endangered or threatened throughout all of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by this cactus. We reviewed information presented in the 2012 petition, information available in our files and gathered through our 90-day finding in response to this petition, and other available published and unpublished information.

In considering factors that might constitute threats to a species, we must look beyond the exposure of the species to a factor to evaluate whether the species responds to the factor in a way that causes impacts to the species or is likely to cause impacts in the future. If a species responds negatively to such exposure, the factor may be a threat and, during the status review, our aim is to determine whether impacts are or will be of an intensity or magnitude to place the species at risk. The factor is a threat if it drives, or contributes to, the risk of extinction of the species such that the species warrants listing as an endangered or threatened species as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely affected could suffice. In sum, the mere identification of factors that could affect a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors act on the species to the point that the species meets the definition of an endangered or threatened species.

The known range of *Echinocereus fendleri* var. *kuenzleri* consisted of a single population of approximately 200 individuals when we listed it as endangered. As such, it was perceived to be upon the brink of extinction. The most serious threat to such a small population would be the elimination of plants in the wild by commercial and hobbyist collectors. Subsequent information on the range and abundance of this cactus has significantly altered this perception. In reality, *Echinocereus fendleri* var. *kuenzleri* exists across a much broader geographic range in several populations. Increased survey efforts and habitat model development have resulted in more occupied habitat identified, leaving open the potential of finding even more *Echinocereus fendleri* var. *kuenzleri* plants. Protection under the Act and CITES has curtailed unauthorized take by collectors. Dry conditions and remote growing locations of *Echinocereus fendleri* var. *kuenzleri* have lessened the impacts of land use within occupied habitats, and most of these habitats have been determined to exist on Federal lands. Thus, threats of collection and development have been diminished. Therefore, *Echinocereus fendleri* var. *kuenzleri* is no longer in danger of extinction now. Although now known to be more widespread and abundant than previously thought, *Echinocereus fendleri* var. *kuenzleri* remains a relatively rare plant taxon. It occurs only on the lower slopes of Sacramento and Guadalupe Mountain ranges and is an uncommon plant within this limited geographic range. Populations are generally small and scattered, and some habitat that appears suitable is presently unoccupied. Threats remain related to its limited population numbers and distribution, to wild or prescribed fires, and to trampling and erosion from livestock grazing and fire. However, because nearly all of known occupied habitat falls on lands managed by Federal agencies, conservation of the species will continue by addressing potential fire and grazing threats.

The recently published taxonomic determinations of *Echinocereus fendleri* var. *kuenzleri* status represent broad-brushed approaches that may not adequately address local variation. To establish the taxonomic status of *Echinocereus fendleri* var. *kuenzleri,* surveys are needed to determine the extent of interbreeding at the northern edge of the range and molecular research is needed to determine the genetic variation within *E. fendleri.* The controversy and lack of definitive data regarding the taxonomy of *Echinocereus fendleri* var. *kuenzleri,* combined with the limited distribution and actual population numbers, preclude a recommendation to delist based on taxonomic revision at this time.

As a result of recent information, we know that there are 11 known populations of *Echinocereus fendleri* var. *kuenzleri* compared to only 2 that were known at the time of listing and these individuals are spread across a 100 miles of rocky, isolated habitat patches. Significant impacts at the time of listing such as over collection and residential development that could have resulted in the extirpation of all or parts of populations have been eliminated or reduced since listing. We conclude that the previously recognized impacts to *E. fendleri* var. *kuenzleri* from present or threatened destruction, modification, or curtailment of its habitat or range (specifically, residential development, road maintenance) (Factor A); overutilization for commercial, recreational, scientific, or educational purposes (Factor B); disease or predation (Factor C); and other natural or manmade factors affecting its continued existence (specifically, reproductive isolation) (Factor E) do not rise to a level of significance, either individually or in combination, such that the species is in danger of extinction now. However, there continues to be concern about the long term impacts of drought, catastrophic wildfire, and effects due to climate change throughout the range of the species. Climate change data indicate an increase in temperature and a decrease in precipitation within the occupied *Echinocereus fendleri* var. *kuenzleri* range over the next 25 years. We anticipate that effects due to climate change, fire, and increased drought, and the compounding effects of these threats, including any associated threats such as increased herbivory and predation, are anticipated to impact all of the populations. However, none of these is an imminent threat or at a magnitude such that the taxon warrants endangered status. We conclude that these same factors support the status of threatened, as the cactus is still likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

In conclusion, we have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by *Echinocereus fendleri* var. *kuenzleri.* After review of the information pertaining to the five factors, we find that the ongoing threats are not of sufficient imminence, intensity, or magnitude to indicate that *E. fendleri* var. *kuenzleri* is presently in danger of extinction throughout all of its range. Yet, due to threats with ongoing impacts, we find that *E. fendleri* var. *kuenzleri* is likely to become an endangered species within the foreseeable future throughout all of its range.

Significant Portion of the Range Analysis

On July 1, 2014, we published a final policy interpreting the phrase ''significant portion of its range'' (SPR) (79 FR 37578). The SPR policy is

applied to all status determinations, including analyses for the purposes of making listing, delisting, and reclassification determinations. The procedure for analyzing whether any portion is an SPR is similar, regardless of the type of status determination we are making. The first step in our analysis of the status of a species is to determine its status throughout all of its range. If we determine that the species is in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range, we list the species as an endangered or threatened species and no SPR analysis will be required. Because we are proposing to reclassify the listing status of *E. f.* var. *kuenzleri* as a threatened species under the Act, we are not conducting an SPR analysis for this taxon.

Effects of This Rule

If this proposed rule is made final, it would revise 50 CFR 17.12(h) to reclassify *Echinocereus fendleri* var. *kuenzleri* from endangered to threatened on the List of Endangered and Threatened Plants. However, this reclassification does not significantly change the protections afforded this plant under the Act. Pursuant to section 7 of the Act, all Federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of *Echinocereus fendleri* var. *kuenzleri.* The prohibitions of section 9 of the Act only apply directly to endangered species. However, the Service has extended most of these prohibitions to threatened plants through 50 CFR 17.71. The Act allows for the promulgation of a rule under section 4(d) that modifies the standard protections for threatened plants (found at 50 CFR 17.71); however no such rule is proposed here. In light of this, the prohibitions of 50 CFR 17.71 will apply for this species.

As applicable, recovery actions directed at *Echinocereus fendleri* var. *kuenzleri* will continue to be implemented as outlined in the recovery plan for this taxon (Service 1985, entire). One of the primary actions will be to develop a species status assessment, upon which we will base a revised recovery plan with delisting criteria for the cactus. Section 4(b)(6)(C) of the Act (16 U.S.C. 1533(b)(6)(C)) requires critical habitat to be designated concurrently with a final reclassification rule, unless it is not prudent or determinable. We will determine if critical habitat is prudent and determinable, and publish proposed critical habitat as necessary.

Required Determinations

Clarity of the Rule

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

(a) Be logically organized;

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

(c) Use clear language rather than jargon;

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

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the names of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act

We determined we do not need to prepare an environmental assessment or an environmental impact statement, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited in this proposed rule is available on the Internet at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0137 or upon request from the Field Supervisor, New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary author of this proposed rule is the Southwest Regional Office in Albuquerque, New Mexico, in coordination with the New Mexico Ecological Services Field Office in Albuquerque, New Mexico (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

■ 2. Amend § 17.12(h) by revising the entry for ''*Echinocereus fendleri* var. *kuenzleri*'' under FLOWERING PLANTS in the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
FLOWERING PLANTS.				
*	*	*	*	*
Echinocereus fendleri var. *kuenzleri.*	Kuenzler hedgehog cactus.	Wherever found	T	44 FR 61924, 10/26/1979; [**Federal Register** citation of the final rule].
*	*	*	*	*

Dated: December 22, 2016.

James W. Kurth,

Acting Director, Fish and Wildlife Service.

[FR Doc. 2016–31763 Filed 1–5–17; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register
Vol. 82, No. 4
Friday, January 6, 2017

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

DEPARTMENT OF AGRICULTURE

Forest Service

Information Collection; Significant Cave Nomination

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on a new information collection, Significant Cave Nominations under the Federal Cave Resources Protection Act (FCRPA).

DATES: Comments must be received in writing on or before March 7, 2017 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to Johanna Kovarik, Minerals and Geology Management, 740 Simms Street, Golden, CO 80401. Comments also may be submitted via facsimile to (303) 275–5122 or by email to: *jkovarik@fs.fed.us.* The public may inspect comments received at 740 Simms Street, Golden, CO 80401 during normal business hours. Visitors are encouraged to call ahead to facilitate entry to the building by calling (303) 275–5350.

FOR FURTHER INFORMATION CONTACT: Johanna Kovarik, Minerals and Geology Management, 303–275–5378. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 twenty-four hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Title: Significant Cave Nomination.

OMB Number: 0596–New.

Expiration Date of Approval: Not applicable, new request.

Type of Request: New.

Abstract: The information covered in this request applies to caves on Federal lands administered by the Department of Agriculture, U.S. Forest Service. The U.S. Forest Service, in accordance with the FCRPA, collects information from appropriate private sector interests, including ''cavers,'' in order to update a list of significant caves that are under the jurisdiction of the agencies listed above. The U.S. Forest Service also processes requests for confidential information regarding significant caves. While the FCRPA does not define what ''significant'' means, it does require the Secretaries of Agriculture and Interior to issue regulations that define criteria for identification of significant caves. This criteria can be found at 36 CFR 290.3. This information enables the U.S. Forest Service to comply with the FCRPA (16 U.S.C. 4301–4310).

Estimate of Annual Burden per Response: 11 hours.

Type of Respondents: Individuals and Households.

Estimated Annual Number of Respondents: 10.

Estimated Annual Number of Responses per Respondent: One.

Estimated Total Annual Burden on Respondents: 110.

Comment is Invited:

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the 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 the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission request toward Office of Management and Budget approval.

Dated: December 22, 2016.

Glenn Casamassa,

Associate Deputy Chief, National Forest System.

[FR Doc. 2017–00061 Filed 1–5–17; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Availability of the Atlantic Coast Pipeline Project and Supply Header Project Draft Environmental Impact Statement and the Forest Service Draft of Associated Land and Resource Management Plan Amendments

AGENCY: Forest Service, USDA.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 (NEPA), as amended; the Federal Land Policy and Management Act of 1976, as amended; and the National Forest Management Act of 1976 (NFMA), as amended; the Forest Service (FS), U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (USACE), U.S. Fish and Wildlife Service (FWS) Great Dismal Swamp, West Virginia Division of Natural Resources (WVDNR), and West Virginia Department of Environmental Protection (WVDEP) have participated as cooperating agencies with the Federal Energy Regulatory Commission (FERC) in the preparation of the Atlantic Coast Pipeline (ACP) and Supply Header Project (SHP) Draft Environmental Impact Statement (EIS). The Draft EIS addresses: (1) The impacts of these projects, (2) the associated draft amendments to the Land and Resource Management Plans (LRMPs) for the Monongahela National Forest (MNF) and George Washington National Forest (GWNF), and (3) the proposal for authorization from the Forest Service to construct, operate, maintain, and eventually decommission a natural gas transmission pipeline that crosses National Forest System (NFS) lands. With this agency-specific Notice of Availability, the FS is announcing the opening of the FERC comment period. Comments submitted to the FERC concerning FS actions need to be timely and specific, showing a direct

relationship to the proposal and include supporting reasons.

DATES: To ensure that comments will be considered, the FERC must receive written comments on the ACP and Supply Header Project Draft EIS within 90 days following the date of publication of the FERC Notice of Availability (NOA) for the draft EIS in the **Federal Register**. The FERC's NOA also lists public meetings where interested groups and individuals can attend and present oral comments on the draft EIS.

ADDRESSES: You may submit comments related to the ACP and Supply Header Project Draft EIS, including any comments related to the FS consideration of the authorization of ACP to cross NFS lands and/or the FS consideration of LRMP amendments, to the FERC by any of the four methods listed below. The FERC encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the eComment feature on the FERC's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the eFiling feature on the FERC's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' If you are filing a comment on a particular project, please select ''Comment on a Filing'' as the filing type; or

(3) You can file a paper copy of your comments by mailing them to the following address. Be sure to reference the project docket numbers (CP15–554–000 and CP15–554–001 for ACP) with your submission: Nathaniel J. Davis, Sr., Deputy Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

(4) In lieu of sending written or electronic comments, you can submit oral comments at any of the FERC-sponsored public sessions that are scheduled in the FERC Notice of Availability for the draft EIS.

Your comments must reference the FERC Docket number for the Atlantic Coast Pipeline and Supply Header Project, L.P., Docket Nos. CP15–554–000 and CP15–554–001 (ACP), to be correctly attributed to this specific project. Copies of the ACP and Supply Header Project Draft EIS are available for inspection in the offices of the Forest Supervisor for the Monongahela National Forest and the Forest Supervisor for the George Washington and Jefferson National Forests.

FOR FURTHER INFORMATION CONTACT: Additional information about the projects is available from the FERC's Office of External Affairs at 866–208–FERC (3372), or on the FERC Web site (*www.ferc.gov*). On the FERC's Web site, go to ''Documents & Filings,'' click on the ''eLibrary'' link, click on ''General Search'' and enter the docket number CP15–554. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov,* or toll free at 866–208–3676, or for TTY, contact 202–502–8659. The eLibrary link also provides access to the texts of formal documents issues by the FERC such as orders, notices, and rulemakings.

SUPPLEMENTARY INFORMATION: This NOA is specific to the FS and provides notice that the agency has participated as a cooperating agency with FERC in the preparation of the ACP and Supply Header Project Draft EIS. The Atlantic Coast Pipeline route would cross about 21 miles of lands managed by the FS. More specifically, the pipeline route would cross 5.1 miles of lands managed by the Monongahela National Forest, in Pocahontas County, West Virginia and 15.9 miles of lands managed by the George Washington National Forest, in Highland, Bath, and Augusta counties, Virginia. The Supply Header Project would not affect the Monongahela or George Washington National Forests.

The FERC is the NEPA Lead Federal Agency for the environmental analysis of the construction and operation of the proposed ACP and Supply Header Project. The FS is the federal agency responsible for authorizing this use and issuing special use permits for natural gas pipelines across NFS lands under its jurisdiction.

Before issuing a Special Use permit (SUP) to construct, operate, maintain, and eventually decommission a natural gas transmission pipeline that crosses NFS lands, the FS would include any specific stipulations applicable to lands, facilities, water bodies, and easements for inclusion in the SUP.

In order for the potential actions to be consistent with the respective LRMPs (36 CFR 219.15), the FS would need to make several amendments to the LRMPs before the FS could authorize the use and issue a SUP.

The FERC's draft EIS includes the consideration of a FS authorization across NFS lands and the associated FS LRMP amendments. The FS intends to adopt FERC's EIS for agency decisions if the analysis provides sufficient evidence to support the agency's decisions and the agency is satisfied that agency comments and suggestions have been addressed.

''Project-specific plan amendments'' would be needed to deviate from the existing forest plan standards for the construction and operation of the ACP. These amendments are considered project-specific amendments because they would not change FS requirements for other projects or authorize any other actions. Additionally, if the proposed route was authorized and a SUP issued, the GWNF LRMP would need to be amended to change the current management prescriptions in the pipeline's operational corridor to Management Prescription Area (Rx) 5C-Designated Utility Corridors. The MNF does not have LRMP direction that would require a similar plan amendment to reallocate management prescriptions. This amendment is considered a ''plan-level'' amendment and would change future management direction for the lands reallocated to the new management prescription. The FS has also identified potential amendments that may be required, pending survey information and analyses that are not currently available.

The following amendments have been proposed by the FS as part of the proposed action in the FERC draft EIS:

Monongahela National Forest

The type of amendment applicable to the MNF would be a project-specific amendment. This amendment would not change FS requirements for other projects or authorize any other actions.

Potential Amendment 1: The MNF LRMP may need to be amended to allow construction of the Atlantic Coast Pipeline to temporarily exceed standards identified under management direction for soils and water, specifically forest wide standards SW06 and SW07, provided that design criteria, mitigation measures, project requirements and/or monitoring activities agreed upon by the Forest Service are implemented as needed to achieve adequate slope and soil stability.

Other potential amendments may be needed pending the outcome of ongoing analyses and development of project design and mitigation.

George Washington National Forest

The first type of LRMP amendment applicable to the GWNF would be a plan-level amendment that would change land allocations. This would change future management direction for the lands reallocated to the new management prescription (Rx) and is required by LRMP Standards FW–243 and FW–244.

Proposed Amendment 1: The LRMP would be amended to reallocate 102.3 acres to the Management Prescription 5C-Designated Utility Corridors from these Rxs: 7E1-Dispersed Recreation Areas (7 acres), and 13-Mosaics of Habitat (95 acres). Management Prescription 11-Riparian Corridors would remain embedded within the new Rx 5C area.

Rx 5C-Designated Utility Corridors contain special uses which serve a public benefit by providing a reliable supply of electricity, natural gas, or water essential to local, regional, and national economies. The new Rx 5C land allocation would be 53.5 feet wide, the width of the final operational right-of-way. The area would not cross into the Rx 4A-Appalachian National Scenic Area but would stop and start at the existing Rx 4A boundary. The applicable area within Rx4A would continue to be managed for the Appalachian National Scenic Trail.

The second type of amendment applicable to the GWNF would be a project-specific amendment that would apply only to the construction and operation of this pipeline. The following standards would require a temporary waiver to allow the project to proceed. These amendments would not change LRMP requirements for other projects or authorize any other actions.

Proposed Amendment 2: The LRMP would be amended to allow construction of the Atlantic Coast Pipeline to exceed restrictions on soil conditions and riparian corridor conditions as described in LRMP Standards FW–5, FW–15, FW–16, FW–17 and 11–019, provided that mitigation measures or project requirements agreed upon by the Forest Service are implemented as needed.

Proposed Amendment 3: The LRMP would be amended to allow the Atlantic Coast Pipeline to cross the Appalachian National Scenic Trail in Augusta County, Virginia. (reference LRMP Standard 4A–025)

Potential Amendment 4: The LRMP may need to be amended to allow removal of old growth trees within the construction corridor of the Atlantic Coast Pipeline. (reference LRMP Standard FW–85)

Potential Amendment 5: The LRMP may need to be amended to allow major reconstruction of a National Forest System Road within Rx 2C3 area to provide access for pipeline construction. This is contingent on the final location of access roads. (reference LRMP Standard 2C3–015)

Potential Amendment 6: The LRMP may need to be amended to allow the ACP to not immediately meet Scenic Integrity Objectives; however, mitigation measures, including vegetation management and restoration actions, are expected to improve quality over an extended timeframe. (reference LRMP Standard FW–182)

The FS will prepare separate Records of Decisions for the authorization decision and for the plan amendments decisions, after issuance of the FERC final EIS. The FS decision to authorize ACP will be subject to FS predecisional administrative review procedures established in 36 CFR 218. The MNF Potential Amendment 1, GWNF Proposed Amendments 2 and 3 and Potential Amendments 4, 5 and 6 were developed in accordance to 36 CFR 219 (2012) regulations but will be subject to the administrative review procedures under 36 CFR 218 regulations Subparts A and B, per 36 CFR 219.59(b). GWNF Proposed Amendment 1 was developed in accordance to 36 CFR 219 (2012 version) regulations and will be subject to the administrative review procedures under 36 CFR 219 Subpart B. Refer to the applicable administrative review regulations for eligibility.

The FS is requesting public comments on the authorization of ACP on NFS lands and the draft proposed and potential amendments of the LRMPs that would allow ACP to cross the MNF and GWNF. All comments must be submitted to the FERC, the Lead Federal Agency, within 90 days following the date of publication of the FERC Notice of Availability for their draft EIS in the **Federal Register**. Refer to Dockets CP15–554–000 and CP15–544–001 (ACP) in all correspondence to ensure that your comments are correctly filed in the record. You may submit comments to the FERC using one of the methods listed in the **ADDRESSES** section above. Only those who submit timely and specific written comments regarding the proposed project during a public comment period are eligible to file an objection with the FS. Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that the entire text of your comments—including your personal identifying information—would be publicly available through the FERC eLibrary system if you file your comments with the Secretary of the FERC.

Responsible Officials for Fs Authorization of Use To Issue a Special Use Permit: The Regional Forester Eastern Region for NFS lands on the Monongahela National Forest and the Regional Forester Southern Region for NFS lands on the George Washington National Forest are the Responsible Officials.

Responsible Officials for Fs LRMP Amendments: The Forest Supervisor for the Monongahela National Forest is the Responsible Official for the LRMP Amendment on the Monongahela National Forest.

The Forest Supervisor for the George Washington and Jefferson National Forests is the Responsible Official for the LRMP Amendments on the George Washington National Forest.

Lead Responsible Official for Coordinating Between Regions and Forests for the Project: The Forest Supervisor for the Monongahela National Forest.

Authority: 40 CFR 1506.6, 40 CFR 1506.10.

Dated: December 29, 2016.

Clyde Thompson,

Forest Supervisor.

[FR Doc. 2017–00008 Filed 1–5–17; 8:45 am]

BILLING CODE 3411–15–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Meeting Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of Commission Business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a Business Meeting of the U.S. Commission on Civil Rights will be convened at 10 a.m. on Friday, January 13, 2017.

DATES: Friday, January 13, 2017, at 10 a.m. EST.

ADDRESSES: National Place Building, 1331 Pennsylvania Ave. NW., 11th Floor, Suite 1150, Washington, DC 20425 (Entrance on F Street NW.).

FOR FURTHER INFORMATION CONTACT: Brian Walch, Communications and Public Engagement Director. Telephone: (202) 376–8371; TTY: (202) 376–8116; Email: *publicaffairs@usccr.gov.*

SUPPLEMENTARY INFORMATION: This business meeting is open to the public. If you would like to listen to the business meeting, please contact the above for the call-in information.

Hearing-impaired persons who will attend the briefing and require the services of a sign language interpreter should contact Pamela Dunston at (202) 376–8105 or at *signlanguage@usccr.gov* at least three business days before the scheduled date of the meeting.

Meeting Agenda

I. Approval of Agenda
II. Business Meeting
A. Program Planning
- OCRE Program Planning Update
- Update on Status of 60th Anniversary Plans

B. State Advisory Committees
- Presentation by Indiana SAC Chair Diane Clements-Boyd and SAC member Carlton Waterhouse of report on School-to-Prison Pipeline in Indiana

C. Management and Operations
- Staff Director's Report
- Staff Changes

III. Adjourn Meeting

Dated: January 4, 2017.

Brian Walch,

Director, Communications and Public Engagement.

[FR Doc. 2017–00142 Filed 1–4–17; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

[Docket No.: 161229999–6999–01]

Commerce Alternative Personnel System

AGENCY: Office of Administration, Office of Human Resources Management, Department of Commerce.

ACTION: Notice.

SUMMARY: This notice announces the expansion of employee coverage under the Commerce Alternative Personnel System, formerly the Department of Commerce Personnel Management Demonstration Project, published in the **Federal Register** on December 24, 1997. This coverage is extended to include employees located in the Enterprise Services Organization (ESO), a new organization, in the Office of the Secretary (OS), Office of the Deputy Secretary.

DATES: This notice expanding and modifying the Commerce Alternative Personnel System is effective January 6, 2017.

FOR FURTHER INFORMATION CONTACT: Department of Commerce—Sandra Thompson, U.S. Department of Commerce, 14th and Constitution Avenue NW., Room 51020, Washington, DC 20230, (202) 482–0056 or Valerie Smith at (202) 482–0272.

SUPPLEMENTARY INFORMATION:

1. Background

The Office of Personnel Management (OPM) approved the Department of Commerce (DoC) demonstration project for an alternative personnel management system, and published the final plan in the **Federal Register** on Wednesday, December 24, 1997 (62 FR 67434). The demonstration project was designed to simplify current classification systems for greater flexibility in classifying work and paying employees; establish a performance management and rewards system for improving individual and organizational performance; and improve recruiting and examining to attract highly-qualified candidates. The purpose of the project was to strengthen the contribution of human resources management and test whether the same innovations conducted under the National Institute of Standards and Technology alternative personnel management system would produce similarly successful results in other DoC environments. The project was implemented on March 29, 1998. The project plan has been modified eleven times to clarify certain DoC Demonstration Project authorities, and to extend and expand the project: 64 FR 52810 (September 30, 1999); 68 FR 47948 (August 12, 2003); 68 FR 54505 (September 17, 2003); 70 FR 38732 (July 5, 2005); 71 FR 25615 (May 1, 2006); 71 FR 50950 (August 28, 2006); 74 FR 22728 (May 14, 2009); 80 FR 25 (January 2, 2015); 81 FR 20322 (April 7, 2016); 81 FR 40653 (June 22, 2016); 81 FR 54747 (August 17, 2016). With the passage of the Consolidated Appropriations Act, 2008, Public Law 110–161, on December 26, 2007, the project was made permanent (extended indefinitely) and renamed the Commerce Alternative Personnel System (CAPS).

CAPS provides for modifications to be made as experience is gained, results are analyzed, and conclusions are reached on how the system is working. This notice announces that the DoC expands CAPS to include non-bargaining unit employees in the Enterprise Services Organization (ESO) in all duty locations, as a participating organization. The ESO will hire new employees and convert reassigned employees to career paths and occupational series already established under CAPS, requiring no additional series to be added to accommodate the expansion.

The DoC will follow the CAPS plan as published in the **Federal Register** on December 24, 1997, and subsequent modifications as listed in the Background Section of this notice.

Kevin E. Mahoney,

Director for Human Resources Management and Chief Human Capital Officer.

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II. Basis for CAPS Expansion
III. Changes to the Project Plan

I. Executive Summary

CAPS is designed to (1) improve hiring and allow DoC to compete more effectively for high-quality candidates through direct hiring, selective use of higher entry salaries, and selective use of recruitment incentives; (2) motivate and retain staff through higher pay potential, pay-for-performance, more responsive personnel systems, and selective use of retention incentives; (3) strengthen the manager's role in personnel management through delegation of personnel authorities; and (4) increase the efficiency of personnel systems through the installation of a simpler and more flexible classification system based on pay banding through reduction of guidelines, steps, and paperwork in classification, hiring, and other personnel systems, and through automation.

The current participating organizations include 7 offices of the Chief Financial Officer/Assistant Secretary for Administration in the Office of the Secretary; the Bureau of Economic Analysis; 2 units of the National Telecommunications and Information Administration (NTIA): the Institute for Telecommunication Sciences and the First Responder Network Authority (an independent authority within NTIA); and 12 units of the National Oceanic and Atmospheric Administration: Office of Oceanic and Atmospheric Research, National Marine Fisheries Service, the National Environmental Satellite, Data, and Information Service, National Weather Service—Space Environment Center, National Ocean Service, Program Planning and Integration Office, Office of the Under Secretary, Marine and Aviation Operations, Office of the Chief Administrative Officer, Office of the Chief Financial Officer, the Workforce Management Office, and the Office of the Chief Information Officer.

This amendment modifies the December 24, 1997, **Federal Register** notice. Specifically, it expands DoC CAPS to include the ESO.

II. Basis for CAPS Expansion

A. Purpose

CAPS is designed to provide managers at the lowest organizational level the authority, control, and flexibility to recruit, retain, develop, recognize, and motivate its workforce, while ensuring adequate accountability and oversight.

The ESO is a new organization designed to deliver common business support and mission-enabling services in the functional areas of human resources, acquisition, information technology financial management, and other areas as determined necessary. The mission of the ESO is to: Enhance customer experience through the efficient delivery of high-quality mission-enabling services; increase service transparency and accountability; and enable employees, currently performing these functions, to dedicate more time to the unique mission needs of their organization. The expansion of CAPS coverage to include the ESO, should improve the organization's ability to recruit and retain a high-quality workforce to meet the organization's mission.

DoC's CAPS allows for modifications of procedures if no new waiver from law or regulation is added. Given that this expansion and modification is in accordance with existing law and regulation and CAPS is a permanent alternative personnel system, the DoC is authorized to make the changes described in this notice.

B. Participating Employees

Employee notification of this expansion will be accomplished by providing employees and managers electronic access to all CAPS policies and procedures, including the eleven previous **Federal Register** Notices. A copy of this **Federal Register** notice will also be accessible electronically upon approval. Supervisor training and informational briefings for employees will be conducted as the ESO undergoes full transition over a period of a few years.

III. Changes to the Project Plan

The CAPS at DoC, published in the **Federal Register** on December 24, 1997 (62 FR 67434), is amended as follows:

1. The following organization will be added to the project plan, Section II D—Participating Organizations

Office of the Secretary (OS), Office of the Deputy Secretary, Enterprise Services Organization (ESO)

[FR Doc. 2017–00057 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–EA–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–085–2016]

Foreign-Trade Zone (FTZ) 76—Danbury, Connecticut Notification of Proposed Production Activity; MannKind Corporation, (Fumaryl Diketopiperazone (FDKP) Carrier/Receptor Powder), Danbury, Connecticut

MannKind Corporation (MannKind) submitted a notification of proposed production activity to the FTZ Board for its facility in Danbury, Connecticut within Subzone 76B. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on December 21, 2016.

MannKind currently has authority to use the facility for the production of Technosphere Insulin®, an inhalable insulin made by a combination of imported fumaryl diketopiperazone (FDKP) and domestic material active ingredients. MannKind's current request would add a finished product to the scope of authority. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials and components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt MannKind from customs duty payments on the foreign-status components used in export production. On its domestic sales, MannKind would be able to choose the duty rate during customs entry procedures that applies to FDKP carrier/receptor powder (duty rate 6.5%) for the foreign-status components and materials in the existing scope of authority. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is February 15, 2017.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Juanita H. Chen at *Juanita.Chen@trade.gov* or (202) 482–1378.

Dated: December 28, 2016.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2016–32034 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Dane Francisco Delgado, Inmate Number: 60114–379, Eden, Correctional Institution, P.O. Box 605, Eden, TX 76837; Order Denying Export Privileges

On November 4, 2014, in the U.S. District Court for the Southern District of Texas, Dane Francisco Delgado (''Delgado''), was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2012)) (''AECA''). Specifically, Delgado knowingly and willfully conspired with persons known and unknown to export, furnish, and cause to be exported from the United States to Mexico defense articles designated on the United States Munitions List without having first obtained from the Department of State a license or written authorization for such export. Delgado was sentenced to 60 months in prison, three years of supervised release, and a $100 assessment.

Section 766.25 of the Export Administration Regulations (''EAR'' or ''Regulations'') [1] provides, in pertinent part, that ''[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the Export Administration Act (''EAA''), the EAR, or any order, license or authorization issued thereunder; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2016). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. 4601–4623 (Supp. III 2015) (available at *http://uscode.house.gov*)). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52587 (Aug. 8, 2016)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2006 & Supp. IV 2010)).

U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778).'' 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. 4610(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. 4610(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security (''BIS'') licenses previously issued in which the person had an interest in at the time of his conviction.

BIS has received notice of Delgado's conviction for violating the AECA, and has provided notice and an opportunity for Delgado to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has received a submission from Delgado.

Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Delgado's export privileges under the Regulations for a period of 10 years from the date of Delgado's conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Delgado had an interest at the time of his conviction.

Accordingly, it is hereby *ordered:*

First, from the date of this Order until November 4, 2024, Dane Francisco Delgado, with a last known address of Inmate Number: 60114–379, Eden, Correctional Institution, P.O. Box 605, Eden, TX 76837, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (the ''Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Delgado by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with Part 756 of the Regulations, Delgado may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to the Delgado. This Order shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until November 4, 2024.

Issued this 29th day of December, 2016.

Karen H. Nies-Vogel,

Director, Office of Exporter Services.

[FR Doc. 2017–00015 Filed 1–5–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Robert Luba, Inmate Number: 65986–050, USP Canaan, U.S. Penitentiary, Satellite Camp, P.O. Box 200, Waymart, PA 18472; Order Denying Export Privileges

On April 25, 2016, in the U.S. District Court for the District of New Jersey, Robert Luba (''Luba''), was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2012)) (''AECA''). Specifically, Luba knowingly and willfully exported and caused to be exported from the United States to India a defense article, that is, the technical drawing for the NSSN Class Submarine, Torpedo Tube, Open Breech Door, Gagging Collar A, Drawing Number 7072856, which was designated as a defense article on the United States Munitions List, without having first obtained from the Department of State a license for such export or written authorization for such export. Luba was sentenced six months in prison, three years of supervised release, $173,736.67 in restituition, and a $200 assessment.

Section 766.25 of the Export Administration Regulations (''EAR'' or ''Regulations'') [1] provides, in pertinent part, that ''[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the Export Administration Act (''EAA''), the EAR, or any order, license or authorization

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2016). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. 4601–4623 (Supp. III 2015) (available at *http://uscode.house.gov*)). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52587 (Aug. 8, 2016)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2006 & Supp. IV 2010)).

issued thereunder; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778).'' 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. 4610(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. 4610(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security (''BIS'') licenses previously issued in which the person had an interest in at the time of his conviction.

BIS has received notice of Luba's conviction for violating the AECA, and has provided notice and an opportunity for Luba to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has not received a submission from Luba.

Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Luba's export privileges under the Regulations for a period of 10 years from the date of Luba's conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Luba had an interest at the time of his conviction.

Accordingly, it is hereby *ordered:*

First, from the date of this Order until April 25, 2026, Robert Luba, with a last known address of Inmate Number: 65986–050, USP Canaan, U.S. Penitentiary, Satellite Camp, P.O. Box 200, Waymart, PA 18472, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (the ''Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Luba by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with Part 756 of the Regulations, Luba may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to the Luba. This Order shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until April 25, 2026.

Dated: December 29, 2016.

Karen H. Nies-Vogel,

Director, Office of Exporter Services.

[FR Doc. 2017–00007 Filed 1–5–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Kamran Ashfaq Malik, Inmate Number: 57841–037, FCI Fort Dix, Federal Correctional Institution, P.O. Box 2000, Joint Base MDL, NJ 08640; Order Denying Export Privileges

On June 29, 2015, in the U.S. District Court for the District of Maryland, Kamran Ashfaq Malik (''Malik''), was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2012)) (''AECA''). Specifically, Malik knowingly and willfully exported and caused the exportation of firearm parts and accessories designated as defense articles in Category I of the United States Munitions List, to wit: A .223 caliber rifle lower receiver, a .334 caliber rifle lower receiver, two .223 caliber rifle bolt carriers, and two .223 10 round magazines, from the United States and destined for Pakistan without having first obtained the required licenses or authorizations from the Department of State. Malik was sentenced to 24 months in prison, three years of supervised release, and a $100 assessment.

Section 766.25 of the Export Administration Regulations (''EAR'' or ''Regulations'') [1] provides, in pertinent part, that ''[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2016). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. 4601–4623 (Supp. III 2015) (available at *http://uscode.house.gov*)). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52,587 (Aug. 8, 2016)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2006 & Supp. IV 2010)).

Enforcement, may deny the export privileges of any person who has been convicted of a violation of the Export Administration Act (''EAA''), the EAR, or any order, license or authorization issued thereunder; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778).'' 15 CFR 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. 4610(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); *see also* 50 U.S.C. 4610(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security (''BIS'') licenses previously issued in which the person had an interest in at the time of his conviction.

BIS has received notice of Malik's conviction for violating the AECA, and has provided notice and an opportunity for Malik to make a written submission to BIS, as provided in Section 766.25 of the Regulations. BIS has not received a submission from Malik.

Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Malik's export privileges under the Regulations for a period of five years from the date of Malik's conviction. I have also decided to revoke all licenses issued pursuant to the Act or Regulations in which Malik had an interest at the time of his conviction.

Accordingly, it is hereby *ordered:*

First, from the date of this Order until June 29, 2020, Kamran Ashfaq Malik, with a last known address of Inmate Number: 57841–037, FCI Fort Dix, Federal Correctional Institution, P.O. Box 2000, Joint Base MDL, NJ 08640, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (the ''Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Malik by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with Part 756 of the Regulations, Malik may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to the Malik. This Order shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until June 29, 2020.

Issued this 29th day of December, 2016.

Karen H. Nies-Vogel,

Director, Office of Exporter Services.

[FR Doc. 2017–00016 Filed 1–5–17; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–560–823, C–560–824, A–570–958, C–570–959]

Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia and the People's Republic of China: Continuation of Antidumping and Countervailing Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (the Department) and the International Trade Commission (ITC) that revocation of the antidumping duty (AD) and countervailing duty (CVD) orders on certain coated paper suitable for high-quality print graphics using sheet-fed presses (coated paper) from Indonesia and the People's Republic of China (PRC) would be likely to lead to continuation or recurrence of dumping and countervailable subsidies and material injury to an industry in the United States, the Department is publishing a notice of continuation of the AD and CVD orders.

DATES: Effective January 6, 2017.

FOR FURTHER INFORMATION CONTACT: Terre Keaton Stefanova at (202) 482–1280 (AD orders), Jackie Arrowsmith at (202) 482–5255 (Indonesia CVD order), or Mark Kennedy at (202) 482–7883 (PRC CVD order), AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401

Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2015, the Department initiated [1] and the ITC instituted [2] five-year (sunset) reviews of the AD and CVD orders on coated paper from Indonesia and the PRC, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). As a result of its reviews, the Department determined that revocation of the AD orders on coated paper from Indonesia and the PRC would likely lead to continuation or recurrence of dumping,[3] and that revocation of the CVD orders would likely lead to continuation or recurrence of countervailable subsidies.[4] The Department, therefore, notified the ITC of the magnitude of the margins of dumping and net countervailable subsidy rates likely to prevail were the AD and CVD orders revoked.[5]

On December 29, 2016, the ITC published its determinations, pursuant to sections 751(c) and 752 of the Act, that revocation of the AD and CVD orders on coated paper from Indonesia and the PRC would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[6]

Scope of the Orders

The scope of the orders cover certain coated paper and paperboard [7] in sheets suitable for high quality print graphics using sheet-fed presses; coated on one or both sides with kaolin (China or other clay), calcium carbonate, titanium dioxide, and/or other inorganic substances; with or without a binder; having a GE brightness level of 80 or higher,[8] weighing not more than 340 grams per square meter; whether gloss grade, satin grade, matte grade, dull grade, or any other grade of finish; whether or not surface-colored, surface-decorated, printed (except as described below), embossed, or perforated; and irrespective of dimensions (Certain Coated Paper).

Certain Coated Paper includes (a) coated free sheet paper and paperboard that meets this scope definition; (b) coated groundwood paper and paperboard produced from bleached chemi-thermo-mechanical pulp (BCTMP) that meets this scope definition; and (c) any other coated paper and paperboard that meets this scope definition.

Certain Coated Paper is typically (but not exclusively) used for printing multi-colored graphics for catalogues, books, magazines, envelopes, labels and wraps, greeting cards, and other commercial printing applications requiring high quality print graphics.

Specifically excluded from the scope are imports of paper and paperboard printed with final content printed text or graphics.

Imports of the subject merchandise are provided for under the following categories of the Harmonized Tariff Schedule of the United States (HTSUS): 4810.14.11, 4810.14.1900, 4810.14.2010, 4810.14.2090, 4810.14.5000, 4810.14.6000, 4810.14.70, 4810.19.1100, 4810.19.1900, 4810.19.2010, 4810.19.2090, 4810.22.1000, 4810.22.50, 4810.22.6000, 4810.22.70, 4810.29.1000, 4810.29.5000, 4810.29.6000, 4810.29.70, 4810.32, 4810.39 and 4810.92. While HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these orders is dispositive.

Continuation of the Orders

As a result of the determinations by the Department and the ITC that revocation of the AD and CVD orders would likely lead to a continuation or a recurrence of dumping and countervailable subsidies and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), the Department hereby orders the continuation of the AD and CVD orders on coated paper from Indonesia and the PRC. U.S. Customs and Border Protection (CBP) will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the orders will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next five-year review of these orders not later than 30 days prior to the fifth anniversary of the effective date of continuation.

Administrative Protective Order

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return/destruction or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Failure to comply is a violation of the APO which may be subject to sanctions.

These five-year (sunset) reviews and notice are in accordance with sections 751(c) and published pursuant to section 777(i) the Act and 19 CFR 351.218(f)(4).

Dated: December 29, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2017–00029 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Initiation of Five-Year ("Sunset") Reviews,* 80 FR 59133 (October 1, 2015).

[2] *See Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia,* 80 FR 59189 (October 1, 2015).

[3] *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia and the People's Republic of China: Final Results of Expedited First Sunset Reviews of the Antidumping Duty Orders,* 81 FR 907 (January 8, 2016) (*Dumping Final*).

[4] *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Results of Expedited First Sunset Review of the Countervailing Duty Order,* 81 FR 6234 (February 5, 2016); and *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Results of Expedited First Sunset Review of the Countervailing Duty Order,* 81 FR 7081 (February 10, 2016).

[5] *Id.* and *Dumping Final.*

[6] *See Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia; Determination,* 81 FR 96044 (December 29, 2016). *See also* Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia, Inv. Nos. 701–TA–470–471 and 731–TA–1169–1170 (Review), USITC Publication 4656, December 2016.

[7] " 'Paperboard' refers to Certain Coated Paper that is heavier, thicker and more rigid than coated paper which otherwise meets the product description. In the context of Certain Coated Paper, paperboard typically is referred to as 'cover,' to distinguish it from 'text.' "

[8] One of the key measurements of any grade of paper is brightness. Generally speaking, the brighter the paper the better the contrast between the paper and the ink. Brightness is measured using a GE Reflectance Scale, which measures the reflection of light off of a grade of paper. One is the lowest reflection, or what would be given to a totally black grade, and 100 is the brightest measured grade.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–807]

Sulfanilic Acid From India: Final Results of Expedited Sunset Review of the Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) finds that revocation of the countervailing duty (CVD) order on sulfanilic acid from India would likely lead to the continuation or recurrence of a countervailable subsidy at the levels indicated in the Final Results of Review section of this notice.

DATES: Effective January 6, 2017.

FOR FURTHER INFORMATION CONTACT: John Conniff, Office III, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1009.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 2016, the Department initiated this fourth sunset review of the CVD order on sulfanilic acid from India pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[1] The Department received a notice of intent to participate from Nation Ford Chemical Company (NFC) (domestic interested party), within the deadline specified in 19 CFR 351.218(d)(1)(i). The domestic interested party claimed interested party status under section 771(9)(C) of the Act as a domestic producer of sulfanilic acid in the United States.

The Department received an adequate substantive response from the domestic interested party within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i). The Department also received a response from a domestic importer of sulfanilic acid, which we rejected as inadequate under 19 CFR 351.218(d)(3)(ii).[2] As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted an expedited review of the CVD order.

Scope of the Order

The merchandise covered by the CVD order are all grades of sulfanilic acid, which include technical (or crude) sulfanilic acid, refined (or purified) sulfanilic acid and sodium salt of sulfanilic acid (sodium sulfanilate).

Sulfanilic acid is a synthetic organic chemical produced from the direct sulfonation of aniline with sulfuric acid. Sulfanilic acid is used as a raw material in the production of optical brighteners, food colors, specialty dyes, and concrete additives. The principal differences between the grades are the undesirable quantities of residual aniline and alkali insoluble materials present in the sulfanilic acid. All grades are available as dry free flowing powders.

Technical sulfanilic acid contains 96 percent minimum sulfanilic acid, 1.0 percent maximum aniline, and 1.0 percent maximum alkali insoluble materials. Refined sulfanilic acid contains 98 percent minimum sulfanilic acid, 0.5 percent maximum aniline, and 0.25 percent maximum alkali insoluble materials. Sodium salt of sulfanilic acid (sodium sulfanilate) is a granular or crystalline material containing 75 percent minimum sulfanilic acid, 0.5 percent maximum aniline, and 0.25 percent maximum alkali insoluble materials based on the equivalent sulfanilic acid content.

In response to a request from 3V Corporation, on May 5, 1999, the Department determined that sodium sulfanilate processed in Italy from sulfanilic acid produced in India is within the scope of the order. *See Notice of Scope Rulings and Anticircumvention Inquiries,* 65 FR 41957 (July 7, 2000).

The merchandise is currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 2921.42.22 and 2921.42.90. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Analysis of Comments Received

All issues raised in this review are addressed in the Issues and Decision Memorandum, which is dated concurrently with and adopted by this notice.[3] The issues discussed in the Issues and Decision Memorandum include the likelihood of continuation or recurrence of a countervailable subsidy and the net countervailable subsidy likely to prevail if the order were revoked. Parties can find a complete discussion of all issues raised in this expedited sunset review and the corresponding recommendations in this public memorandum, which is on file electronically *via* the Enforcement and Compliance 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 Issues and Decision Memorandum can be accessed directly on the Internet at *http://enforcement.trade.gov/frn/index.html.* The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

Final Results of Review

Pursuant to sections 752(b)(1) and (3) of the Act, we determine that revocation of the *Order* on sulfanilic acid from India would be likely to lead to continuation or recurrence of a net countervailable subsidy at the rate listed below:[4]

Manufacturers/producers/exporters	Net countervailable subsidy rate (percent)
All-Others	43.71

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

The Department is issuing and publishing these final results and this notice in accordance with sections 751(c), 752(b), and 777(i)(1) of the Act and 19 CFR 351.218(e)(1)(ii)(c)(2).

Dated: December 29, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. History of the Order
III. Background
IV. Scope
V. Discussion of the Issues
  1. Continuation or Recurrence of a Countervailable Subsidy
  2. Net Countervailable Subsidy Likely To Prevail
  3. Nature of the Subsidy
V. Final Results of Review
VI. Recommendation

[FR Doc. 2017–00035 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Initiation of Five-Year (Sunset) Review,* 81 FR 60343 (September 1, 2016).

[2] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Enforcement and Compliance, to Paul Piquado, Assistant Secretary for Enforcement and Compliance regarding, ''Issues and Decision Memorandum for the Final Results of Expedited Sunset Review of the Countervailing Duty Order on Sulfanilic Acid from India,'' dated concurrently with this notice (Sulfanilic Acid from India IDM) for more information on the reasons for the Department's rejection.

[3] *See* Sulfanilic Acid from India IDM.

[4] *Id.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–803]

Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles From the People's Republic of China: Continuation of Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (the Department) and the International Trade Commission (ITC) that revocation of the antidumping duty (AD) orders on heavy forged hand tools, finished or unfinished, with or without handles (HFHTs) from the People's Republic of China (PRC) would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, the Department is publishing this notice of continuation of the AD orders.

DATES: Effective January 6, 2017.

FOR FURTHER INFORMATION CONTACT: Paul Walker, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: 202.482.0413.

SUPPLEMENTARY INFORMATION:

Background

On February 19, 1991, the Department published the AD orders on HFHTs from the PRC.[1] On July 1, 2016, the Department published the notice of initiation of the fourth sunset review of the AD orders on HFHTs from the PRC, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] As a result of its review, the Department determined that revocation of the AD orders would likely lead to a continuation or recurrence of dumping.[3] The Department, therefore, notified the ITC of the magnitude of the margins likely to prevail should the AD orders be revoked. On December 20, 2016, the ITC published its determination that revocation of the AD orders on HFHTs from the PRC would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, pursuant to section 751(c) of the Act.[4]

Scope of the Orders

The merchandise covered by these orders are hand tools comprising the following classes or kinds of merchandise: (1) Hammers and sledges with heads over 1.5 kg (3.33 pounds); (2) bars over 18 inches in length, track tools and wedges; (3) picks and mattocks; and (4) axes, adzes and similar hewing tools. Subject hand tools are manufactured through a hot forge operation in which steel is sheared to required length, heated to forging temperature, and formed to final shape on forging equipment using dies specific to the desired product shape and size. These products are classifiable under tariff article codes 8205.20.60, 8205.59.30, 8201.30.00, and 8201.40.60 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the AD orders is dispositive.[5]

Continuation of the Orders

As a result of the determinations by the Department and the ITC that revocation of the AD orders would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), the Department hereby orders the continuation of the AD orders on HFHTs from the PRC. United States Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the AD orders will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next five-year review of the AD orders not later than 30 days prior to the fifth anniversary of the effective date of continuation.

This five-year sunset review and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: December 29, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2017–00030 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Antidumping Duty Orders: Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles From the People's Republic of China,* 56 FR 6622 (February 19, 1991). There are four orders on HFHTs from the PRC: axes & adzes, bars & wedges, hammers & sledges, and picks & mattocks.

[2] *See Initiation of Five-Year (''Sunset'') Review,* 81 FR 43185 (July 1, 2016).

[3] *See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles from the People's Republic of China: Final Results of the Expedited Fourth Sunset Review of the Antidumping Duty Orders,* 81 FR 78777 (November 9, 2016) (*Final Results*) and accompanying Issues and Decision Memorandum.

[4] *See Heavy Forged Hand Tools from China: Investigation No. 731–TA–457–A–D (Fourth Review),* USITC Publication 4654 (December 2016); *see also Heavy Forged Hand Tools from China; Determination,* 81 FR 92852 (December 20, 2016).

[5] *See Final Results,* and accompanying Issues and Decision Memorandum at ''III. Scope of the Orders.''

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–954]

Magnesia Carbon Bricks From the People's Republic of China: Final Results and Partial Rescission of the Antidumping Duty Administrative Review; 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce

SUMMARY: On September 9, 2016, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty (AD) order on magnesia carbon bricks (MCBs) from the People's Republic of China (PRC) covering the period of review (POR) September 1, 2014, to August 31, 2015.[1] This review covers 20 companies. We invited interested parties to comment on the *Preliminary Results.* No party filed comments or requested a hearing. Accordingly, the final results remain unchanged from the *Preliminary Results.*

DATES: Effective January 6, 2017.

FOR FURTHER INFORMATION CONTACT: Kenneth Hawkins, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6491.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The scope of the order includes certain chemically-bonded (resin or pitch), MCBs with a magnesia component of at least 70 percent magnesia (MgO) by weight, regardless of

[1] *See Magnesia Carbon Bricks from the People's Republic of China: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review; 2014–2015,* 81 FR 62472 (September 9, 2016) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum.

the source of raw materials for the MgO, with carbon levels ranging from trace amounts to 30 percent by weight, regardless of enhancements (for example, MCBs can be enhanced with coating, grinding, tar impregnation or coking, high temperature heat treatments, anti-slip treatments or metal casing) and regardless of whether or not antioxidants are present (for example, antioxidants can be added to the mix from trace amounts to 15 percent by weight as various metals, metal alloys, and metal carbides). Certain MCBs that are the subject of this order are currently classifiable under subheadings 6902.10.1000, 6902.10.5000, 6815.91.0000, 6815.99.2000, and 6815.99.4000 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings are provided for convenience and customs purposes, the written description is dispositive.

Final Results of Review

As noted above, the Department received no comments concerning the *Preliminary Results.* As there are no changes from, or comments upon, the *Preliminary Results,* the Department finds that there is no reason to modify its analysis. Therefore, in these final results of review, we have rescinded the review with respect to Fedmet Resources Corporation, continued to find that Fengchi Imp. and Exp. Co., Ltd. of Haicheng City and RHI Refractories Liaoning, Co. Ltd. had no reviewable entries, and treated the remaining companies under review as part of the PRC-wide entity.[2] The Department's policy regarding conditional review of the PRC-wide entity applies to this administrative review.[3] Under this policy, the PRC-wide entity will not be under review unless a party specifically requests, or the Department self-initiates, a review of the entity. Because the PRC-wide entity is not under review, the entity's rate (*i.e.,* 236.00 percent) is not subject to change.[4]

Assessment Rates

The Department determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries in this review, in accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1). The Department intends to issue assessment instructions directly to CBP 15 days after publication in the **Federal Register** of these final results of this administrative review.

In accordance with the Department's assessment practice in NME cases, for entries that were not reported in the U.S. sales data submitted by companies individually examined during the administrative review, the Department will instruct CBP to liquidate such entries for the PRC-wide entity. Additionally, if the Department determines that an exporter had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's cash deposit rate) will be liquidated at the rate for the PRC-wide entity.[5]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For any companies listed that have a separate rate, the cash deposit rate will be that established in the final results of this review (except, if the rate is zero or *de minimis,* then zero cash deposit will be required); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the PRC-wide entity; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation, which is subject to sanction.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(h).

Dated: December 29, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2017–00027 Filed 1–5–17; 8:45 am]

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[2] For further details of the issues addressed in this proceeding, *see* the *Preliminary Results* and accompanying PDM which can be accessed directly at *http://enforcement.trade.gov/frn/index.html.*

[3] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[4] *See Certain Magnesia Carbon Bricks from the People's Republic of China: Final Results and Final Partial Rescission of the Antidumping Duty Administrative Review; 2012–2013,* 80 FR 19961, 19962 (April 14, 2015).

[5] For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694, 65694–95 (October 24, 2011).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–896]

Magnesium Metal From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2015–2016

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''Department'') is conducting the administrative review of the antidumping duty order on magnesium metal from the People's Republic of China (''PRC''), covering the period April 1, 2015, through March 31, 2016. The Department preliminarily determines that Tianjin Magnesium International, Co., Ltd. (''TMI'') and Tianjin Magnesium Metal, Co., Ltd. (''TMM'') did not have reviewable entries during the period of review (''POR''). We invite interested parties to comment on these preliminary results.

DATES: Effective January 6, 2017.

FOR FURTHER INFORMATION CONTACT: James Terpstra or Brendan Quinn, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington DC 20230; telephone: (202) 482–3965 or (202) 482–5848, respectively.

Background

On April 1, 2016, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on magnesium metal from the PRC for the POR.[1] On April 29, 2016, in response to a timely request from Petitioner,[2] and in accordance with section 751(a) of the Tariff Act of 1930, as amended (the ''Act''), and 19 CFR 351.221(c)(1)(i), we initiated an administrative review of the antidumping duty order on magnesium metal from the PRC with respect to TMI and TMM.[3]

Scope of the Order

The product covered by this order is magnesium metal from the PRC, which includes primary and secondary alloy magnesium metal, regardless of chemistry, raw material source, form, shape, or size. Magnesium is a metal or alloy containing by weight primarily the element magnesium. Primary magnesium is produced by decomposing raw materials into magnesium metal. Secondary magnesium is produced by recycling magnesium-based scrap into magnesium metal. The magnesium covered by this order includes blends of primary and secondary magnesium.

The subject merchandise includes the following alloy magnesium metal products made from primary and/or secondary magnesium including, without limitation, magnesium cast into ingots, slabs, rounds, billets, and other shapes; magnesium ground, chipped, crushed, or machined into rasping, granules, turnings, chips, powder, briquettes, and other shapes; and products that contain 50 percent or greater, but less than 99.8 percent, magnesium, by weight, and that have been entered into the United States as conforming to an ''ASTM Specification for Magnesium Alloy''[4] and are thus outside the scope of the existing antidumping orders on magnesium from the PRC (generally referred to as ''alloy'' magnesium).

The scope of this order excludes: (1) All forms of pure magnesium, including chemical combinations of magnesium and other material(s) in which the pure magnesium content is 50 percent or greater, but less than 99.8 percent, by weight, that do not conform to an ''ASTM Specification for Magnesium Alloy''[5]; (2) magnesium that is in liquid or molten form; and (3) mixtures containing 90 percent or less magnesium in granular or powder form by weight and one or more of certain non-magnesium granular materials to make magnesium-based reagent mixtures, including lime, calcium metal, calcium silicon, calcium carbide, calcium carbonate, carbon, slag coagulants, fluorspar, nephaline syenite, feldspar, alumina (Al203), calcium aluminate, soda ash, hydrocarbons, graphite, coke, silicon, rare earth metals/mischmetal, cryolite, silica/fly ash, magnesium oxide, periclase, ferroalloys, dolomite lime, and colemanite.[6]

The merchandise subject to this order is classifiable under items 8104.19.00, and 8104.30.00 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS items are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Preliminary Determination of No Shipments

We received timely submissions from TMM and TMI certifying that they did not have sales, shipments, or exports of subject merchandise to the United States during the POR.[7] On July 11, 2016, we requested the U.S. Customs and Border Protection (''CBP'') data file of entries of subject merchandise imported into the United States during the POR, and exported by TMM and/or TMI. This query returned no entries during the POR.[8] Additionally, in order to examine TMM's and TMI's claim, we sent an inquiry to CBP requesting that it provide any information contrary to these no-shipments claims.[9] We received no notification from CBP of any entries of subject merchandise concerning these companies. On August 15, 2016, Petitioner, submitted public information it alleged contradicts TMM's and TMI's certifications of no shipments of subject merchandise during the POR.[10]

Because we have not received information to the contrary from CBP, consistent with our practice, we preliminarily determine that TMI and TMM had no shipments and, therefore, no reviewable entries during the POR. In addition, we find it is not appropriate to rescind the review with respect to these companies but, rather, to complete the review with respect to TMI and TMM and issue appropriate instructions to CBP based on the final results of the review, consistent with our practice in non-market economy (''NME'') cases.[11]

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 81 FR 18826 (April 1, 2016).

[2] *See* letter from U.S. Magnesium LLC (''Petitioner''), ''Magnesium Metal from the People's Republic of China: Request for Administrative Review,'' dated April 29, 2016.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 81 FR 36268 (June 6, 2016).

[4] The meaning of this term is the same as that used by the American Society for Testing and Materials in its Annual Book for ASTM Standards: Volume 01.02 Aluminum and Magnesium Alloys.

[5] The material is already covered by existing antidumping orders. *See Notice of Antidumping Duty Orders: Pure Magnesium from the People's Republic of China, the Russian Federation and Ukraine; Notice of Amended Final Determination of Sales at Less Than Fair Value: Antidumping Duty Investigation of Pure Magnesium From the Russian Federation,* 60 FR 25691 (May 12, 1995); and *Antidumping Duty Order: Pure Magnesium in Granular Form from the People's Republic of China,* 66 FR 57936 (November 19, 2001).

[6] This third exclusion for magnesium-based reagent mixtures is based on the exclusion for reagent mixtures in the 2000–2001 investigations of magnesium from China, Israel, and Russia. *See Final Determination of Sales at Less Than Fair Value: Pure Magnesium in Granular Form From the People's Republic of China,* 66 FR 49345 (September 27, 2001); *Final Determination of Sales at Less Than Fair Value: Pure Magnesium From Israel,* 66 FR 49349 (September 27, 2001); *Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium From the Russian Federation,* 66 FR 49347 (September 27, 2001). These mixtures are not magnesium alloys, because they are not combined in liquid form and cast into the same ingot.

[7] *See* letter from TMM, ''Magnesium Metal From the People's Republic of China; A–570–896; Certification of No Sales by Tianjin Magnesium Metal Co., Ltd.,'' dated June 24, 2016, at 1. *See* letter from TMI, ''Magnesium Metal from the People's Republic of China; A–570–896; Certification of No Sales by Tianjin Magnesium International, Co., Ltd.,'' dated July 1, 2016, at 1.

[8] *See* Memorandum to the File, ''RE: U.S. Customs and Border Protection Data,'' dated September 29, 2016 (''No Shipments Memo''), at Attachment 1.

[9] *See* No Shipments Memo, at Attachment 2. *See also* CBP message 6250303, dated 09/06/2016.

[10] *See* letter from Petitioner, ''Magnesium Metal from the People's Republic of China: Response to TMM/TMI's No Shipment Certifications,'' dated August 15, 2016, at Exhibits 1–3. We provided the information submitted by Petitioner to CBP on November 4, 2016. *See* the Department's letter to Alexander Amdur, Director, AD/CVD Policy & Programs Division, Office of International Trade U.S. Customs & Border Protection, from Wendy J. Frankel Director, Customs Liaison Unit, ''Pure Magnesium from the People's Republic of China and Magnesium Metal from the People's Republic of China,'' dated November 4, 2016, at Attachment II.

[11] *See Glycine From the People's Republic of China: Final Results of Antidumping Duty Administrative Review 2014–2015,* 81 FR 72567 (October 20, 2016) and the ''Assessment Rates'' section, below.

Public Comment

Interested parties may submit case briefs no later than 30 days after the date of publication of this notice in the **Federal Register**.[12] Rebuttals to case briefs, which must be limited to issues raised in the case briefs, must be filed within five days after the date for filing case briefs.[13] Parties who submit arguments are requested to submit with each argument (a) a statement of the issue, (b) a brief summary of the argument, and (c) a table of authorities.[14] Parties submitting briefs should do so pursuant to the Department's electronic filing system: Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (''ACCESS'').[15] ACCESS is available to registered users at *https://access.trade.gov,* and is available to all parties in the Central Records Unit, Room B8024 of the main Department of Commerce building.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce within 30 days of the date of publication of this notice. Hearing requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, parties will be notified of the time and date of the hearing which will be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230.

Unless extended, we intend to issue the final results of this administrative review, including our analysis of all issues raised in any written brief, within 120 days of publication of this notice in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[16] We intend to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. Pursuant to the Department's practice in NME cases, if we continue to determine in the final results that TMI and TMM had no shipments of subject merchandise, any suspended entries of subject merchandise during the POR from these companies will be liquidated at the PRC-wide rate.[17]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of review, as provided for by section 751(a)(2)(C) of the Act: (1) For TMI, which claimed no shipments, the cash deposit rate will remain unchanged from the rate assigned to TMI in the most recently completed review of the company; (2) for previously investigated or reviewed PRC and non-PRC exporters who are not under review in this segment of the proceeding but who have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate (including TMM, which claimed no shipments, but has not been found to be separate from the PRC-wide entity), the cash deposit rate will be the PRC-wide rate of 141.49 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter(s) that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this period. Failure to comply with this requirement may result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice is issued in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: December 29, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2017–00036 Filed 1–5–17; 8:45 am]

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[12] *See* 19 CFR 351.309(c)(1)(ii).

[13] *See* 19 CFR 351.309(d)(1)(2).

[14] *See* 19 CFR 351.309(c)(2), (d)(2).

[15] *See* 19 CFR 351.303 (for general filing requirements).

[16] *See* 19 CFR 351.212(b)(1).

[17] For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–932]

Certain Steel Threaded Rod From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the ''Department'') published the *Final Results* of the sixth administrative review of the antidumping duty order on certain steel threaded rod from the People's Republic of China (''PRC'') on November 22, 2016. The period of review (''POR'') is April 1, 2014, through March 31, 2015. This review covers two PRC exporters of subject merchandise, RMB Fasteners Ltd., IFI & Morgan Ltd., and Jiaxing Brother Standard Part Co., Ltd. (collectively ''the RMB/IFI Group''), and Zhejiang New Oriental Fastener Co., Ltd. (''New Oriental''). The amended final dumping margins are listed below in the ''Final Results of Administrative Review'' section of this notice.

DATES: Effective January 6, 2017.

FOR FURTHER INFORMATION CONTACT: Paul Walker, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington DC 20230; telephone: (202) 482–0413.

SUPPLEMENTARY INFORMATION:

Background

The Department published in the **Federal Register** the *Final Results* of this administrative review on November 22, 2016.[1] On December 2, 2016, New Oriental filed a timely allegation that the Department made two ministerial errors in the *Final Results* and requested, pursuant to 19 CFR 351.224, that the Department correct the alleged ministerial errors. No other party

[1] *See Certain Steel Threaded Rod from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014–2015,* 81 FR 8300 (November 22, 2016) (''*Final Results*''), and accompanying Issues and Decision Memorandum (''IDM'').

submitted ministerial error allegations or rebuttal comments.

Scope of the Order

The merchandise covered by the order is steel threaded rod.[2] Steel threaded rod is certain threaded rod, bar, or studs, of carbon quality steel, having a solid, circular cross section, of any diameter, in any straight length, that have been forged, turned, cold-drawn, cold-rolled, machine straightened, or otherwise cold-finished, and into which threaded grooves have been applied. Certain steel threaded rod subject to the order is currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheadings 7318.15.5051, 7318.15.5056, 7318.15.5090, and 7318.15.2095. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise is dispositive.[3]

Amended Final Results

Section 751(h) of the Tariff Act of 1930, as amended (''the Act''), defines ''ministerial error'' as including ''errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.'' After analyzing New Oriental's comments, we have determined, in accordance with section 751(h) of the Act and 19 CFR 351.224(e), that we made certain ministerial errors in the final results with respect to our calculation of surrogate financial ratios.[4]

For a detailed discussion of these ministerial errors, as well as the Department's analysis of these errors, *see* Ministerial Errors Memo. In accordance with section 751(h) of the Act and 19 CFR 351.224(e), we are amending the *Final Results* of this administrative review of certain steel threaded rod from the PRC. The dumping margins for the period of review for these amended final results are as follows:

Exporter	Weighted-average margin (percent)
RMB Fasteners Ltd., and IFI & Morgan Ltd. (''RMB/IFI Group'')	0.00
Zhejiang New Oriental Fasteners Co., Ltd. (''New Oriental'')	5.40

These amended final results and notice are issued and published in accordance with sections 751(h), and 777(i)(1) of the Act, and 19 CFR 351.224(e).

Dated: December 23, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2017–00026 Filed 1–5–17; 8:45 am]

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[2] *See Certain Steel Threaded Rod from the People's Republic of China: Notice of Antidumping Duty Order,* 74 FR 17154 (April 14, 2009).

[3] *See* Memorandum to Paul Piquado, from Christian Marsh, regarding ''Sixth Antidumping Administrative Review of Certain Steel Threaded Rod from the People's Republic of China: Ministerial Error Memorandum,'' dated concurrently with this notice (''Ministerial Errors Memo'').

[4] *See* Ministerial Errors Memo.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–503, A–351–503, A–570–502, C–351–504]

Iron Construction Castings From Brazil, Canada, and the People's Republic of China: Continuation of Antidumping Duty Orders and Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) and the International Trade Commission (the ITC) have determined that revocation of the antidumping duty (AD) orders on certain iron construction castings (iron castings) from Brazil, Canada, and the People's Republic of China (PRC) would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States. The Department and the ITC have also determined that revocation of the countervailing duty (CVD) order on heavy iron construction castings (heavy iron castings) from Brazil would likely lead to continuation or recurrence of net countervailable subsidies and material injury to an industry in the United States. Therefore, the Department is publishing a notice of continuation of the AD orders and the CVD order.

DATES: Effective January 6, 2017.

FOR FURTHER INFORMATION CONTACT: Shanah Lee or Patricia Tran, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6386 or (202) 482–1503, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2015, the Department initiated[1] and the ITC instituted[2] five-year (sunset) reviews of the *AD Orders*[3] on iron castings from Brazil, Canada, and the PRC, and the *CVD Order*[4] on heavy iron castings from Brazil pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). The Department conducted expedited sunset reviews of these orders. As a result of its reviews, the Department determined that revocation of the *AD Orders* on iron castings would likely lead to continuation or recurrence of dumping and that revocation of the *CVD Order* on heavy iron castings would likely lead to continuation or recurrence of net countervailable subsidies.[5] Therefore, the Department notified the ITC of the magnitude of the margins and the net countervailable subsidy rate likely to prevail should the orders be revoked, pursuant to sections 751(c)(1) and 752(b) and (c) of the Act.[6]

On December 28, 2016, the ITC published its determination, pursuant to sections 751(c) and 752 of the Act, that revocation of the AD orders on iron castings from Brazil, Canada, and the PRC, and the CVD order on heavy iron castings from Brazil, would likely lead to continuation or recurrence of material

[1] *See Initiation of Five-year (''Sunset'') Reviews,* 80 FR 59133 (October 1, 2015).

[2] *See Iron Construction Castings From Brazil, Canada, and China; Institution of Five-Year Reviews,* 80 FR 59192 (October 1, 2015).

[3] *See Antidumping Duty Order; Iron Construction Castings From Brazil,* 51 FR 17220 (May 9, 1986); *Antidumping Duty Order; Certain Iron Construction Castings Grom Canada,* 51 FR 7600 (March 5, 1986), as amended by *Iron Construction Castings From Canada; Amendment to Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order,* 51 FR 34110 (September 25, 1986); *Antidumping Duty Order; Iron Construction Castings From the People's Republic of China,* 51 FR 17222 (May 9, 1986) (collectively *AD Orders*).

[4] *See Countervailing Duty Order; Certain Heavy Iron Construction Casting From Brazil,* 51 FR 17786 (May 15, 1986) (*CVD Order*).

[5] *See Iron Construction Castings From Brazil, Canada, and, the People's Republic of China: Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders,* 81 FR 7083 (February 10, 2016), and *Heavy Iron Construction Castings From Brazil: Final Results of Expedited Fourth Sunset Review of the Countervailing Duty Order,* 81 FR 6237 (February 5, 2016).

[6] *See Iron Construction Castings From Brazil, Canada, and, the People's Republic of China: Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders,* 81 FR 7083 (February 10, 2016), and *Heavy Iron Construction Castings From Brazil: Final Results of Expedited Fourth Sunset Review of the Countervailing Duty Order,* 81 FR 6237 (February 5, 2016).

injury to an industry in the United States within a reasonably foreseeable time.[7]

Scopes of the AD Orders

Brazil

The merchandise covered by the order consists of certain iron construction castings from Brazil, limited to manhole covers, rings, and frames, catch basin grates and frames, cleanout covers and frames used for drainage or access purposes for public utility, water and sanitary systems, classifiable as heavy castings under Harmonized Tariff Schedule (HTS) item under 7325.10.0010; and to valve, service, and meter boxes which are placed below ground to encase water, gas, or other valves, or water and gas meters, classifiable as light castings under HTS item number 7325.10.0050. The HTS item numbers are provided for convenience and customs purposes only. The written product description remains dispositive.

Canada

The merchandise covered by the order consists of certain iron construction castings from Canada, limited to manhole covers, rings, and frames, catch basin grates and frames, clean-out covers, and frames used for drainage or access purposes for public utility, water and sanitary systems, classifiable as heavy castings under HTS item number 7325.10.0010. The HTS item number is provided for convenience and customs purposes only. The written product description remains dispositive.

PRC

The products covered by the order are certain iron construction castings from the PRC, limited to manhole covers, rings and frames, catch basin grates and frames, cleanout covers and drains used for drainage or access purposes for public utilities, water and sanitary systems; and valve, service, and meter boxes which are placed below ground to encase water, gas, or other valves, or water or gas meters. These articles must be of cast iron, not alloyed, and not malleable. This merchandise is currently classifiable under the HTS item numbers 7325.10.0010 and 7325.10.0050. The HTS item numbers are provided for convenience and customs purposes. The written product description remains dispositive.

Scope of the CVD Order

Brazil

The products covered by this order are certain heavy iron construction castings, which are defined for purposes of this proceeding as manhole covers, rings and frames; catch basin grates and frames; and cleanout covers and frames. Such castings are used for drainage or access purposes for public utility, water and sanitary systems. These articles must be of cast iron, not alloyed, and not malleable. The merchandise is currently classified under HTS item number 7325.10.00. While the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Continuation of the Orders

As a result of the determinations by the Department and the ITC that revocation of the AD orders and the CVD order would likely lead to a continuation or recurrence of dumping and countervailable subsidies and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), the Department hereby orders the continuation of the AD orders on iron castings from Brazil, Canada, and the PRC, and the CVD order on heavy iron castings from Brazil. U.S. Customs and Border Protection will continue to collect cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the AD orders and the CVD order will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next five-year review of these orders not later than 30 days prior to the fifth anniversary of the effective date of this continuation notice.

These five-year sunset reviews and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published pursuant to section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: December 29, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2017–00028 Filed 1–5–17; 8:45 am]

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[7] *See Iron Construction Castings From Brazil, Canada, and China; Determination,* 81 FR 95639 (December 28, 2016). *See also* the letter from the Chairman of the ITC, Irving Williamson, to Deputy Assistant Secretary Christian Marsh, dated December 21, 2016.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–820]

Certain Hot-Rolled Carbon Steel Flat Products From India: Final Results of Antidumping Duty Administrative Review; 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On September 7, 2016, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty (AD) order on certain hot-rolled carbon steel flat products (hot-rolled steel) from India. We received no comments or requests for a hearing. Therefore, for the final results, we continue to find that Ispat Industries Ltd. (Ispat), JSW Steel Ltd. (JSW), JSW Ispat Steel Ltd. (JSW Ispat), and Tata Steel Ltd. (Tata) had no shipments of the subject merchandise, and, therefore, no reviewable transactions, during the period of review (POR).

DATES: Effective January 6, 2017.

FOR FURTHER INFORMATION CONTACT: George McMahon or Eric Greynolds, AD/CVD Operations Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1167 and (202) 482–6071, respectively.

Background

On September 7, 2016, the Department published the *Preliminary Results.*[1] The POR is December 1, 2014, through November 30, 2015. We invited interested parties to comment on the *Preliminary Results.* We received no comments from any party. The Department conducted this administrative review in accordance with section 751(a)(2) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

For purposes of this order, the products covered are certain hot-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with

[1] *See Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Preliminary Results of Antidumping Duty Administrative Review; 2014–2015,* 81 FR 61664 (September 7, 2016) (*Preliminary Results*).

plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*i.e.,* flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4.0 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of this order.

Specifically included in the scope of this order are vacuum-degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high-strength low-alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low-carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products in which: (i) Iron predominates, by weight, over each of the other contained elements; (ii) the carbon content is 2 percent or less, by weight; and (iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.15 percent of vanadium, or
0.15 percent of zirconium

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this order:

- Alloy hot-rolled carbon steel products in which at least one of the chemical elements exceeds those listed above (including, *e.g.,* American Society for Testing and Materials (ASTM) specifications A543, A387, A514, A517, A506).
- Society of Automotive Engineers (SAE)/American Iron & Steel Institute (AISI) grades of series 2300 and higher.
- Ball bearings steels, as defined in the HTSUS.
- Tool steels, as defined in the HTSUS.
- Silico-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 2.25 percent.
- ASTM specifications A710 and A736.
- United States Steel (USS) Abrasion-resistant steels (USS AR 400, USS AR 500).
- All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).
- Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTSUS.

The merchandise subject to this order is currently classifiable in the HTSUS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot-rolled carbon steel covered by this order, including: Vacuum-degassed fully stabilized; high-strength low-alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise subject to this proceeding is dispositive.

Final Determination of No Shipments

As noted above, the Department received no comments concerning the *Preliminary Results* on the record of this segment of the proceeding. As there are no changes from, or comments on, the *Preliminary Results,* the Department finds that there is no reason to modify its analysis. Thus, we continue to find that Ispat, JSW, JSW Ispat, and Tata had no shipments of the subject merchandise, and, therefore, no reviewable transactions, during the POR. Accordingly, no decision memorandum accompanies this **Federal Register** notice. For further details of the issues addressed in this proceeding, see the *Preliminary Results* and the accompanying Preliminary Decision Memorandum.[2]

Assessment Rates

Upon issuance of the final results of this administrative review, the Department shall determine, and Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries, in accordance with section 751(a)(2)(C) of the Act and 19 CFR 351.212. The Department intends to issue assessment instructions to CBP 15 days after publication of the final results of this review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003.[3] If applicable, this clarification will apply to all entries of subject merchandise during the POR produced or exported by Ispat, JSW, JSW Ispat, and Tata, for which these companies did not know that its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate these un-reviewed entries at the all others rate established in the less-than fair-value (LTFV) investigation, as amended, which is 38.72 percent,[4] if there is no

[2] *See* Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, titled ''Certain Hot-Rolled Carbon Steel Flat Products from India: Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review; 2014–2015,'' dated August 19, 2016 (Preliminary Decision Memorandum). The Preliminary Decision Memorandum can be accessed directly at: *http://enforcement.trade.gov/frn/index.html.*

[3] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*).

[4] *See Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From India,* 66 FR 60194

Continued

rate for the intermediary company(ies) involved in the transaction. These cash deposit requirements, when imposed, shall remain in effect until further notice.[5]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication of the final results of this administrative review, as provided by section 751(a)(2) of the Act: (1) The cash deposit rates for respondents noted above, which claimed no shipments, will remain unchanged from the rates assigned to the companies in the most recently completed review of the companies; (2) for merchandise exported by manufacturers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the manufacturer of the subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 38.72 percent, the all-others rate established in the *Amended Final Determination.* These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation, which is subject to sanction.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(h).

Dated: December 30, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2017–00037 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–DS–P

(December 3, 2001) (*Amended Final Determination*).

[5] *See Assessment Policy Notice* for a full discussion of this clarification.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF024

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Long Range Strike Weapons Systems Evaluations Program

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

ACTION: Notice; receipt of application for Letter of Authorization; request for comments and information.

SUMMARY: NMFS has received a request from the United States Air Force (USAF), 86 Fighter Weapons Squadron (86 FWS) for authorization to take marine mammals incidental to conducting munitions testing for their Long Range Strike Weapons Systems Evaluation Program (LRS WSEP) over the course of five years, from September 1, 2017 through August 31, 2022. Pursuant to regulations implementing the Marine Mammal Protection Act (MMPA), NMFS is announcing receipt of the 86 FWS's request for the development and implementation of regulations governing the incidental taking of marine mammals and inviting information, suggestions, and comments on the 86 FWS's application and request.

DATES: Comments and information must be received no later than February 6, 2017.

ADDRESSES: Comments on the application should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. 1315 East-West Highway, Silver Spring, MD 20910–3225 and electronic comments should be sent *ITP.McCue@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments sent via email, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/military.htm* without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Laura McCue, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

An electronic copy of the 86 FWS's application may be obtained online at: *www.nmfs.noaa.gov/pr/permits/incidental/military.htm.* In case of problems accessing the document, please call the contact listed above.

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings for marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and

requirements pertaining to the mitigation, monitoring, and reporting of such taking are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

The NDAA of 2004 (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations indicated earlier and amended the definition of harassment as it applies to a ''military readiness activity'' to read as follows (Section 3(18)(B) of the MMPA): (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B Harassment). 86 FWS has identified LRS WSEP missions as military readiness activities.

On September 27, 2016, NMFS issued an incidental harassment authorization (IHA), similar to this request, for takes of marine mammals incidental to Long Range Strike Weapons System Evaluation Program (LRS WSEP) activities in the BSURE area of the PMRF off Kauai, Hawaii. 86 FWS complied with all conditions of the IHA issued, including submission of final reports. Based on these reports, NMFS has determined that impacts to marine mammals were not beyond those anticipated.

Summary of Request

On December 21, 2016, NMFS received an adequate and complete application from the 86 FWS requesting authorization for the take of marine mammals incidental to LRS WSEP activities in the Barking Sands Underwater Range Expansion (BSURE) area of the Pacific Missile Range Facility (PMRF) off Kauai, Hawaii for a period of five years. LRS WSEP activities have the potential to result in take of marine mammals in the waters of the PMRF. Therefore, 86 FWS requests authorization to take 16 species of marine mammals that may occur in this area.

Specified Activities

86 FWS proposes actions that include LRS WSEP test missions that involve the use of multiple types of live and inert munitions (bombs and missiles) detonated above, at, or slightly below the water surface. The ordnance may be delivered by multiple types of aircraft, including bombers and fighter aircraft. The actions include air-to-surface test missions of the Joint Air-to-Surface Stand-off Missile/Joint Air-to-Surface Stand-off Missile-Extended Range (JASSM/JASSM–ER), Small Diameter Bomb-I/II (SDB–I/II), High-speed Anti-Radiation Missile (HARM), Joint Direct Attack Munition/Laser Joint Direct Attack Munition (JDAM/LJDAM), and Miniature Air-Launched Decoy (MALD). Net explosive weight of the live munitions ranges from 23 to 300 pounds. 86 FWS anticipates the ability to test approximately 110 munitions per year.

Information Solicited

Interested persons may submit information, suggestions, and comments concerning 86 FWS's request (see **ADDRESSES**). Comments should be supported by data or literature citations as appropriate. We will consider all relevant information, suggestions, and comments related to the request during the development of proposed regulations governing the incidental taking of marine mammals by 86 FWS, if appropriate.

Dated: December 27, 2016.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–31947 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[0648–XE753]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Operation, Maintenance, and Repair of the Northeast Gateway Liquefied Natural Gas Port and the Algonquin Pipeline Lateral Facilities in Massachusetts Bay

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that we have issued an incidental harassment authorization (IHA) to Northeast Gateway® Energy Bridge™, L.P. (Northeast Gateway or NEG) and Algonquin Gas Transmission, LLC (Algonquin) to take small numbers of 14 species of marine mammals, by Level B harassment, incidental to operating, maintaining, and repairing a liquefied natural gas (LNG) port and the Algonquin Pipeline Lateral (Pipeline Lateral) facilities by NEG and Algonquin, in Massachusetts Bay.

DATES: This authorization is effective from December 22, 2016 through December 21, 2017.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for a one-year authorization to incidentally take small numbers of marine mammals by harassment, provided that there is no potential for serious injury or mortality to result from the activity. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment

period, NMFS must either issue or deny the authorization.

Summary of Request

On June 9, 2015, NMFS received an application from Excelerate Energy, L.P. (Excelerate) and Tetra Tech, Inc. (Tetra Tech), on behalf of NEG and Algonquin, for an annual IHA and a subsequent five-year letter of authorization (LOA) pursuant to a rulemaking under section 101(a)(5)(A), to take 14 species of marine mammals by Level B harassment incidental to operations, maintenance, and repair of the NEG Port and the Pipeline Lateral facilities in Massachusetts Bay. They are: North Atlantic right whale, humpback whale, fin whale, sei whale, minke whale, long-finned pilot whale, Atlantic white-sided dolphin, bottlenose dolphin, short-beaked common dolphin, killer whale, Risso's dolphin, harbor porpoise, harbor seal, and gray seal. Since the NEG Port and Pipeline Lateral operation, maintenance, and repair activities have the potential to take marine mammals, a marine mammal take authorization under the MMPA is warranted. NMFS issued an IHA to NEG and Algonquin on December 22, 2015 (81 FR 744; January 7, 2016). The IHA is valid until December 22, 2016. In June 2016 NMFS learned that NEG and Algonquin are considering decommissioning the NEG Port in the foreseeable future. Upon discussion with Excelerate and Tetra Tech, it was agreed that instead of conducting a rulemaking for five years of incidental take authorization that may not be needed, NMFS would process another one-year IHA to NEG and Algonquin to cover marine mammal takes from its operations, maintenance, and repair work from December 23, 2016 through December 22, 2017.

NMFS first issued an IHA to NEG and Algonquin to allow for the incidental harassment of small numbers of marine mammals resulting from the construction and operation of the NEG Port and the Pipeline Lateral (72 FR 27077; May 14, 2007). Subsequently, NMFS issued five one-year IHAs for the take of marine mammals incidental to the operation of the NEG Port activity pursuant to section 101(a)(5)(D) of the MMPA (73 FR 29485; May 21, 2008, 74 FR 45613; September 3, 2009, 75 FR 53672; September 1, 2010, and 76 FR 62778; October 11, 2011). After that, NMFS issued two one-year IHAs to NEG and Algonquin to take marine mammals incidental to the operations of the NEG Port as well as maintenance and repair (79 FR 78806; December 31, 2014, 81 FR 744; January 7, 2016).

Description of the Specified Activity

The NEG and Algonquin activities include the following:

NEG Port Operations: The NEG Port operations involve docking of NEG vessels and regasification of NEG for delivery to shore. Noises generated during these activities, especially from the NEG vessel's dynamic positioning (DP) thrusters during docking, could result in takes of marine mammals in the port vicinity by level B behavioral harassment.

NEG Port Maintenance and Repair: Regular maintenance and occasional repair of the NEG Port are expected to occur throughout the NEG Port operation period. Machinery used during these activities generate noises that could result in takes of marine mammals in the port vicinity by Level B behavioral harassment.

Algonquin Pipeline Lateral Routine Operations and Maintenance: The Algonquin Pipeline Lateral that is used for gas delivery would be inspected regularly to ensure proper operations. The work would be done using support vessels operating in dynamic positioning mode. Noises generated from these activities could result in takes of marine mammals in the vicinity of Pipeline Lateral by Level B behavioral harassment.

Unplanned Pipeline Repair Activities: Unplanned repair activities may be required occasionally at a location along the Pipeline Lateral in west Massachusetts Bay, as shown in Figure 2.1 of the application. The repair would involve the use of a dive vessel operating in dynamic positioning mode. Noise generated from this activity could result in takes of marine mammals in the vicinity of repair work by Level B behavioral harassment.

An IHA was previously issued to NEG and Algonquin for this activity on December 22, 2015 (81 FR 744; January 7, 2016), based on activities described on Excelerate and Tetra Tech's marine mammal incidental take request submitted in June 2014 and on the **Federal Register** notice for the proposed IHA (78 FR 69049; November 18, 2013). The latest application submitted by Excelerate and Tetra Tech on June 9, 2015, contains the same information on project descriptions as described in the June 2014 IHA application. There is no change on the NEG and Algonquin's proposed NEG Port and Pipeline Lateral operations and maintenance and repair. Please refer to these documents for a detailed description of NEG and Algonquin's proposed NEG Port and Pipeline Lateral operations and maintenance and repair activities.

Comments and Responses

A notice of NMFS' proposal to issue an IHA was published in the **Federal Register** on November 15, 2016 (81 FR 80016). During the 30-day public comment period, NMFS received a comment letter from the Marine Mammal Commission (Commission). Specific comments and responses are provided below.

Comment 1: The Commission states that the method used to estimate the numbers of takes, which sums fractions of takes for each species across days, does not account for NMFS's 24-hour reset policy. The Commission states that instead of summing fractions of takes across days and then rounding to estimate total takes, NMFS should have calculated a daily take estimate (determined by multiplying the estimated density of marine mammals in the area by the daily ensonified area) and then rounding that to a whole number before multiplying it by the number of days that activities would occur. Thus, the Commission recommends that NMFS (1) follow its policy of a 24-hour reset for enumerating the number of each species that could be taken, (2) apply standard rounding rules before summing the numbers of estimated takes across days, and (3) for species that have the potential to be taken but model-estimated or calculated takes round to zero, use group size to inform the take estimates—these methods should be used consistently for all future incidental take authorizations.

Response: While for certain projects NMFS has rounded to the whole number for daily takes, the circumstance for projects like this one when the objective of take estimation is to provide more accurate assessments for potential impacts to marine mammals for the entire project, the rounding on a daily basis will introduce large errors into the process. In addition, while NMFS uses a 24-hour reset for its take calculation to ensure that individual animals are not counted as a take more than once per day, that fact does not make the calculation of take across the entire activity period inherently incorrect. There is no need for daily (24-hour) rounding in this case because there is no daily limit of takes, so long as total authorized takes of marine mammal are not exceeded. In short, the calculation of predicted take is not an exact science and there are arguments for taking different mathematical approaches in different situations, and for making qualitative adjustments in other situations. We

believe, however, that the prediction for this action remains appropriate.

Description of Marine Mammals in the Area of the Specified Activities

Marine mammal species that potentially occur in the vicinity of the Northeast Gateway facility include the North Atlantic right whale, humpback whale, fin whale, sei whale, minke whale, long-finned pilot whale, Atlantic white-sided dolphin, bottlenose dolphin, common dolphin, killer whale, Risso's dolphin, harbor porpoise, harbor seal, and gray seal. General information on the distribution of these marine mammal species can be found in NMFS Stock Assessment Reports (Waring *et al.,* 2016). This latter document is available at: *http://www.nmfs.noaa.gov/pr/sars/pdf/atlantic2015_final.pdf.* Additional information regarding these species within the NEG's action area is provided below, with a summary in Table 1.

Humpback Whale

The highest abundance for humpback whales is distributed primarily along a relatively narrow corridor following the 100-meter (m) (328-feet (ft)) isobath across the southern Gulf of Maine from the northwestern slope of Georges Bank, south to the Great South Channel, and northward alongside Cape Cod to Stellwagen Bank and Jeffreys Ledge. The relative abundance of whales increases in the spring with the highest occurrence along the slope waters (between the 40- and 140-m, or 131- and 459-ft, isobaths) off Cape Cod and Davis Bank, Stellwagen Basin and Tillies Basin and between the 50- and 200-m (164- and 656-ft) isobaths along the inner slope of Georges Bank. High abundance is also estimated for the waters around Platts Bank. In the summer months, abundance increases markedly over the shallow waters (<50 m, or <164 ft) of Stellwagen Bank, the waters (100–200 m or 328–656 ft) between Platts Bank and Jeffreys Ledge, the steep slopes (between the 30- and 160-m isobaths) of Phelps and Davis Bank north of the Great South Channel towards Cape Cod, and between the 50- and 100-m (164- and 328-ft) isobath for almost the entire length of the steeply sloping northern edge of Georges Bank. This general distribution pattern persists in all seasons except winter, when humpbacks remain at high abundance in only a few locations including Porpoise and Neddick Basins adjacent to Jeffreys Ledge, northern Stellwagen Bank and Tillies Basin, and the Great South Channel. The best estimate of abundance for Gulf of Maine, formerly western North Atlantic, humpback whales is 823 animals (Waring *et al.,* 2016).

Fin Whale

Spatial patterns of habitat utilization by fin whales are very similar to those of humpback whales. Spring and summer high-use areas follow the 100-m (328 ft) isobath along the northern edge of Georges Bank (between the 50- and 200-m (164- and 656-ft) isobaths), and northward from the Great South Channel (between the 50- and 160-m, or 164- and 525-ft, isobaths). Waters around Cashes Ledge, Platts Bank, and Jeffreys Ledge are all high-use areas in the summer months. Stellwagen Bank is a high-use area for fin whales in all seasons, with highest abundance occurring over the southern Stellwagen Bank in the summer months. In fact, the southern portion of the Stellwagen Bank National Marine Sanctuary (SBNMS) is used more frequently than the northern portion in all months except winter, when high abundance is recorded over the northern tip of Stellwagen Bank. In addition to Stellwagen Bank, high abundance in winter is estimated for Jeffreys Ledge and the adjacent Porpoise Basin (100- to 160-m, 328- to 656-ft, isobaths), as well as Georges Basin and northern Georges Bank. The best estimate of abundance for the western North Atlantic stock of fin whales is 1,618 (Waring *et al.,* 2016). Currently, there are insufficient data to determine population trends for this species.

Minke Whale

Like other piscivorous baleen whales, highest abundance for minke whale is strongly associated with regions between the 50- and 100-m (164- and 328-ft) isobaths, but with a slightly stronger preference for the shallower waters along the slopes of Davis Bank, Phelps Bank, Great South Channel and Georges Shoals on Georges Bank. Minke whales are sighted in the SBNMS in all seasons, with highest abundance estimated for the shallow waters (approximately 40 m, or 131 ft) over southern Stellwagen Bank in the summer and fall months. Platts Bank, Cashes Ledge, Jeffreys Ledge, and the adjacent basins (Neddick, Porpoise and Scantium) also support high relative abundance. Very low densities of minke whales remain throughout most of the southern Gulf of Maine in winter. The best estimate of abundance for the Canadian East Coast stock, which occurs from the western half of the Davis Strait to the Gulf of Mexico, of minke whales is 20,741 animals (Waring *et al.,* 2016). Currently, there are insufficient data to determine population trends for this species.

North Atlantic Right Whale

North Atlantic right whales are generally distributed widely across the southern Gulf of Maine in spring with highest abundance located over the deeper waters (100- to 160-m (328- to 525-ft) isobaths) on the northern edge of the Great South Channel and deep waters (100–300 m, 328–984 ft) parallel to the 100-m (328-ft) isobath of northern Georges Bank and Georges Basin. High abundance is also found in the shallowest waters (<30 m, or <98 ft) of Cape Cod Bay, over Platts Bank and around Cashes Ledge. Lower relative abundance is estimated over deep-water basins including Wilkinson Basin, Rodgers Basin and Franklin Basin. In the summer months, right whales move almost entirely away from the coast to deep waters over basins in the central Gulf of Maine (Wilkinson Basin, Cashes Basin between the 160- and 200-m (525- and 656-ft) isobaths) and north of Georges Bank (Rogers, Crowell and Georges Basins). Highest abundance is found north of the 100-m (328-ft) isobath at the Great South Channel and over the deep slope waters and basins along the northern edge of Georges Bank. The waters between Fippennies Ledge and Cashes Ledge are also estimated as high-use areas. In the fall months, right whales are sighted infrequently in the Gulf of Maine, with highest densities over Jeffreys Ledge and over deeper waters near Cashes Ledge and Wilkinson Basin. In winter, Cape Cod Bay, Scantum Basin, Jeffreys Ledge, and Cashes Ledge were the main high-use areas. Although SBNMS does not appear to support the highest abundance of right whales, sightings within SBNMS are reported for all four seasons, albeit at low relative abundance. Highest sighting within SBNMS occurred along the southern edge of the Bank.

The western North Atlantic minimum stock size is based on a census of individual whales identified using photo-identification techniques. A review of the photo-ID recapture database as it existed on 20 October 2014 indicated that 476 individually recognized whales in the catalog were known to be alive during 2011. This number represents a minimum population size. This is a direct count and has no associated coefficient of variation (Waring *et al.,* 2016). Examination of the minimum number alive population index calculated from the individual sightings database, as it existed on 20 October 2014, for the years 1990–2011 suggests a positive and slowly accelerating trend in population size. These data reveal a significant

increase in the number of catalogued whales with a geometric mean growth rate for the period of 2.8 percent (Waring *et al.,* 2016).

Long-Finned Pilot Whale

The long-finned pilot whale is more generally found along the edge of the continental shelf (a depth of 330 to 3,300 ft or 100 to 1,000 m), choosing areas of high relief or submerged banks in cold or temperate shoreline waters. This species is split between two subspecies: The Northern and Southern subspecies. The Southern subspecies is circumpolar with northern limits of Brazil and South Africa. The Northern subspecies, which could be encountered during operation of the NEG Port, ranges from North Carolina to Greenland (Reeves *et al.,* 2002; Wilson and Ruff 1999). In the western North Atlantic, long-finned pilot whales are pelagic, occurring in especially high densities in winter and spring over the continental slope, then moving inshore and onto the shelf in summer and autumn following squid and mackerel populations (Reeves *et al.,* 2002). They frequently travel into the central and northern Georges Bank, Great South Channel, and Gulf of Maine areas during the summer and early fall (May and October) (NOAA 1993). According to the species stock report, the population estimate for the Western North Atlantic long-finned pilot whale is 5,636 individuals (Waring *et al.,* 2010). Currently, there are insufficient data to determine population trends for the long-finned pilot whale.

Atlantic White-Sided Dolphin

In spring, summer and fall, Atlantic white-sided dolphins are widespread throughout the southern Gulf of Maine, with the high-use areas widely located either side of the 100-m (328-ft) isobath along the northern edge of Georges Bank, and north from the Great South Channel to Stellwagen Bank, Jeffreys Ledge, Platts Bank and Cashes Ledge. In spring, high-use areas exist in the Great South Channel, northern Georges Bank, the steeply sloping edge of Davis Bank and Cape Cod, southern Stellwagen Bank and the waters between Jeffreys Ledge and Platts Bank. In summer, there is a shift and expansion of habitat toward the east and northeast. High-use areas are identified along most of the northern edge of Georges Bank between the 50- and 200-m (164- and 656-ft) isobaths and northward from the Great South Channel along the slopes of Davis Bank and Cape Cod. High numbers of sightings are also recorded over Truxton Swell, Wilkinson Basin, Cashes Ledge and the bathymetrically complex area northeast of Platts Bank. High numbers of sightings of white-sided dolphin are recorded within SBNMS in all seasons, with highest density in summer and most widespread distributions in spring located mainly over the southern end of Stellwagen Bank. In winter, high numbers of sightings are recorded at the northern tip of Stellwagen Bank and Tillies Basin.

A comparison of spatial distribution patterns for all baleen whales (Mysticeti) and all porpoises and dolphins combined show that both groups have very similar spatial patterns of high- and low-use areas. The baleen whales, whether piscivorous or planktivorous, are more concentrated than the dolphins and porpoises. They utilize a corridor that extended broadly along the most linear and steeply sloping edges in the southern Gulf of Maine indicated broadly by the 100-m (328-ft) isobath. Stellwagen Bank and Jeffreys Ledge support a high abundance of baleen whales throughout the year. Species richness maps indicate that high-use areas for individual whales and dolphin species co-occur, resulting in similar patterns of species richness primarily along the southern portion of the 100-m (328-ft) isobath extending northeast and northwest from the Great South Channel. The southern edge of Stellwagen Bank and the waters around the northern tip of Cape Cod are also highlighted as supporting high cetacean species richness. Intermediate to high numbers of species are also calculated for the waters surrounding Jeffreys Ledge, the entire Stellwagen Bank, Platts Bank, Fippennies Ledge and Cashes Ledge. The best estimate of abundance for the western North Atlantic stock of white-sided dolphins is 48,819 (Waring *et al.,* 2016). A trend analysis has not been conducted for this species.

Killer Whale, Common Dolphin, Bottlenose Dolphin, Risso's Dolphin, and Harbor Porpoise

Although these five species are some of the most widely distributed small cetacean species in the world (Jefferson *et al.,* 1993), they are not commonly seen in the vicinity of the project area in Massachusetts Bay (Wiley *et al.,* 1994; Northeast Gateway Marine Mammal Monitoring Weekly Reports 2007). The total number of killer whales off the eastern U.S. coast is unknown, and present data are insufficient to calculate a minimum population estimate or to determine the population trends for this stock (Blaylock *et al.,* 1995). The best estimate of abundance for the western North Atlantic stock of common dolphins is 173,486 animals, and a trend analysis has not been conducted for this species (Waring *et al.,* 2016). There are several stocks of bottlenose dolphins found along the eastern United States from Maine to Florida. The stock that may occur in the area of the Neptune Port is the western North Atlantic coastal northern migratory stock of bottlenose dolphins. The best estimate of abundance for this stock is 11,548 animals (Waring *et al.,* 2016). There are insufficient data to determine the population trend for this stock. The best estimate of abundance for the western North Atlantic stock of Risso's dolphins is 18,250 animals (Waring *et al.,* 2016). There are insufficient data to determine the population trend for this stock. The best estimate of abundance for the Gulf of Maine/Bay of Fundy stock of harbor porpoise is 79,833 animals (Waring *et al.,* 2016). A trend analysis has not been conducted for this species.

Harbor Seal and Gray Seal

In the U.S. waters of the western North Atlantic, both harbor and gray seals are usually found from the coast of Maine south to southern New England and New York (Waring *et al.,* 2010).

Along the southern New England and New York coasts, harbor seals occur seasonally from September through late May (Schneider and Payne 1983). In recent years, their seasonal interval along the southern New England to New Jersey coasts has increased (deHart 2002). In U.S. waters, harbor seal breeding and pupping normally occur in waters north of the New Hampshire/Maine border, although breeding has occurred as far south as Cape Cod in the early part of the 20th century (Temte *et al.,* 1991; Katona *et al.,* 1993). The best estimate of abundance for the western North Atlantic stock of harbor seals is 75,834 animals (Waring *et al.,* 2016). Although gray seals are often seen off the coast from New England to Labrador, within the U.S. waters, only small numbers of gray seals have been observed pupping on several isolated islands along the Maine coast and in Nantucket-Vineyard Sound, Massachusetts (Katona *et al.,* 1993; Rough, 1995). In the late 1990s, a year-round breeding population of approximately 400 gray seals was documented on outer Cape Cod and Muskeget Island (Warring *et al.,* 2007). Depending on the model used, the minimum estimate for the Canadian gray seal population was estimated to range between 125,541 and 169,064 animals (Trzcinski *et al.,* 2005, cited in Waring *et al.,* 2009); however, present data are insufficient to calculate the minimum population estimate for U.S. waters. Waring *et al.* (2016) note that

gray seal abundance in the U.S. Atlantic is likely increasing, but the rate of increase is unknown.

TABLE 1—MARINE MAMMAL SPECIES POTENTIALLY PRESENT IN REGION OF ACTIVITY

Species	ESA status	MMPA status	Abundance	Range	Occurrence
North Atlantic right whale	Endangered	Depleted	476	N. Atlantic	Occasional.
Humpback whale	Endangered	Depleted	823	N. Atlantic	Occasional.
Fin whale	Endangered	Depleted	1618	N. Atlantic	Occasional.
Sei whale	Endangered	Depleted	357	N. Atlantic	Occasional.
Minke whale	Not listed	Non-depleted	20741	N. Atlantic	Occasional.
Long-finned pilot whale	Not listed	Non-depleted	5636	N. Atlantic	Occasional.
Atlantic white-sided dolphin	Not listed	Non-depleted	48819	N. Atlantic	Occasional.
Bottlenose dolphin	Not listed	Non-depleted	11548	N. Atlantic	Uncommon.
Common dolphin	Not listed	Non-depleted	173486	N. Atlantic	Uncommon.
Killer whale	Not listed	Non-depleted	Unknown	N. Atlantic	Uncommon.
Risso's dolphin	Not listed	Non-depleted	18250	N. Atlantic	Uncommon.
Harbor porpoise	Not listed	Non-depleted	79833	N. Atlantic	Uncommon.
Harbor Seal	Not listed	Non-depleted	75834	N. Atlantic	Occasional.
Gray seal	Not listed	Non-depleted	Unknown	N. Atlantic	Occasional.

Potential Effects of the Specified Activity on Marine Mammals

This section includes a summary and discussion of the ways that the types of stressors associated with the specified activity (*e.g.,* pile removal and pile driving) have been observed to impact marine mammals. This discussion may also include reactions that we consider to rise to the level of a take and those that we do not consider to rise to the level of a take (for example, with acoustics, we may include a discussion of studies that showed animals not reacting at all to sound or exhibiting barely measurable avoidance). This section is intended as a background of potential effects and does not consider either the specific manner in which this activity will be carried out or the mitigation that will be implemented and how either of those will shape the anticipated impacts from this specific activity. The ''Estimated Take by Incidental Harassment'' section later in this document will include a quantitative analysis of the number of individuals that are expected to be taken by this activity. The ''Negligible Impact Analysis'' section will include the analysis of how this specific activity will impact marine mammals and will consider the content of this section, the ''Estimated Take by Incidental Harassment'' section, the ''Mitigation'' section, and the ''Anticipated Effects on Marine Mammal Habitat'' section to draw conclusions regarding the likely impacts of this activity on the reproductive success or survivorship of individuals and from that on the affected marine mammal populations or stocks.

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms have been derived using auditory evoked potentials, anatomical modeling, and other data. NMFS (2016) designate ''marine mammal hearing groups'' for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The marine mammal hearing groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their hearing range):

- Low frequency cetaceans (13 species of mysticetes): Functional hearing is estimated to occur between approximately 7 Hertz (Hz) and 35 kilo Hertz (kHz);
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): Functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, *Kogia,* the franciscana, and four species of cephalorhynchids): Functional hearing is estimated to occur between approximately 275 Hz and 160 kHz;
- Phocid pinnipeds (true seals): Functional hearing is estimated between 50 Hz to 86 kHz; and
- Otariid pinnipeds (sea lions and fur seals): Functional hearing is estimated between 60 Hz to 39 kHz.

Species found in the vicinity of the NEG Port and Pipeline Lateral operations and maintenance and repair area include five low-frequency cetacean species (North Atlantic right whale, humpback whale, fin whale, sei whale, and minke whale), six mid-frequency cetacean species (long-finned pilot whale, Atlantic white-sided dolphin, bottlenose dolphin, common dolphin, Risso's dolphin, and killer whale), one high-frequency cetacean species (harbor porpoise), and two pinniped species (harbor seal and gray seal) (Table 1).

The NEG Port operations and maintenance and repair activities could adversely affect marine mammal species and stocks by exposing them to elevated noise levels in the vicinity of the activity area.

Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.,* 1999; Schlundt *et al.,* 2000; Finneran *et al.,* 2002; 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is unrecoverable, or temporary (TTS), in which case the animal's hearing threshold will recover over time (Southall *et al.,* 2007). Since marine mammals depend on acoustic cues for vital biological functions, such as orientation, communication, finding prey, and avoiding predators, marine mammals that suffer from PTS or TTS will have reduced fitness in survival and reproduction, either permanently or temporarily. Repeated noise exposure that leads to TTS could cause PTS.

In addition, chronic exposure to excessive, though not high-intensity, noise could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions (Clark *et al.,* 2009). Acoustic masking can interfere with detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Therefore, under

certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction.

Masking occurs at the frequency band which the animals utilize. Therefore, since noise generated from in-water vibratory pile driving and removal is mostly concentrated at low frequency ranges, it may have less effect on high frequency echolocation sounds by odontocetes (toothed whales). However, lower frequency man-made noises are more likely to affect detection of communication calls and other potentially important natural sounds such as surf and prey noise. It may also affect communication signals when they occur near the noise band and thus reduce the communication space of animals (*e.g.,* Clark *et al.,* 2009) and cause increased stress levels (*e.g.,* Foote *et al.,* 2004; Holt *et al.,* 2009).

Unlike TS, masking can potentially affect the species at population, community, or even ecosystem levels, as well as individual levels. Masking affects both senders and receivers of the signals and could have long-term chronic effects on marine mammal species and populations. Recent science suggests that low frequency ambient sound levels have increased by as much as 20 decibel (dB) (more than 3 times in terms of sound pressure level (SPL)) in the world's ocean from pre-industrial periods, and most of these increases are from distant shipping (Hildebrand 2009). All anthropogenic noise sources, such as those from vessel traffic, vessel docking, and stationing while operating DP thrusters, dredging and pipe laying associated with NEG Port and Pipeline Lateral maintenance and repair, and NEG regasification activities, contribute to the elevated ambient noise levels, thus increasing potential for or severity of masking.

Finally, exposure of marine mammals to certain sounds could lead to behavioral disturbance (Richardson *et al.,* 1995), such as: Changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where noise sources are located; and/or flight responses (*e.g.,* pinnipeds flushing into water from haulouts or rookeries).

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification are expected to be biologically significant if the change affects growth, survival, and/or reproduction.

The onset of behavioral disturbance from anthropogenic noise depends on both external factors (characteristics of noise sources and their paths) and the receiving animals (hearing, motivation, experience, demography) and is also difficult to predict (Southall *et al.,* 2007). Currently NMFS uses 160 dB re 1 microPascal (root-mean-square) (μPa (rms)) at received level for impulse noises (such as impact pile driving) as the onset of marine mammal behavioral harassment, and 120=dB re 1 μPa (rms) for non-impulse noises (such as operating DP thrusters, dredging, pipe laying, and NEG regasification). No impulse noise is expected from the NEG and Algonquin's NEG Port and Pipeline Lateral operation, maintenance, and repair activities. For the NEG Port and Pipeline Lateral operations and maintenance and repair activities, only the 120=dB re 1 μPa (rms) threshold is considered because only non-impulse noise sources would be generated.

Potential Effects on Marine Mammal Habitat

The action area is considered biologically important habitat for the North Atlantic right, fin, humpback, and minke whales during part of the seasons, and it is adjacent to the SBNMS. There is no critical habitat in the vicinity of the action area.

NEG Port Operations

Operation of the NEG Port will not result in short-term effects, however, long-term effects on the marine environment, including alteration of the seafloor conditions, continued disturbance of the seafloor, regular withdrawal of sea water, and regular generation of underwater noise, will result from NEG Port operations. Specifically, a small area (0.14 acre) along the Pipeline Lateral has been permanently altered (armored) at two cable crossings. In addition, the structures associated with the NEG Port (flowlines, mooring wire rope and chain, suction anchors, and pipeline end manifolds) occupy 4.8 acres of seafloor. An additional area of the seafloor of up to 43 acres (worst case scenario based on severe 100-year storm with Energy Bridge Regasification Vehicle (EBRV) occupying both submerged turret loading (STL) buoys will be subject to disturbance due to chain sweep while the buoys are occupied. Given the relatively small size of the NEG Port area that will be directly affected by Port operations, NMFS does not anticipate that habitat loss will be significant.

EBRVs are currently authorized to withdraw an average of 4.97 million gallons per day (mgd) and 2.6 billion gallons per year of sea water for general ship operations during cargo delivery activities at the NEG Port. However, as we explained in the **Federal Register** notice for the 2015 IHA (78 FR 69049; November 18, 2013), during the operations of the NEG Port facility, it was revealed that significantly more water usage is needed than what was originally evaluated in the final USCG Environmental Impact Statement/Environmental Impact Report (EIS/EIR). The updates for the needed water intake and discharge temperature are:

- 11 billion gallons of total annual water use at the Port;
- Maximum daily intake volume of up to 56 mgd at a rate of 0.45 ft per second when an EBRV is not able to achieve the heat recovery system (HRS) it is the capability of reducing water use during the regasification process) mode of operation; and
- Maximum daily change in discharge temperature of 12°C (53.6°F) from ambient from the vessel's main condenser cooling system.

Under the requested water-use scenario, Tetra Tech (2011) conducted an environmental analysis on the potential impacts to marine mammals and their prey. To evaluate impacts to phytoplankton under the increased water usage, the biomass of phytoplankton lost from the Massachusetts Bay ecosystem was estimated based on the method presented in the final EIS/EIR. Phytoplankton densities of 65,000 to 390,000 cells/gallon were multiplied by the annual planned activities of withdrawal rate of 11 billion gallons to estimate a loss of 7.15×10^{14} to 4.29×10^{15} cells per year. Assuming a dry-weight biomass of 10^{-10} to 10^{-11} gramper cell (g/cell), an estimated 7.2 kilograms (kg) to 429 kg of biomass would be lost from Massachusetts Bay under the activity, up to approximately 4.2 times that estimated in the final EIS/EIR for the permitted operational scenario. An order of magnitude estimate of the effect of this annual biomass loss on the regional food web can be calculated assuming a 10 percent transfer of biomass from one trophic level to the next (Sumich 1988) following the method used in the final EIS/EIR. This suggests that the loss of 7.2 kg to 429 kg of phytoplankton will result in the loss of about 0.7 kg to 42.9 kg of zooplankton, less than 0.1 kg to 4.3

kg of small planktivorous fish, and up to 0.4 kg of large piscivorous fish (approximately equivalent to a single 1-pound striped bass). Relative to the biomass of these trophic levels in the project area, this biomass loss is minor and consistent with the findings in the final EIS/EIR.

In addition, zooplankton losses will also increase proportionally to the increase in water withdrawn. The final EIS/EIR used densities of zooplankton determined by the sampling conducted by the Massachusetts Water Resource Authority (MWRA) to characterize the area around its offshore outfall and assumed a mean zooplankton density of 34.9×10^3 organisms per m^3. Applying this density, the water withdrawal volume under the activity would result in the entrainment of 2.2×10^{10} zooplankton individuals per trip or 1.5×10^{12} individuals per year. Assuming an average biomass of 0.63×10^{-6} g per individual, this would result in the loss of 14.1 kg of zooplankton per shipment or 916.5 kg of zooplankton per year. As discussed for phytoplankton, biomass transfers from one trophic level to the next at a rate of about 10 percent. Therefore, this entrainment of zooplankton would result in loss of about 91.6 kg of planktivorous fish and 9.2 kg of large piscivorous fish (approximately equivalent to two 9-pound striped bass). These losses are minor relative to the total biomass of these trophic levels in Massachusetts Bay.

Finally, ichthyoplankton (fish eggs and larvae) losses and equivalent age one juvenile fish estimates under the activity were made based on actual monthly ichthyoplankton data collected in the port area from October 2005 through December 2009 and the activity withdrawal volume of 11 billion gallons per year evenly distributed among months (0.92 billion gallons per month) as a worst-case scenario, representing the maximum number of NEG Port deliveries during any given month. Similarly, the lower, upper, and mean annual entrainment estimates are based on the lower and upper 95 percent confidence limits, of the monthly mean ichthyoplankton densities, and the monthly mean estimates multiplied by the monthly withdrawal rate of 0.92 billion gallons per month. At this withdrawal rate approximately 106 million eggs and 67 million larvae are estimated to be lost (see Table 4.2–2 of the IHA application). The most abundant species and life stages estimated to be entrained under the activity are cunner post yolk-sac larvae (33.3 million), yellowtail flounder/*Labridae* eggs (27.4 million) and hake species eggs (18.7 million). Together, these species and life stages accounted for approximately 46 percent of the total entrainment estimated. Entrainment was estimated to be highest in June through July when 97.4 million eggs and larvae (approximately 57 percent of the annual total) were estimated to be entrained. However, the demand for natural gas and corresponding NEG Port activities will likely be greatest during the winter heating season (November through March) when impacts from entrainment will likely be lower.

These estimated losses are not significant given the very high natural mortality of ichthyoplankton. This comparison was done in the final EIS/EIR where ichthyoplankton losses based on historic regional ichthyoplankton densities and a withdrawal rate of approximately 2.6 billion gallons per year were represented by the equivalent number of age-one fish. Under the final EIS/EIR withdrawal scenario, equivalent age-one losses due to entrainment ranged from 1 haddock to 43,431 sand lance (Tetra Tech 2010). Equivalent age-one losses under the conditions when no NEG Port operation occurrence were recalculated using Northeast Gateway monitoring data in order to facilitate comparisons between the permitted scenario and the updated scenario. Using Northeast Gateway monitoring data, withdrawal of 2.6 billion gallons per year would result in equivalent age-one losses ranging from less than 1 haddock to 5,602 American sand lance. By comparison, equivalent age one losses under the activity withdrawal rate of 11 billion gallons per year ranged from less than 1 haddock to 23,701 sand lance and were generally similar to or less than those in the final EIS/EIR. Substantially more equivalent age-one Atlantic herring, pollock, and butterfish were estimated to be lost under the final EIS/EIR at a withdrawal rate of 2.6 billion gallons per year, while substantially more equivalent age-one Atlantic cod, silver hake and hake species, cunner, and Atlantic mackerel are estimated to be lost under the activity.

Although no reliable annual food consumption rates of baleen whales are available for comparison, based on the calculated quantities of phytoplankton, zooplankton, and ichthyoplankton removal analyzed above, it is reasonable to conclude that baleen whale predation rates would dwarf any reasonable estimates of prey removals by NEG Port operations.

NEG Port Maintenance

As stated earlier, NEG Port will require scheduled maintenance inspections using either divers or remote operated vehicles (ROVs). The duration of these inspections are not anticipated to be more than two 8-hour working days. An EBRV will not be required to support these annual inspections. Water usage during the NEG Port maintenance would be limited to the standard requirements of NEG's normal support vessel. As with all vessels operating in Massachusetts Bay, sea water uptake and discharge is required to support engine cooling, typically using a once-through system. The rate of seawater uptake varies with the ship's horsepower and activity and therefore will differ between vessels and activity type. For example, the *Gateway Endeavor* is a 90-foot vessel powered with a 1,200-horsepower diesel engine with a four-pump seawater cooling system. This system requires seawater intake of about 68 gallons per minute (gpm) while idling and up to about 150 gpm at full power. Use of full power is required generally for transit. A conservatively high estimate of vessel activity for the Gateway Endeavor would be operation at idle for 75 percent of the time and full power for 25 percent of the time. During the routine activities this would equate to approximately 42,480 gallons of seawater per 8-hour work day. When compared to the engine cooling requirements of an EBRV over an 8-hour period (approximately 18 million gallons), the *Gateway Endeavour* uses about 0.2 percent of the EBRV requirement. To put this water use into context, potential effects from the water-use scenario of 56 mgd have been concluded to be orders of magnitude less than the natural fluctuations of Massachusetts Bay and Cape Cod Bay and not detectable. Water use by support vessels during routine port activities would not materially add to the overall impacts.

Certain maintenance and repair activities may also require the presence of an EBRV at the NEG Port. Such instances may include maintenance and repair on the STL Buoy, vessel commissioning, and any onboard equipment malfunction or failure occurring while a vessel is present for cargo delivery. Because the requested water-use scenario allows for daily water use of up to 56 mgd to support standard EBRV requirements when not operating in the HRS mode, vessels would be able to remain at the NEG Port as necessary to support all such maintenance and repair scenarios. Therefore, NMFS considers that NEG Port maintenance and repair would

have negligible impacts to marine mammal habitat in the activity area.

Unanticipated Algonquin Pipeline Lateral Maintenance and Repair

As stated earlier, proper care and maintenance of the Pipeline Lateral should minimize the likelihood of an unanticipated maintenance and/or repair event. However, unanticipated activities may occur from time to time if facility components become damaged or malfunction. Unanticipated repairs may range from relatively minor activities requiring minimal equipment and one or two diver/ROV support vessels to major activities requiring larger construction-type vessels similar to those used to support the construction and installation of the facility.

Major repair activities, although unlikely, may include repairing or replacement of pipeline manifolds or sections of the Pipeline Lateral. This type of work would likely require the use of large specialty construction vessels such as those used during the construction and installation of the NEG Port and Pipeline Lateral. The duration of a major unplanned activity would depend upon the type of repair work involved and would require careful planning and coordination.

Turbidity would likely be a potential effect of Pipeline Lateral maintenance and repair activities on listed species. In addition, the possible removal of benthic or planktonic species, resulting from relatively minor construction vessel water use requirements, as measured in comparison to EBRV water use, is unlikely to affect in a measurable way the food sources available to marine mammals. Thus, any impacts to marine mammal habitat are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

Mitigation Measures

In order to issue an incidental take authorization under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses.

(a) General Marine Mammal Avoidance Measures

All vessels shall utilize the International Maritime Organization (IMO)-approved Boston Traffic Separation Scheme (TSS) on their approach to and departure from the NEG Port and/or the repair/maintenance area at the earliest practicable point of transit in order to avoid the risk of whale strikes.

Upon entering the TSS and areas where North Atlantic right whales are known to occur, including the Great South Channel Seasonal Management Area (GSC–SMA) and the SBNMS, EBRVs shall go into ''Heightened Awareness'' as described below.

(1) Prior to entering and navigating the modified TSS, the Master of the vessel shall:

- Consult Navigational Telex (NAVTEX), NOAA Weather Radio, the NOAA Right Whale Sighting Advisory System (SAS) or other means to obtain current right whale sighting information as well as the most recent Cornell acoustic monitoring buoy data for the potential presence of marine mammals;
- Post a look-out to visually monitor for the presence of marine mammals;
- Provide the USCG required 96-hour notification of an arriving EBRV to allow the NEG Port manager to notify Cornell of vessel arrival.

(2) The look-out shall concentrate his/her observation efforts within the 2-mile radius ZOI from the maneuvering EBRV.

(3) If marine mammal detection was reported by NAVTEX, NOAA Weather Radio, SAS and/or an acoustic monitoring buoy, the look-out shall concentrate visual monitoring efforts towards the areas of the most recent detection.

(4) If the look-out (or any other member of the crew) visually detects a marine mammal within the 2-mile radius ZOI of a maneuvering EBRV, he/she will take the following actions:

- The Officer-of-the-Watch shall be notified immediately; who shall then relay the sighting information to the Master of the vessel to ensure action(s) can be taken to avoid physical contact with marine mammals; and
- The sighting shall be recorded in the sighting log by the designated look-out.

In accordance with 50 CFR 224.103(c), all vessels associated with NEG Port and Pipeline Lateral activities shall not approach closer than 500 yards (yd, 460 m) to a North Atlantic right whale and 100 yd (91 m) to other whales to the extent physically feasible given navigational constraints. In addition, when approaching and departing the project area, vessels shall be operated so as to remain at least 1 kilometer away from any visually-detected North Atlantic right whales.

In response to active right whale sightings and active acoustic detections, and taking into account exceptional circumstances, EBRVs as well as repair and maintenance vessels shall take appropriate actions to minimize the risk of striking whales. Specifically vessels shall:

(1) Respond to active right whale sightings and/or Dynamic Management Areas (DMAs) reported on the Mandatory Ship Reporting (MSR) or SAS by concentrating monitoring efforts towards the area of most recent detection and reducing speed to 10 knots or less if the vessel is within the boundaries of a DMA or within the circular area centered on an area 8 nautical miles (nmi) in radius from a sighting location;

(2) Respond to active acoustic detections by concentrating monitoring efforts towards the area of most recent detection and reducing speed to 10 knots or less within an area 5 nm in radius centered on the detecting auto-detection buoy (AB); and

(3) Respond to additional sightings made by the designated look-outs within a 2-mile radius of the vessel by slowing the vessel to 10 knots or less and concentrating monitoring efforts towards the area of most recent sighting.

All vessels operated under NEG and Algonquin must follow the established specific speed restrictions when calling at the NEG Port. The specific speed restrictions required for all vessels (*i.e.,* EBRVs and vessels associated with maintenance and repair) consist of the following:

(1) Vessels shall reduce their maximum transit speed while in the TSS from 12 knots or less to 10 knots or less from March 1 to April 30 in all waters bounded by straight lines connecting the following points in the order stated below unless an emergency situation dictates for an alternate speed. This area shall hereafter be referred to as the Off Race Point Seasonal Management Area (ORP–SMA) and tracks NMFS regulations at 50 CFR 224.105:

42°30′ N. 70°30′ W. 41°40′ N. 69°57′ W.
42°30′ N. 69°45′ W. 42°12′ N. 70°15′ W.
41°40′ N. 69°45′ W. 42°12′ N. 70°30′ W.
42°04.8′ N. 70°10′ W. 42°30′ N. 70°30′ W.;

(2) Vessels shall reduce their maximum transit speed while in the TSS to 10 knots or less unless an emergency situation dictates for an alternate speed from April 1 to July 31 in all waters bounded by straight lines connecting the following points in the order stated below. This area shall hereafter be referred to as the GSC–SMA and tracks NMFS regulations at 50 CFR 224.105:

42°30′ N. 69°45′ W. 41°40′ N. 69°45′ W.

42°30′ N. 67°27′ W. 42°30′ N. 69°45′ W. 42°09′ N. 67°08.4′ W. 41°00′ N. 69°05′ W.;

(3) Vessels are not expected to transit the Cape Cod Bay or the Cape Cod Canal; however, in the event that transit through the Cape Cod Bay or the Cape Cod Canal is required, vessels shall reduce maximum transit speed to 10 knots or less from January 1 to May 15 in all waters in Cape Cod Bay, extending to all shorelines of Cape Cod Bay, with a northern boundary of 42°12′ N. latitude and the Cape Cod Canal. This area shall hereafter be referred to as the Cape Cod Bay Seasonal Management Area (CCB–SMA);

(4) All Vessels transiting to and from the project area shall report their activities to the mandatory reporting Section of the USCG to remain apprised of North Atlantic right whale movements within the area. All vessels entering and exiting the MSRA shall report their activities to WHALESNORTH. Vessel operators shall contact the USCG by standard procedures promulgated through the Notice to Mariner system;

(5) All Vessels greater than or equal to 300 gross tons (GT) shall maintain a speed of 10 knots or less, unless an emergency situation requires speeds greater than 10 knots; and

(6) All Vessels less than 300 GT traveling between the shore and the project area that are not generally restricted to 10 knots will contact the Mandatory Ship Reporting (MSR) system, the USCG, or the project site before leaving shore for reports of active DMAs and/or recent right whale sightings and, consistent with navigation safety, restrict speeds to 10 knots or less within 5 miles (mi) (8 km) of any sighting location, when traveling in any of the seasonal management areas (SMAs) or when traveling in any active DMA.

(b) NEG Port-Specific Operations

In addition to the general marine mammal avoidance requirements identified above, vessels calling on the NEG Port must comply with the following additional requirements:

(1) EBRVs shall travel at 10 knots maximum speed when transiting to/from the TSS or to/from the NEG Port/Pipeline Lateral area. For EBRVs, at 1.86 mi (3 km) from the NEG Port, speed will be reduced to 3 knots and to less than 1 knot at 1,640 ft (500 m) from the NEG buoys, unless an emergency situation dictates the need for an alternate speed;

(2) EBRVs that are approaching or departing from the NEG Port and are within the Area to be Avoided (ATBA) surrounding the NEG Port, shall remain at least 1 km away from any visually-detected North Atlantic right whale and at least 100 yd (91 m) away from all other visually-detected whales unless an emergency situation requires that the vessel stay its course. During EBRV maneuvering, the Vessel Master shall designate at least one look-out to be exclusively and continuously monitoring for the presence of marine mammals at all times while the EBRV is approaching or departing from the NEG Port;

(3) During NEG Port operations, in the event that a whale is visually observed within 1 km of the NEG Port or a confirmed acoustic detection is reported on either of the two ABs closest to the NEG Port (western-most in the TSS array), departing EBRVs shall delay their departure from the NEG Port, unless an emergency situation requires that departure is not delayed. This departure delay shall continue until either the observed whale has been visually (during daylight hours) confirmed as more than 1 km from the NEG Port or 30 minutes have passed without another confirmed detection either acoustically within the acoustic detection range of the two ABs closest to the NEG Port, or visually within 1 km from the NEG Port.

Vessel captains shall focus on reducing DP thruster power to the maximum extent practicable, taking into account vessel and Port safety, during the operation activities. Vessel captains will shut down thrusters whenever they are not needed.

(c) Planned and Unplanned Maintenance and Repair Activities

NEG Port

(1) The Northeast Gateway shall conduct empirical source level measurements on all noise emitting from construction equipment and all vessels that are involved in maintenance/repair work.

(2) If DP systems are to be employed and/or activities will emit noise with a source level of 139 dB re 1 μPa at 1 m, activities shall be conducted in accordance with the requirements for DP systems listed above.

(3) Northeast Gateway shall provide the NMFS Headquarters Office of the Protected Resources, NMFS Northeast Region Ship Strike Coordinator, and SBNMS with a minimum of 30-days notice prior to any planned repair and/or maintenance activity. For any unplanned/emergency repair/maintenance activity, Northeast Gateway shall notify the agencies as soon as it determines that repair work must be conducted. Northeast Gateway shall continue to keep the agencies apprised of repair work plans as further details (*e.g.,* the time, location, and nature of the repair) become available. A final notification shall be provided to agencies 72 hours prior to crews being deployed into the field.

Pipeline Lateral

(1) Pipeline maintenance/repair vessels less than 300 GT traveling between the shore and the maintenance/repair area that are not generally restricted to 10 knots shall contact the MSR system, the USCG, or the project site before leaving shore for reports of active DMAs and/or recent right whale sightings and, consistent with navigation safety, restrict speeds to 10 knots or less within 5 mi (8 km) of any sighting location, when travelling in any of the seasonal management areas (SMAs) as defined above.

(2) Maintenance/repair vessels greater than 300 GT shall not exceed 10 knots, unless an emergency situation that requires speeds greater than 10 knots.

(3) Planned maintenance and repair activities shall be restricted to the period between May 1 and November 30 when most of the majority of North Atlantic right whales are absent in the area.

(4) Unplanned/emergency maintenance and repair activities shall be conducted utilizing anchor-moored dive vessel whenever operationally possible.

(5) Algonquin shall also provide the NMFS Office of the Protected Resources, NMFS Northeast Region Ship Strike Coordinator, and SBNMS with a minimum of 30-day notice prior to any planned repair and/or maintenance activity. For any unplanned/emergency repair/maintenance activity, Northeast Gateway shall notify the agencies as soon as it determines that repair work must be conducted. Algonquin shall continue to keep the agencies apprised of repair work plans as further details (*e.g.,* the time, location, and nature of the repair) become available. A final notification shall be provided to agencies 72 hours prior to crews being deployed into the field.

(6) If DP systems are to be employed and/or activities will emit noise with a source level of 139 dB re 1 μPa at 1 m, activities shall be conducted in accordance with the requirements for DP systems listed in (5)(b)(ii).

(7) In the event that a whale is visually observed within 0.5 mi (0.8 km) of a repair or maintenance vessel, the vessel superintendent or on-deck supervisor shall be notified immediately. The vessel's crew shall be put on a heightened state of alert and the marine mammal shall be monitored

constantly to determine if it is moving toward the repair or maintenance area.

(8) Repair/maintenance vessel(s) must cease any movement and/or cease all activities that emit noises with source level of 139 dB re 1 μPa @ 1 m or higher when a right whale is sighted within or approaching at 500 yd (457 meters) from the vessel. The source level of 139 dB corresponds to 120 dB received level at 500 yd (457 meters). Repair and maintenance work may resume after the marine mammal is positively reconfirmed outside the established zones (500 yd (457 meters)) or 30 minutes have passed without a redetection. Any vessels transiting the maintenance area, such as barges or tugs, must also maintain these separation distances.

(9) Repair/maintenance vessel(s) must cease any movement and/or cease all activities that emit noises with source level of 139 dB re 1 μPa @ 1 m or higher when a marine mammal other than a right whale is sighted within or approaching at 100 yd (91 m) from the vessel. Repair and maintenance work may resume after the marine mammal is positively reconfirmed outside the established zones (100 yd (91 meters)) or 30 minutes have passed without a redetection. Any vessels transiting the maintenance area, such as barges or tugs, must also maintain these separation distances.

(10) Algonquin and associated contractors shall also comply with the following:

- Operations involving excessively noisy equipment (source level exceeding 139 dB re 1μPa @ 1 m) shall ''ramp-up'' sound sources, allowing whales a chance to leave the area before sounds reach maximum levels. In addition, Northeast Gateway, Algonquin, and other associated contractors shall maintain equipment to manufacturers' specifications, including any sound-muffling devices or engine covers in order to minimize noise effects. Noisy construction equipment shall only be used as needed and equipment shall be turned off when not in operation;
- Any material that has the potential to entangle marine mammals (*e.g.,* anchor lines, cables, rope or other construction debris) shall only be deployed as needed and measures shall be taken to minimize the chance of entanglement;
- For any material that has the potential to entangle marine mammals, such material shall be removed from the water immediately unless such action jeopardizes the safety of the vessel and crew as determined by the Captain of the vessel; and
- In the event that a marine mammal becomes entangled, the marine mammal coordinator and/or protected species observer (PSO) will notify NMFS (if outside the SBNMS), and SBNMS staff (if inside the SBNMS) immediately so that a rescue effort may be initiated.

(11) All maintenance/repair activities shall be scheduled to occur between May 1 and November 30. However, in the event of unplanned/emergency repair work that cannot be scheduled during the preferred May through November work window, the following additional measures shall be followed for Pipeline Lateral maintenance and repair related activities between December and April:

- Between December 1 and April 30, if on-board PSOs do not have at least 0.5-mile visibility, they shall call for a shutdown. At the time of shutdown, the use of thrusters must be minimized. If there are potential safety problems due to the shutdown, the captain will decide what operations can safely be shut down;
- Prior to leaving the dock to begin transit, the barge shall contact one of the PSOs on watch to receive an update of sightings within the visual observation area. If the PSO has observed a North Atlantic right whale within 30 minutes of the transit start, the vessel shall hold for 30 minutes and again get a clearance to leave from the PSOs on board. PSOs shall assess whale activity and visual observation ability at the time of the transit request to clear the barge for release;
- Transit route, destination, sea conditions and any marine mammal sightings/mitigation actions during watch shall be recorded in the log book. Any whale sightings within 1,000 meters of the vessel shall result in a high alert and slow speed of 4 knots or less and a sighting within 750 m shall result in idle speed and/or ceasing all movement;
- The material barges and tugs used in repair and maintenance shall transit from the operations dock to the work sites during daylight hours when possible provided the safety of the vessels is not compromised. Should transit at night be required, the maximum speed of the tug shall be 5 knots; and
- All repair vessels must maintain a speed of 10 knots or less during daylight hours. All vessels shall operate at 5 knots or less at all times within 5 km of the repair area.

Acoustic Monitoring Related Activities

Vessels associated with maintaining the AB network operating as part of the mitigation/monitoring protocols shall adhere to the following speed restrictions and marine mammal monitoring requirements.

(1) In accordance with 50 CFR 224.103 (c), all vessels associated with NEG Port activities shall not approach closer than 500 yd (460 meters) to a North Atlantic right whale.

(2) All vessels shall obtain the latest DMA or right whale sighting information via the NAVTEX, MSR, SAS, NOAA Weather Radio, or other available means prior to operations.

Mitigation Conclusions

NMFS has carefully evaluated the mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals.
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned.
- The practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's mitigation measures, as well as other measures considered by NMFS, NMFS has determined that the mitigation measures provide the means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an incidental take authorization (ITA) for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth, ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area. NE Gateway has provided marine mammal monitoring measures as part of the IHA application. It can be found at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

(1) An increase in the probability of detecting marine mammals, both within the mitigation zone (thus allowing for more effective implementation of the mitigation) and in general to generate more data to contribute to the analyses mentioned below;

(2) An increase in our understanding of how many marine mammals are likely to be exposed to levels of pile driving that we associate with specific adverse effects, such as behavioral harassment, TTS, or PTS;

(3) An increase in our understanding of how marine mammals respond to stimuli expected to result in take and how anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival) through any of the following methods:

- Behavioral observations in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Physiological measurements in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information); and
- Distribution and/or abundance comparisons in times or areas with concentrated stimuli versus times or areas without stimuli;

(4) An increased knowledge of the affected species; and

(5) An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

Monitoring Measures

(a) Vessel-Based Visual Monitoring

Vessel-based monitoring for marine mammals shall be done by trained look-outs during NEG Port and Pipeline Lateral operations and maintenance and repair activities. The observers shall monitor the occurrence of marine mammals near the vessels during NEG Port and Pipeline Lateral related activities. Lookout duties include watching for and identifying marine mammals; recording their numbers, distances, and reactions to the activities; and documenting ''take by harassment.'' The vessel look-outs assigned to visually monitor for the presence of marine mammals shall be provided with the following:

(1) Recent NAVTEX, NOAA Weather Radio, SAS and/or acoustic monitoring buoy detection data;

(2) Binoculars to support observations;

(3) Marine mammal detection guide sheets; and

(4) Sighting log.

(b) NEG Port Operations

All individuals onboard the EBRVs responsible for the navigation duties and any other personnel that could be assigned to monitor for marine mammals shall receive training on marine mammal sighting/reporting and vessel strike avoidance measures.

While an EBRV is navigating within the designated TSS, there shall be three people with look-out duties on or near the bridge of the ship including the Master, the Officer-of-the-Watch and the Helmsman-on-watch. In addition to the standard watch procedures, while the EBRV is transiting within the designated TSS, maneuvering within the ATBA, and/or while actively engaging in the use of thrusters, an additional look-out shall be designated to exclusively and continuously monitor for marine mammals.

All sightings of marine mammals by the designated look-out, individuals posted to navigational look-out duties, and/or any other crew member while the EBRV is transiting within the TSS, maneuvering within the ATBA and/or when actively engaging in the use of thrusters, shall be immediately reported to the Officer-of-the-Watch who shall then alert the Master. The Master or Officer-of-the-Watch shall ensure the required reporting procedures are followed and the designated marine mammal look-out records all pertinent information relevant to the sighting.

Visual sightings made by look-outs from the EBRVs shall be recorded using a standard sighting log form. Estimated locations shall be reported for each individual and/or group of individuals categorized by species when known. This data shall be entered into a database and a summary of monthly sighting activity shall be provided to NMFS. Estimates of take and copies of these log sheets shall also be included in the reports to NMFS.

(c) Planned and Unplanned Maintenance and Repair

Two qualified and NMFS-approved PSOs shall be assigned to each vessel that will use DP systems during maintenance and repair related activities. PSOs shall operate individually in designated shifts to accommodate adequate rest schedules. Additional PSOs shall be assigned to additional vessels if AB data indicates that sound levels exceed 120 dB re 1 μPa, further then 100 m (328 ft) from these vessels.

All PSOs shall receive NMFS-approved marine mammal observer training and be approved in advance by NMFS after review of their resume. All PSOs shall have direct field experience on marine mammal vessels and/or aerial surveys in the Atlantic Ocean/Gulf of Mexico.

PSOs (one primary and one secondary) shall be responsible for visually locating marine mammals at the ocean's surface and, to the extent possible, identifying the species. The primary PSO shall act as the identification specialist and the secondary PSO will serve as data recorder and also assist with identification. Both PSOs shall have responsibility for monitoring for the presence of marine mammals and sea turtles. Specifically PSO's shall:

(1) Monitor at all hours of the day, scanning the ocean surface by eye for a minimum of 40 minutes every hour;

(2) Monitor the area where maintenance and repair work is conducted beginning at daybreak using 25x power binoculars and/or hand-held binoculars. Night vision devices must be provided as standard equipment for monitoring during low-light hours and at night;

(3) Conduct general 360° visual monitoring during any given watch period and target scanning by the observer shall occur when alerted of a whale presence;

(4) Alert the vessel superintendent or construction crew supervisor of visual detections within 2 mi (3.31 km) immediately; and

(5) Record all sightings on marine mammal field sighting logs. Specifically, all data shall be entered at the time of observation, notes of activities will be kept, and a daily report prepared and attached to the daily field sighting log form. The basic reporting requirements include the following:

- Beaufort sea state;
- Wind speed;
- Wind direction;
- Temperature;
- Precipitation;
- Glare;
- Percent cloud cover;
- Number of animals;
- Species;
- Position;
- Distance;
- Behavior;
- Direction of movement; and
- Apparent reaction to construction activity.

In the event that a whale is visually observed within the 2-mi (3.31-km) ZOI

of a DP vessel or other construction vessel that has shown to emit noise with source level in excess of 139 dB re 1 μPa @1 m, the PSO will notify the repair/maintenance construction crew to minimize the use of thrusters until the animal has moved away, unless there are divers in the water or an ROV is deployed.

(d) Acoustic Monitoring

Northeast Gateway shall deploy 10 ABs within the Separation Zone of the TSS for the operational life of the Project. The ABs shall be used to detect a calling North Atlantic right whale an average of 5 nmi from each AB. The AB system shall be the primary detection mechanism that alerts the EBRV Master to the occurrence of right whales, heightens EBRV awareness, and triggers necessary mitigation actions as described above. Northeast Gateway shall conduct short-term passive acoustic monitoring to document sound levels during:

(1) The initial operational events in the 2015–2016 winter heating season;

(2) Regular deliveries outside the winter heating season should such deliveries occur; and

(3) Scheduled and unscheduled maintenance and repair activities.

Northeast Gateway shall conduct long-term monitoring of the noise environment in Massachusetts Bay in the vicinity of the NEG Port and Pipeline Lateral using marine autonomous recording units (MARUs) when there is anticipated to be more than 5 NEG shipments in a 30-day period or over 20 shipments in a 6-month period.

The acoustic data collected shall be analyzed to document the seasonal occurrences and overall distributions of whales (primarily fin, humpback and right whales) within approximately 10 nmi of the NEG Port and shall measure and document the noise ''budget'' of Massachusetts Bay so as to eventually assist in determining whether or not an overall increase in noise in the Bay associated with the Project might be having a potentially negative impact on marine mammals.

Northeast Gateway shall make all acoustic data, including data previously collected by the MARUs during prior construction, operations, and maintenance and repair activities, available to NOAA. Data storage will be the responsibility of NOAA.

(e) Acoustic Whale Detection and Response Plan

NEG Port Operations

(1) Ten ABs that have been deployed since 2007 shall be used to continuously screen the low-frequency acoustic environment (less than 1,000 Hertz) for right whale contact calls occurring within an approximately 5-nm radius from each buoy (the AB's detection range).

(2) Once a confirmed detection is made, the Master of any EBRVs operating in the area will be alerted immediately.

NEG Port and Pipeline Lateral Planned and Unplanned/Emergency Repair and Maintenance Activities

(1) If the repair/maintenance work is located outside of the detectible range of the 10 project area ABs, Northeast Gateway and Algonquin shall consult with NOAA (NMFS and SBNMS) to determine if the work to be conducted warrants the temporary installation of an additional AB(s) to help detect and provide early warnings for potential occurrence of right whales in the vicinity of the repair area.

(2) The number of ABs installed around the activity site shall be commensurate with the type and spatial extent of maintenance/repair work required, but must be sufficient to detect vocalizing right whales within the 120-dB impact zone.

(3) Should acoustic monitoring be deemed necessary during a planned or unplanned/emergency repair and/or maintenance event, active monitoring for right whale calls shall begin 24 hours prior to the start of activities.

(4) Source level data from the acoustic recording units deployed in the NEG Port and/or Pipeline Lateral maintenance and repair area shall be provided to NMFS.

Reporting Measures

(a) Throughout NEG Port and Pipeline Lateral operations, Northeast Gateway and Algonquin shall provide a monthly Monitoring Report. The Monitoring Report shall include:

- Both copies of the raw visual EBRV lookout sighting information of marine mammals that occurred within 2 miles of the EBRV while the vessel transits within the TSS, maneuvers within the ATBA, and/or when actively engaging in the use of thrusters, and a summary of the data collected by the look-outs over each reporting period;
- Copies of the raw PSO sightings information on marine mammals gathered during pipeline repair or maintenance activities. This visual sighting data shall then be correlated to periods of thruster activity to provide estimates of marine mammal takes (per species/species class) that took place during each reporting period; and
- Conclusion of any planned or unplanned/emergency repair and/or maintenance period, a report shall be submitted to NMFS summarizing the repair/maintenance activities, marine mammal sightings (both visual and acoustic), empirical source-level measurements taken during the repair work, and any mitigation measures taken.

(b) During the maintenance and repair of NEG Port and Pipeline Lateral components, weekly status reports shall be provided to NOAA (both NMFS and SBNMS) using standardized reporting forms. The weekly reports shall include data collected for each distinct marine mammal species observed in the repair/maintenance area during the period that maintenance and repair activities were taking place. The weekly reports shall include the following information:

- Location (in longitude and latitude coordinates), time, and the nature of the maintenance and repair activities;
- Indication of whether a DP system was operated, and if so, the number of thrusters being used and the time and duration of DP operation;
- Marine mammals observed in the area (number, species, age group, and initial behavior);
- The distance of observed marine mammals from the maintenance and repair activities;
- Changes, if any, in marine mammal behaviors during the observation;
- A description of any mitigation measures (power-down, shutdown, etc.) implemented;
- Weather condition (Beaufort sea state, wind speed, wind direction, ambient temperature, precipitation, and percent cloud cover etc.);
- Condition of the observation (visibility and glare); and
- Details of passive acoustic detections and any action taken in response to those detections.

(d) Injured/Dead Protected Species Reporting

In the unanticipated event that survey operations clearly cause the take of a marine mammal in a manner prohibited by the issued IHA, such as an injury (Level A harassment), serious injury or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), NEG and/or Algonquin shall immediately cease activities and immediately report the incident to the Supervisor of the Incidental Take Program, Permits and Conservation Division, Office of Protected Resources, NMFS and the Northeast Regional Stranding Coordinators. The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;

• The name and type of vessel involved;
• The vessel's speed during and leading up to the incident;
• Description of the incident;
• Status of all sound source use in the 24 hours preceding the incident;
• Water depth;
• Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);
• Description of marine mammal observations in the 24 hours preceding the incident;
• Species identification or description of the animal(s) involved;
• The fate of the animal(s); and
• Photographs or video footage of the animal (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with NEG and/or Algonquin to determine what is necessary to minimize the likelihood of further prohibited take and ensure Marine Mammal Protection Act (MMPA) compliance. NEG and/or Algonquin may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that NEG and/or Algonquin discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition as described in the next paragraph), NEG and/or Algonquin will immediately (*i.e.,* within 24 hours of the discovery) report the incident to the Supervisor of the Incidental Take Program, Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS Northeast Stranding Coordinators. The report must include the same information identified above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with NEG and/or Algonquin to determine whether modifications in the activities are appropriate.

In the event that NEG or Algonquin discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized (if the IHA is issued) (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), NEG and/or Algonquin shall report the incident to the Supervisor of the Incidental Take Program, Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS Northeast Stranding Coordinators, within 24 hours of the discovery. NEG and/or Algonquin shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. NEG and/or Algonquin can continue its operations under such a case.

Marine Mammal Monitoring Report From Previous IHA

Prior marine mammal monitoring during NEG Port and Pipeline Lateral operation, maintenance and repair activities and monthly marine mammal observation memorandums (NEG 2010; 2015; 2016) indicate that only a small number of marine mammals were observed during these activities. Only one NEG Port operation occurred within the dates of the current IHA (starting December 23, 2015) and only one unidentified small whale was observed at a distance of 2 nmi from the NEG vessel on January 17, 2016. No other NEG Port and Pipeline Lateral related activity occurred during this period.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment). Only take by Level B harassment is anticipated as a result of NEG's operation and maintenance and repair activities. Anticipated take of marine mammals is associated with operation of dynamic positioning during the docking of the NEG vessels and positioning of maintenance and dive vessels, and by operations of certain machinery during maintenance and repair activities. The regasification process itself is an activity that does not rise to the level of taking, as the modeled source level for this activity is 108 dB. Certain species may have a behavioral reaction to the sound emitted during the activities. Hearing impairment is not anticipated. Additionally, vessel strikes are not anticipated, especially because of the speed restriction measures that were described earlier in this document.

The full suite of potential impacts to marine mammals was described in detail in the ''Potential Effects of the Specified Activity on Marine Mammals'' section found earlier in this document. The potential effects of sound from the NEG Port and Pipeline Lateral operations, maintenance and repair activities might include one or more of the following: masking of natural sounds and behavioral disturbance (Richardson *et al.,* 1995). As discussed earlier in this document, the most common impact will likely be from behavioral disturbance, including avoidance of the ensonified area or changes in speed, direction, and/or diving profile of the animal. Hearing impairment (TTS and PTS) is highly unlikely to occur based on low noise source levels from the activities that would preclude marine mammals from being exposed to noise levels high enough to cause hearing impairment.

For non-pulse sounds, such as those produced by operating DP thruster during vessel docking and supporting underwater construction and repair activities and the operations of various machineries that produces non-pulse noises, NMFS uses the 120 dB (rms) re 1 μPa isopleth to indicate the onset of Level B harassment.

The basis for Northeast Gateway and Algonquin's ''take'' estimate is the number of marine mammals that would be exposed to sound levels in excess of 120 dB, which is the threshold used by NMFS for non-pulse sounds. For the NEG Port and Pipeline Lateral operations and maintenance and repair activities, the take estimates are determined by multiplying the 120-dB ensonified area by local marine mammal density estimates, and then multiplying by the estimated number of days such activities would occur during a year-long period. For the NEG Port operations, the 120-dB ensonified area is 56.8 km^2 for a single visit during docking when running DP system. Although two EBRV docking with simultaneous DP system running was modeled, this situation would not occur in reality. For NEG Port and Pipeline Lateral maintenance and repair activities, modeling based on the empirical measurements showed that the distance of the 120-dB radius is expected to be 3.5 km, making a maximum 120-dB ZOI of approximately 40.7 km^2.

NEG Port and Algonquin Pipeline Lateral Activities Acoustic Footprints

I. NEG Port Operations

For the purposes of understanding the noise footprint of operations at the NEG Port, measurements taken to capture operational noise (docking, undocking, regasification, and EBRV thruster use) during the 2006 Gulf of Mexico field

event were taken at the source. Measurements taken during EBRV transit were normalized to a distance of 328 ft (100 m) to serve as a basis for modeling sound propagation at the NEG Port site in Massachusetts Bay.

Sound propagation calculations for operational activities were then completed at two positions in Massachusetts Bay to determine site-specific distances to the 120/160/180 dB isopleths:

- Operations Position 1—Port (EBRV Operations): 70°36.261′ W and 42°23.790′ N; and
- Operations Position 2—Boston TSS (EBRV Transit): 70°17.621′ W and 42°17.539′ N

At each of these locations sound propagation calculations were performed to determine the noise footprint of the operation activity at each of the specified locations. Updated acoustic modeling was completed using Tetra Tech's underwater sound propagation program which utilizes a version of the publicly available Range Dependent Acoustic Model (RAM). Based on the U.S. Navy's Standard Split-Step Fourier Parabolic Equation, this modeling methodology considers range and depth along with a geo-referenced dataset to automatically retrieve the time of year information, bathymetry, and seafloor geoacoustic properties along the given propagation transects radiating from the sound source. The calculation methodology assumes that outgoing energy dominates over scattered energy, and computes the solution for the outgoing wave equation. An approximation is used to provide two-dimensional transmission loss values in range and depth, *i.e.,* computation of the transmission loss as a function of range and depth within a given radial plane is carried out independently of neighboring radials, reflecting the assumption that sound propagation is predominantly away from the source. Transects were run along compass points at angular directions ranging from 0 to 360° in 5 degree increments. The received underwater sound levels at any location within the region of interest are computed from the ⅓-octave band source levels by subtracting the numerically modelled transmission loss at each ⅓-octave band center frequency and summing across all frequencies to obtain a broadband value. The resultant underwater sound pressure levels to the 120 dB isopleth is presented in Table 2.

TABLE 2—RADII OF 120 dB SPL ISOPLETHS FROM NEG PORT AND ALGONQUIN PIPELINE LATERAL OPERATIONS, MAINTENANCE, AND REPAIR ACTIVITIES

Activities	Radius to 120 dB zone (m)	120-dB ensonified area (km²)
One EBRV docking procedure with support vessel	4,250	56.8
Barge/tug (pulling & pushing)/construction vessel/barge @ mid-pipeline	3,500	40.7

II. NEG Port Maintenance and Repair

Modeling analysis conducted for the construction of the NEG Port concluded that the only underwater noise of critical concern during NEG Port construction would be from vessel noises such as turning screws, engine noise, noise of operating machinery, and thruster use. To confirm these modeled results and better understand the noise footprint associated with construction activities at the NEG Port, field measurements were taken of various construction activities during the 2007 NEG Port and Pipeline Lateral Construction period. Measurements were taken and normalized as described to establish the ''loudest'' potential construction measurement event. One position within Massachusetts Bay was then used to determine site-specific distances to the 120/180 dB isopleths for NEG Port maintenance and repair activities:

Construction Position 1. Port: 70°36.261′ W and 42°23.790′ N

Sound propagation calculations were performed to determine the noise footprint of the construction activity. The results showed that the estimated distance from the loudest source involved in construction activities fell to 120 dB re 1 μPa at a distance of 3,500 m.

III. Algonquin Pipeline Lateral Operation and Maintenance Activities

Modeling analysis conducted during the NEG Port and Pipeline Lateral construction concluded that the only underwater noise of critical concern during such activities would be from vessel noises such as turning screws, engine noise, noise of operating machinery, and thruster use. As with construction noise at the NEG Port, to confirm modeled results and better understand the noise footprint associated with construction activities along the Pipeline Lateral, field measurements were taken of various construction activities during the 2007 NEG Port and Algonquin Pipeline Lateral construction period. Measurements were taken and normalized to establish the ''loudest'' potential construction measurement event. Two positions within Massachusetts Bay were then used to determine site-specific distances to the 120/160/180 dB isopleths:

- Construction Position 2. PLEM: 70°46.755′ W and 42°28.764′ N; and
- Construction Position 3. Mid-Pipeline: 70°40.842′ W and 42°31.328′ N

Sound propagation calculations were performed to determine the noise footprint of the construction activity. The results of the distances to the 120-dB are shown in Table 2.

Since the issuance of an IHA to NEG on December 22, 2015, there was only one NEG delivery at the NEG Port in January 2015. NEG expects that when the Port is under full operation, it will receive up to 65 NEG shipments per year, and would require 14 days for NEG Port maintenance and up to 40 days for planned and unplanned Algonquin Pipeline Lateral maintenance and repair.

Marine Mammal Densities

The density calculation methodology applied to take estimates for this application is derived from the model results produced by Roberts *et al.* (2016) for the east coast region. These files are available Duke University's Habitat-based Cetacean Density Models Web site: *http://http://seamap.env.duke.edu/models/Duke-EC-GOM-2015/.* The estimated mean monthly abundance for each species for each month was an average of each month. Monthly values were not modeled for some species (*e.g.* killer whale), therefore, only the single value was reported. Estimates provided by the models are based on a grid cell size of 100 km², therefore, model grid cell values were divided by 100 to determine animals per km². Gray seal and harbor seal densities are not provided in the Roberts *et al.* (2016) models. Seal densities were derived from the Strategic Environmental

Research and Development Program (SERDP) using the Navy Oparea Density Estimate (NODE) model for the Northeast Opareas. (Best *et al.,* 2012). A summary of the each species density is provided in Table 3 below.

TABLE 3—ESTIMATED SPECIES DENSITIES

[animals per km²]

Species	Mean monthly densities
North Atlantic right whale	0.000838
Fin whale	0.00225
Humpback whale	0.00502
Minke whale	0.00354
Sei whale	0.000025
Long-finned Pilot whale	0.00135
Killer whale	0.0000089
Atlantic white-sided dolphin	0.0219
Bottlenose dolphin	0.0113
Common dolphin	0.0025
Risso's dolphin	0.00025
Harbor porpoise	0.0804
Gray seal	0.027
Harbor seal	0.097

Marine Mammal Take Calculation

Based on NEG Gateway's expectations of up to 65 NEG shipments per year, and up to 14 days for NEG Port maintenance and up to 40 days for planned and unplanned Algonquin Pipeline Lateral repair, the total estimated takes in a given year is calculated based on the following equation.

$$N = A_{NEG}*D*65 + A_{Port}*D*14 + A_{Pipeline}*D*40$$

Where N is the take number for a given species with average density of D. A_{NEG}, A_{Port}, and $A_{Pipeline}$ are the 120-dB ZOI during EMRV vessel docking for regasification, NEG Port maintenance, and Algonquin Pipeline Lateral repair, respectively. In addition, numbers of some species that usually occur in groups were adjusted to reflect the average number of animals in a typical group. A summary of expected takes is provided in Table 4. Since it is very likely that individual animals could be ''taken'' by harassment multiple times, the percentages are the upper boundary of the animal population that could be affected. The actual number of individual animals being exposed or taken would likely be less. Since no population/stock estimates for killer whale and gray seal is available, the percentage of estimated takes for these species is unknown. Nevertheless, since Massachusetts Bay represents only a small fraction of the western North Atlantic basin where these animals occur, NMFS has determined that the takes of 7 killer whales and 159 gray seals represent a small fraction of the population and stocks of these species (Table 4). There is no danger of injury, death, or hearing impairment from the exposure to these noise levels.

TABLE 4—ESTIMATED ANNUAL TAKES OF MARINE MAMMALS FROM THE NEG PORT AND ALGONQUIN PIPELINE LATERAL OPERATIONS AND MAINTENANCE AND REPAIR ACTIVITIES IN MASSACHUSETTS BAY

Species	Population/stock	Number of exposure based on density	Estimated take	Population (%)
Right whale	Western Atlantic	5	5	1.36.
Fin whale	Western North Atlantic	13	13	0.82.
Humpback whale	Gulf of Maine	30	30	3.59.
Sei whale	Nova Scotia	1	3	0.04.
Minke whale	Canadian East Coast	21	21	0.10.
Long-finned pilot whale	Western North Atlantic	8	15	0.14.
Killer whale	Western North Atlantic	1	7	Unknown.*
Atlantic white-sided dolphin	Western North Atlantic	129	129	0.26
Bottlenose dolphin	Western North Atlantic Southern Migratory	67	67	0.58.
Short-beaked common dolphin	Western North Atlantic	15	40	0.01.
Risso's dolphin	Western North Atlantic	2	18	0.01.
Harbor porpoise	Gulf of Maine/Bay of Fundy	474	474	0.59.
Harbor seal	Western North Atlantic	571	571	0.75.
Gray seal	Western North Atlantic	159	159	Unknown.*

* Killer whale and gray seal abundance information is not available.

Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing

On August 4, 2016, NMFS released its Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Guidance). This new guidance established new thresholds for predicting auditory injury, which equates to Level A harassment under the MMPA. In the **Federal Register** notice (81 FR 51694), NMFS explained the approach it would take during a transition period, wherein we balance the need to consider this new best available science with the fact that some applicants have already committed time and resources to the development of analyses based on our previous guidance and have constraints that preclude the recalculation of take estimates, as well as where the action is in the agency's decision-making pipeline. In that Notice, we included a non-exhaustive list of factors that would inform the most appropriate approach for considering the new Guidance, including: the scope of effects; how far in the process the applicant has progressed; when the authorization is needed; the cost and complexity of the analysis; and the degree to which the guidance is expected to affect our analysis.

In this case, we performed an analysis using the new Guidance to calculate potential takes of marine mammal by Level A harassment. The results show that given the brief duration of the NEG operations, NEG Port maintenance, and Algonquin Pipeline Lateral repair activities, no marine mammals would be exposed to received noise levels that would cause auditory injury.

Analysis and Determinations

Negligible Impact

Negligible impact is ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect

the species or stock through effects on annual rates of recruitment or survival'' (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, effects on habitat, and the status of the species.

To avoid repetition, this introductory discussion of our analyses applies to all the species listed in Table 4, given that the anticipated effects of NEG Port and Pipeline Lateral operations, maintenance, and repair activities on marine mammals (taking into account the prescribed mitigation) are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described separately in the analysis below.

No injuries or mortalities are anticipated to occur as a result of NEG Port and Pipeline Lateral operations, maintenance, and repair activities, and none are authorized. Additionally, animals in the area are not expected to incur hearing impairment (*i.e.,* TTS or PTS) or non-auditory physiological effects. The takes that are anticipated and authorized are expected to be limited to short-term Level B behavioral harassment. While NEG expects that when the Port is under full operation, it will receive up to 65 NEG shipments per year, and would require 14 days for NEG Port maintenance and up to 40 days for planned and unplanned Pipeline Lateral maintenance and repair, schedules of NEG delivery would occur throughout the year, which include seasons certain marine mammals may not be present in the area.

Effects on marine mammals are generally expected to be restricted to avoidance of a limited area around NEG's activities and short-term changes in behavior, falling within the MMPA definition of ''Level B harassment.'' Mitigation measures, such as controlled vessel speed, dedicated marine mammal observers, and passive acoustic monitoring, will ensure that takes are limited to Level B harassment and that these takes are minimized. In all cases, the effects are expected to be short-term, with no lasting biological consequence.

Of the 14 marine mammal species likely to occur in the action area, North Atlantic right, humpback, fin, and sei whales are listed as endangered under the ESA. These species are also designated as ''depleted'' under the MMPA. None of the other species that may occur in the project area are listed as threatened or endangered under the ESA or designated as depleted under the MMPA.

The project area of the NEG and Algonquin's activities is a biologically important area (BIA) for feeding for the North Atlantic right whale in February to April, humpback whale in March to December, fin whale year-round, and minke whale in March to November (LaBrecque *et al.,* 2015). However, as stated earlier, the NEG and Algonquin's action would only involve short duration of elevated noise levels. In addition, based on prior monitoring reports, on average NEG only had one NEG delivery event per year, and this trend is likely to continue. Of note, although we have analyzed the impact of the authorized take on the stocks, the actual impacts to these species from the Northeast Gateway's operations would likely be less than what are analyzed here. There are no known important areas for other species within the action area.

Regarding adverse effects to marine mammal habitat, the major potential impact would be the loss of prey due to water intake for cooling during the NEG regasification process. Under the requested water-use scenario, it is estimated that a dry-weight biomass of 916.5 kg of zooplankton per year (including 9.2 kg of large piscivorous fish) would be lost per year. The amount of loss is minor relative to the total biomass of the trophic level in Massachusetts Bay.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammal species and stocks and their habitat, and taking into consideration the implementation of the prescribed monitoring and mitigation measures, NMFS finds that the total marine mammal take from NEG and Algonquin's NEG Port and Pipeline Lateral operation, maintenance, and repair activities in Masschusetts Bay is not expected to adversely the annual rates of recruitment or survival, and therefore will have a negligible impact on the affected marine mammal species or stocks.

Small Numbers

The requested takes represent less than 3.6 percent of all populations or stocks potentially impacted (see Table 4 in this document). These authorized take represent the maximum percentage of each species or stock that could be taken by behavioral harassment or TTS (Level B harassment). The numbers of marine mammals authorized to be taken are small proportions of the total populations of the affected species or stocks.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no subsistence uses of marine mammals in the project area and, thus, no subsistence uses impacted by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

Our November 18, 2013, **Federal Register** notice of the proposed IHA described the history and status of Endangered Species Act (ESA) compliance for the NEG facility (78 FR 69049). As explained in that notice, the biological opinions for construction and operation of the facility only analyzed impacts on ESA-listed species from activities under the initial construction period and during operations, and did not take into consideration potential impacts to marine mammals that could result from the subsequent NEG Port and Pipeline Lateral maintenance and repair activities. In addition, NEG also revealed that significantly more water usage and vessel operating air emissions are needed from what was originally evaluated for the NEG Port operation. NMFS PR1 initiated consultation with NMFS Greater Atlantic Region Fisheries Office under section 7 of the ESA on the proposed issuance of an IHA to NEG under section 101(a)(5)(D) of the MMPA for the activities that include increased NEG Port and Pipeline Lateral maintenance and repair and water usage

for the NEG Port operations this activity. A Biological Opinion was issued on November 21, 2014, and concluded that the action may adversely affect but is not likely to jeopardize the continued existence of ESA-listed right, humpback, fin, and sei whales.

NMFS' Permits and Conservation Division has determined that the activities described in here are the same as those analyzed in the November 21, 2014, Biological Opinion. Therefore, a new consultation is not required for issuance of this IHA.

National Environmental Policy Act

MARAD and the USCG released a Final EIS/Environmental Impact Report (EIR) for the proposed NEG Port and Pipeline Lateral. NMFS was a cooperating agency (as defined by the Council on Environmental Quality (40 CFR 1501.6)) in the preparation of the Draft and Final EISs. NMFS reviewed the Final EIS and adopted it on May 4, 2007. NMFS issued a separate Record of Decision for issuance of authorizations pursuant to section 101(a)(5) of the MMPA for the construction and operation of the NEG Port Facility in Massachusetts Bay.

We have reviewed the NEG's application for a renewed IHA for ongoing activities for 2015–16 and the 2014–15 monitoring report. Based on that review, we have determined that the action is very similar to that considered in the previous IHA. In addition, no significant new circumstances or information relevant to environmental concerns have been identified. Thus, we have determined that the preparation of a new or supplemental NEPA document is not necessary.

Authorization

As a result of these determinations, NMFS has issued an IHA to Northeast Gateway and Algonquin for activities associated with Northeast Gateway's NEG Port and Algonquin's Pipeline Lateral operations and maintenance and repair activities in the Massachusetts Bay, which also includes the mitigation, monitoring, and reporting requirements described in this Notice.

Dated: December 28, 2016.

Donna Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–31948 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF134

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Recreational Advisory Panel to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Wednesday, January 18, 2017, from 1:30 p.m. to 5:30 p.m.

ADDRESSES: The meeting will be held at the Hilton Garden Inn, 5 Park Street, Freeport, ME 04032; telephone: (207) 865–1433.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Recreational Advisory Panel plans to discuss Fishing Year (FY) 2017 Recreational Measures for Gulf of Maine cod and haddock. They will also receive an overview of recent recreational catch and effort data. The Panel will also discuss results from the bioeconomic model to evaluate options for management measures. They will make recommendations to the Groundfish Committee on FY 2017 recreational measures for Gulf of Maine cod and haddock. The Panel also plans to receive an overview and discuss the Council's 2017 Groundfish Priorities and make recommendations to the Groundfish Committee, as appropriate. Other business will be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: January 3, 2017.

Jeffrey N. Lonergan,

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

[FR Doc. 2017–00048 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF125

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC's) Summer Flounder, Scup, and Black Sea Bass Monitoring Committee (MC) will hold a public meeting.

DATES: The meeting will be held on Thursday, January 26, 2017, from 10 a.m. to 5 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The meeting will be held at the Royal Sonesta Harbor Court, 550 Light St, Baltimore, MD 21202; telephone: (410) 234–0550.

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

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

SUPPLEMENTARY INFORMATION: The Summer Flounder, Scup, and Black Sea Bass Monitoring Committee will meet to develop recommendations for commercial and recreational Annual Catch Limits (ACLs) and Annual Catch Targets (ACTs) for black sea bass for

2017–19. The Monitoring Committee will also develop recommendations for recreational management measures for black sea bass in 2017. Meeting materials will be posted to *http://www.mafmc.org/* prior to the meeting.

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: January 3, 2017.

Jeffrey N. Lonergan,

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

[FR Doc. 2017–00059 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF115

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the South Atlantic States; Amendment 43

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

ACTION: Notice of Intent (NOI) to prepare a draft environmental impact statement (DEIS); request for comments.

SUMMARY: The NMFS Southeast Region, in collaboration with the South Atlantic Fishery Management Council (Council), intends to prepare a DEIS to describe and analyze a range of alternatives for management actions to be included in Amendment 43 to the Fishery Management Plan (FMP) for the Snapper-Grouper Fishery of the South Atlantic Region (Amendment 43). The purpose of Amendment 43 is to respond to the most recent stock assessment for red snapper in the South Atlantic, reduce discards of red snapper, and improve the quantity and quality of data collected from private recreational fishermen. This NOI is to solicit public comments on the scope of issues to be addressed in the DEIS.

DATES: Written comments on the scope of issues to be addressed in the DEIS will be accepted until February 6, 2017.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2016–0157, by either of the following methods:

- *Electronic submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0157,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Frank Helies, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. 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).

FOR FURTHER INFORMATION CONTACT: Frank Helies, NMFS Southeast Regional Office, telephone: 727–824–5305; or email: *frank.helies@noaa.gov.*

SUPPLEMENTARY INFORMATION: South Atlantic red snapper were determined to be overfished and undergoing overfishing in the 2009 Southeast Data, Assessment, and Review (SEDAR) stock assessment (SEDAR 15). In response to SEDAR 15, the Council recommended and NMFS subsequently implemented a prohibition on all harvest or possession of South Atlantic red snapper through Amendment 17A to the FMP (75 FR 76874, December 9, 2010). Through management measures implemented in Amendment 28 to the FMP, limited seasons for the harvest of red snapper occurred in the 2012, 2013, and 2014 fishing years (78 FR 44461, July 24, 2013). However, red snapper removals (total landings and dead discards) in the 2014 and 2015 fishing years exceeded the acceptable biological catch (ABC) and subsequent seasons' annual catch limits (ACLs) were set to zero and harvest and possession of red snapper was not allowed in the 2015 or 2016 fishing years.

According to the most recent stock assessment, the red snapper stock in the South Atlantic is undergoing overfishing and is overfished (SEDAR 41 2016). The Council's Scientific and Statistical Committee (SSC) reviewed SEDAR 41 in May 2016 and considered the assessment to be best scientific information available. In response to SEDAR 41 and the SSC's recommendation, the Council is considering changes to the ACLs, the recreational annual catch target, and management reference points.

Discard mortality, particularly from the recreational sector, continues to be a significant source of overall mortality for red snapper. Therefore, the Council is considering methods to reduce discard mortality in Amendment 43 including spatial and temporal closures (where harvest of all snapper-grouper species would be prohibited), changes to allowable fishing gear types (*e.g.,* circle hooks), and requiring the use of descending devices and/or venting tools for released fish.

Finally, the Council is evaluating ways to improve the quantity and quality of data collected from private recreational fishermen. The goal is to improve the data that are used to assess and manage the red snapper stock in the South Atlantic. The Council is considering a Federal permit requirement for private recreational fishermen to fish for or possess snapper-grouper species and a requirement for private recreational fishermen to complete electronic logbooks.

NMFS, in collaboration with the Council, will develop a DEIS for Amendment 43 to describe and analyze alternatives to address the management needs described above, including the ''no action'' alternative. In accordance with the regulations issued by the Council on Environmental Quality (CEQ) for implementing the National Environmental Policy Act (NEPA; 40 CFR parts 1500–1508), NMFS, in collaboration with the Council, has identified preliminary environmental issues as a means to initiate discussion for scoping purposes only. These preliminary issues may not represent the full range of issues that eventually will be evaluated in the DEIS. A copy of the Amendment 43 draft options paper is available at: *http://sero.nmfs.noaa.gov/sustainable_fisheries/s_atl/sg/index.html.*

Comments on the scope of the DEIS may be submitted in writing to NMFS (see **ADDRESSES**) during the 30-day scoping period. After the scoping period and throughout the development of Amendment 43, the Council will accept written comments on the action, and oral comments may be made during upcoming public scoping meetings. The upcoming scoping meetings will be held at locations and times listed in Table 1.

TABLE 1—SCOPING MEETINGS

January 18, 2017—6 p.m., *listening station* ..... Harvey Government Center, 1200 Truman Avenue, 2nd Floor, Key West, FL 33040.	January 19, 2017—6 p.m., *listening station.* Hyatt Place Marathon, 1996 Overseas Highway, Marathon, FL 33050.
January 23, 2017—6 p.m., *in-person meeting* ..... Lexington Hotel & Conference Center, 1515 Prudential Drive, Jacksonville, FL 32207.	January 24, 2017—6 p.m., *in-person meeting.* Hilton Cocoa Beach Oceanfront, 1550 North Atlantic Avenue, Cocoa Beach, FL 32931.
January 25, 2017—6 p.m., *in-person meeting* ..... Flagler Place, 201 SW Flagler Avenue, Stuart, FL 34994	January 26, 2017—6 p.m., *in-person meeting.* Hilton Key Largo, 97000 Overseas Highway, Key Largo, FL 33037.
January 30, 2017—6 p.m., *in-person meeting* ..... Murrells Inlet Community Center, 4462 Murrells Inlet Road, Murrells Inlet, SC 29576.	January 31, 2017—6 p.m., *in-person meeting.* Crowne Plaza, 4831 Tanger Outlet Boulevard, North Charleston, SC 29418.
February 1, 2017—6 p.m., *in-person meeting* ..... Richmond Hill City Center, 520 Cedar Street, Richmond Hill, GA 31324	February 6, 2017—6 p.m., *in-person meeting.* Hilton Wilmington Riverside, 201 N. Water Street, Wilmington, NC 28401.
February 7, 2017—6 p.m., *in-person meeting* ..... Hatteras Community Center, 57689 NC Highway 12, Hatteras, NC 27943.	February 8, 2017—6 p.m., *in-person meeting.* Doubletree by Hilton, 2717 W. Fort Macon Road, Atlantic Beach, NC 28512.

After the DEIS associated with Amendment 43 is completed, it will be filed with the Environmental Protection Agency (EPA). After filing, the EPA will publish a notice of availability of the DEIS for public comment in the **Federal Register**. Consistent with the CEQ regulations, the DEIS will have a 45-day public comment period.

The Council and NMFS will consider public comments received on the DEIS in developing the final environmental impact statement (FEIS) and before adopting final management measures for the amendment. NMFS will submit the consolidated final amendment and supporting FEIS to the Secretary of Commerce (Secretary) for review as required by the Magnuson-Stevens Fishery Conservation and Management Act.

NMFS will announce, through a notification in the **Federal Register**, the availability of the final amendment for public review during the Department of Commerce Secretarial review period and will consider all public comments. During Secretarial review, NMFS will also file the FEIS with the EPA, and the EPA will publish a notice of availability for the FEIS in the **Federal Register**. This public comment period is expected to be concurrent with the Secretarial review period and will end prior to final agency action to approve, disapprove, or partially approve the Amendment 43.

NMFS will announce, through a document published in the **Federal Register**, all public comment periods on the final amendment, its proposed implementing regulations, and the availability of its associated FEIS. NMFS will consider all public comments received during the Secretarial review period, whether they are on the final amendment, the proposed regulations, or the FEIS, prior to final agency action.

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

Dated: December 30, 2016.

Alan D. Risenhoover,

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

[FR Doc. 2016–32049 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF107

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Fishery-Independent Monitoring Activities

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

ACTION: Notice; receipt of application for Letters of Authorization; request for comments and information.

SUMMARY: NMFS has received a request from the Texas Parks and Wildlife Department (TPWD) for authorization to take marine mammals incidental to conducting fishery-independent monitoring activities in estuarine waters of Texas, over the course of five years. Pursuant to regulations implementing the Marine Mammal Protection Act (MMPA), NMFS is announcing receipt of TPWD's request for the development and implementation of regulations governing the incidental taking of marine mammals. NMFS invites the public to provide information, suggestions, and comments on TPWD's application and request.

DATES: Comments and information must be received no later than February 6, 2017.

ADDRESSES: Comments on the application should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Laws@noaa.gov.*

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing online at *www.nmfs.noaa.gov/pr/permits/incidental/research.htm* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

Electronic copies of TPWD's application may be obtained online at: *www.nmfs.noaa.gov/pr/permits/incidental/research.htm.* In case of problems accessing these documents, please call the contact listed above.

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued.

Incidental taking shall be allowed if NMFS finds that the taking will have a negligible impact on the species or stock(s) affected and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).''

Summary of Request

On July 29, 2015, NMFS received an adequate and complete application from TPWD requesting authorization for take of marine mammals incidental to fishery-independent monitoring activities in Texas. The requested regulations would be valid for five years from the date of issuance. The proposed action requires the use of gillnets in Texas bays. Use of gillnets in Texas bays presents a reasonable likelihood of interaction with bottlenose dolphins (*Tursiops truncatus*). Therefore, TPWD requests authorization to incidentally take bottlenose dolphins.

Specified Activities

TPWD conducts a long-term standardized fishery-independent monitoring program to assess the relative abundance and size of finfish and shellfish in Texas bays. This program uses gillnets deployed according to a stratified random sample design, with each Texas bay system as an independent stratum. Gillnets are set overnight during ten-week spring and fall sampling seasons, with gillnets set perpendicularly to shore.

Information Solicited

Interested persons may submit information, suggestions, and comments concerning TPWD's request (see **ADDRESSES**). NMFS will consider all information, suggestions, and comments related to the request during the development of proposed regulations governing the incidental taking of marine mammals by TPWD, if appropriate.

Dated: December 27, 2016.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–31946 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF135

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) is sponsoring a meeting to review new methods proposed to be used in groundfish stock assessments. The meeting is open to the public.

DATES: The Groundfish Assessment Methodology Review Meeting will commence at 8:30 a.m. PST, Wednesday, January 25, 2017, and continue until 5 p.m. or as necessary to complete business for the day. The meeting will reconvene on Thursday, January 26, 2017, starting at 8:30 a.m. PST and continue as necessary to complete business for the day.

ADDRESSES: On January 25, 2017, the Groundfish Assessment Methodology Review Meeting will be held in the auditorium at the NMFS Northwest Fisheries Science Center, 2725 Montlake Boulevard E, Seattle, WA 98112; telephone: (206) 860–3200. On January 26, 2017, the meeting will be held in the Heritage Room at the Seattle Yacht Club, 1807 East Hamlin Street, Seattle, WA 98112; telephone: (206) 325–1000. The Seattle Yacht Club is next door to the NMFS Northwest Fisheries Science Center.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384; telephone: (503) 820–2280.

FOR FURTHER INFORMATION CONTACT: Mr. John DeVore, Pacific Council; telephone: (503) 820–2413.

SUPPLEMENTARY INFORMATION: The purpose of the Groundfish Assessment Methodology Review Meeting is to review proposed methods for groundfish stock assessment. The specific methodologies to be reviewed are:

- Use of the Dirichlet multinomial likelihood for compositional data;
- Application of the Generalized Linear Mixed Model (GLMM) with spatial autocorrelation to survey data;
- Application of the GLMM with spatial autocorrelation to fishery catch per unit effort data;
- Revised set of priors for natural mortality;
- Revised prior for steepness; and
- New features in the revised Stock Synthesis software.

Public comments during the meeting will be received from attendees at the discretion of the chair.

Although non-emergency issues not identified in the meeting agenda may come before the meeting participants for discussion, those issues may not be the subject of formal action during this meeting. Formal action at the meeting will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the meeting participants' intent to take final action to address the emergency.

Visitors who are foreign nationals (defined as a person who is not a citizen or national of the United States) will require additional security clearance to access the NMFS Northwest Fisheries Science Center. Foreign national visitors should contact Ms. Stacey Miller at (541) 867–0535 at least two weeks prior to the meeting date to initiate the security clearance process.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to Mr. Kris Kleinschmidt at 503–820–2425 at least ten days prior to the meeting date.

Dated: January 3, 2017.

Jeffrey N. Lonergan,

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

[FR Doc. 2017–00060 Filed 1–5–17; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings Notice

TIME AND DATE: Wednesday, January 11, 2017, 9:30 a.m.–12:30 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

Matters to be Considered:

1. *Decisional Matter:* Final Rule: Safety Standard for Sling Carriers (9:30 p.m.–11:00 a.m.).
2. *Briefing Matter:* Proposed Rule: Amendments to Fireworks Regulations (11:00 a.m.–12:00 p.m.).

A live webcast of the Meeting can be viewed at *www.cpsc.gov/live.*

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: January 4, 2017.

Todd A. Stevenson,

Secretary.

[FR Doc. 2017–00197 Filed 1–4–17; 4:15 pm]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2017–HA–0001]

Proposed Collection; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

ACTION: Notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Assistant Secretary of Defense for Health Affairs announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by March 7, 2017.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Advisory Committee Division, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Office of the Assistant Secretary of Defense for Health Affairs, ATTN: Dr. Patrice Robinson-Haley, 7700 Arlington Boulevard, Suite 5101 (CODE: FHP&R), Falls Church, VA 22042–5101, or call (703) 681–8885.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Researcher Responsibilities Form; OMB Number 0720–0042.

Needs and Uses: The information collection requirement is necessary to document researchers' understanding and acceptance of the regulatory and ethical responsibilities pertaining to including humans as subjects in research. Principal and associate investigators must have the proposed, signed form on file before they may engage in research conducted or supported by entities under the purview of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)).

Affected Public: Federal Government; Business or Other For-Profit; Not-For-Profit Institutions.

Annual Burden Hours: 45.

Number of Respondents: 89.

Responses per Respondent: 1.

Annual Responses: 89.

Average Burden per Response: 30 minutes.

Frequency: On occasion.

The original document is submitted one time per researcher. Once their document is on file, a researcher may reaffirm their commitment every three years electronically if they remain engaged in human subject research.

Dated: January 3, 2017.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2017–00049 Filed 1–5–17; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Fulbright-Hays Group Projects Abroad Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

Overview Information

Fulbright-Hays Group Projects Abroad Program

Notice inviting applications for new awards for fiscal year (FY) 2017.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.021A.

DATES:

Applications Available: January 6, 2017.

Deadline for Transmittal of Applications: March 7, 2017.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Fulbright-Hays Group Projects Abroad (GPA) Program is to promote, improve, and develop modern foreign languages and area studies at varying levels of education. The program provides opportunities for faculty, teachers, and undergraduate and graduate students to conduct individual and group projects overseas to carry out research and study in the fields of modern foreign languages and area studies. This competition will support both Fulbright-Hays GPA short-term projects (GPA short-term projects) and Fulbright-Hays GPA long-term projects (GPA long-term projects).

There are three types of GPA short-term projects: (1) Short-term seminar

projects of four to six weeks in length designed to increase the linguistic or cultural competency of U.S. students and educators by focusing on a particular aspect of area study, such as the culture of an area or country of study (34 CFR 664.11); (2) curriculum development projects of four to eight weeks in length that provide participants an opportunity to acquire resource materials for curriculum development in modern foreign language and area studies for use and dissemination in the United States (34 CFR 664.12); and (3) group research or study projects of three to twelve months in duration designed to give participants the opportunity to undertake research or study in a foreign country (34 CFR 664.13).

GPA long-term projects are advanced overseas intensive language projects that may be carried out during a full year, an academic year, a semester, a trimester, a quarter, or a summer. GPA long-term projects are designed to take advantage of the opportunities in the foreign country that are not present in the United States when providing intensive advanced foreign language training. Only participants who have successfully completed at least two academic years of training in the language to be studied are eligible for language training under this program. In addition, the language to be studied must be indigenous to the host country and maximum use must be made of local institutions and personnel (34 CFR 664.14).

Applicants may submit only one GPA short-term or GPA long-term application under this notice and must identify whether they are applying for a GPA short-term project or a GPA long-term project.

Priorities: This notice contains one absolute priority and four competitive preference priorities. In accordance with 34 CFR 75.105(b)(2)(ii), the absolute priority is from the regulations for this program (34 CFR 664.32). Competitive Preference Priorities 1 and 2 are from the notice of final priorities and definitions (NFP) published in the **Federal Register** on June 16, 2016 (81 FR 39196). Competitive Preference Priority 3 is from the regulations for this program (34 CFR 664.32), and Competitive Preference Priority 4 is from the notice of final priorities published in the **Federal Register** on September 24, 2010 (75 FR 59050).

Absolute Priority: For FY 2017 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Specific Geographic Regions of the World

A group project that focuses on one or more of the following geographic regions of the world: Africa, East Asia, South Asia, Southeast Asia and the Pacific, the Western Hemisphere (Central and South America, Mexico, and the Caribbean), Eastern and Central Europe and Eurasia, and the Near East.

Competitive Preference Priorities: For FY 2017 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are competitive preference priorities.

Under 34 CFR 75.105(c)(2)(i), we award three additional points to an application that meets Competitive Preference Priority 1; three additional points to an application that meets Competitive Preference Priority 2; one additional point to an application that meets Competitive Preference Priority 3; and up to an additional three points to an application, depending on how well the application meets Competitive Preference Priority 4. Applicants for GPA short-term projects may address Competitive Preference Priorities 1, 3, and 4. Applicants for GPA long-term projects may address Competitive Preference Priorities 2 and 3. An applicant must identify the priority or priorities that it believes it meets and provide documentation supporting its claims.

These priorities are:

Competitive Preference Priority 1: Applications for GPA Short-Term Projects From Selected Institutions and Organizations (3 Points)

Applications for GPA short-term projects from the following types of institutions and organizations:

- Minority-Serving Institutions (MSIs)
- Community colleges
- New applicants
- State educational agencies (SEAs)

Competitive Preference Priority 2: Applications for GPA Long-Term Projects From MSIs (3 Points)

Applications for GPA long-term advanced overseas intensive language training projects from MSIs.

Competitive Preference Priority 3: Substantive Training and Thematic Focus on Priority Languages (1 Point)

Applications that propose GPA short-term or GPA long-term projects that provide substantive training and thematic focus on any of the 78 priority languages selected from the U.S. Department of Education's list of Less Commonly Taught Languages: Akan (Twi-Fante), Albanian, Amharic, Arabic (all dialects), Armenian, Azeri (Azerbaijani), Balochi, Bamanakan (Bamana, Bambara, Mandikan, Mandingo, Maninka, Dyula), Belarusian, Bengali (Bangla), Berber (all languages), Bosnian, Bulgarian, Burmese, Cebuano (Visayan), Chechen, Chinese (Cantonese), Chinese (Gan), Chinese (Mandarin), Chinese (Min), Chinese (Wu), Croatian, Dari, Dinka, Georgian, Gujarati, Hausa, Hebrew (Modern), Hindi, Igbo, Indonesian, Japanese, Javanese, Kannada, Kashmiri, Kazakh, Khmer (Cambodian), Kirghiz, Korean, Kurdish (Kurmanji), Kurdish (Sorani), Lao, Malay (Bahasa Melayu or Malaysian), Malayalam, Marathi, Mongolian, Nepali, Oromo, Panjabi, Pashto, Persian (Farsi), Polish, Portuguese (all varieties), Quechua, Romanian, Russian, Serbian, Sinhala (Sinhalese), Somali, Swahili, Tagalog, Tajik, Tamil, Telugu, Thai, Tibetan, Tigrigna, Turkish, Turkmen, Ukrainian, Urdu, Uyghur/Uigur, Uzbek, Vietnamese, Wolof, Xhosa, Yoruba, and Zulu.

Competitive Preference Priority 4: Inclusion of K–12 Educators (Up to 3 Points)

Applications that propose short-term projects abroad that develop and improve foreign language studies, area studies, or both at elementary and secondary schools by including K–12 teachers or K–12 administrators as at least 50 percent of the project participants.

Definitions: The following definitions are from the NFP and are designed to provide clarity for applicants addressing the competitive preference priorities.

Community college means an institution that meets the definition in section 312(f) of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1058(f)); or an institution of higher education (IHE) (as defined in section 101 of the HEA (20 U.S.C. 1001)) that awards degrees and certificates, more than 50 percent of which are not bachelor's degrees (or an equivalent).

Minority-serving institution (MSI) means an institution that is eligible to receive assistance under sections 316 through 320 of part A of title III, under part B of title III, or under title V of the HEA.

New applicant means any applicant that has not received a discretionary grant from the Department of Education under the Fulbright-Hays Act prior to the deadline date for applications under this program.

State educational agency (SEA) means the State board of education or other

agency or officer primarily responsible for the supervision of public elementary and secondary schools in a State. In the absence of this officer or agency, it is an officer or agency designated by the Governor or State law.

Program Authority: 22 U.S.C. 2452(b)(6).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 81, 82, 84, 86, 97, 98, and 99. (b) The OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 664. (e) The NFP. (f) The notice of final priorities for this program published in the **Federal Register** on September 24, 2010 (75 FR 59050).

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $2,792,440.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2017 from the list of unfunded applications from this competition.

Estimated Range of Awards:

GPA short-term projects: $50,000—$100,000.

GPA long-term projects: $50,000—$250,000.

Estimated Average Size of Awards:

GPA short-term projects: $80,059.

GPA long-term projects: $185,025.

Maximum Award: We will reject any GPA short-term project application that proposes a budget exceeding $100,000 for a single project period of 18 months. We will reject any GPA long-term project application that proposes a budget exceeding $250,000 for a single budget period of 24 months.

Estimated Number of Awards: 20.

GPA short-term projects: 5.

GPA long-term projects: 15.

Note: The Department is not bound by any estimates in this notice.

Project Period:

GPA short-term projects: Up to 18 months.

GPA long-term projects: Up to 24 months.

III. Eligibility Information

1. *Eligible Applicants:* (1) IHEs, (2) State departments of education, (3) Private nonprofit educational organizations, and (4) Consortia of these entities.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *www.Grants.gov*. To obtain a copy from ED Pubs, write, fax, or call: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov*.

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.021A.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content and form of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative (Part III) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to no more than 40 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, *except* titles, headings, footnotes, quotations, references, and captions. Charts, tables, figures, and graphs in the application narrative may be single spaced and will count toward the page limit.
- Use a font that is either 12 point or larger, or no smaller than 10 pitch (characters per inch). However, you may use a 10-point font in charts, tables, figures, and graphs.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman and Arial Narrow) will not be accepted.

The 40-page limit does not apply to Part I, the Application for Federal Assistance face sheet (SF 424); the supplemental information form required by the Department of Education; Part II, Budget Information—Non-Construction Programs (ED 524); Part IV, assurances, certifications, and the response to section 427 of the General Education Provisions Act; the table of contents; the one-page project abstract; the appendices; or the line-item budget. However, the page limit does apply to all of the application narrative. If you include any attachments or appendices not specifically requested, these items will be counted as part of the application narrative for purposes of the page-limit requirement.

We will reject your application if you exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: January 6, 2017.

Deadline for Transmittal of Applications: March 7, 2017.

Applications for grants under this program must be submitted electronically using the *Grants.gov* Apply site (*Grants.gov*). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to *Other Submission Requirements* in section IV of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We specify unallowable costs in 34 CFR 664.33. We

reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet at the following Web site: *http://fedgov.dnb.com/webform.* A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, it may be 24 to 48 hours before you can access the information in, and submit an application through, *Grants.gov*.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov.* To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a *SAM.gov* Tip Sheet, which you can find at: *http://www2.ed.gov/fund/grant/apply/sam-faqs.html.*

In addition, if you are submitting your application via *Grants.gov*, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with *Grants.gov* as an AOR. Details on these steps are outlined at the following *Grants.gov* Web page: *www.grants.gov/web/grants/register.html.*

7. *Other Submission Requirements:*

Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Fulbright-Hays GPA Program, CFDA number 84.021A, must be submitted electronically using the Governmentwide *Grants.gov* Apply site at *www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.* You may access the electronic grant application for the Fulbright-Hays GPA Program at *www.Grants.gov*. You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.021, not 84.021A).

Please note the following:

- When you enter the *Grants.gov* site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by *Grants.gov* are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the *Grants.gov* system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the *Grants.gov* system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from *Grants.gov*, we will notify you if we are rejecting your application because it was date and time stamped by the *Grants.gov* system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov*.
- You should review and follow the Education Submission Procedures for submitting an application through *Grants.gov* that are included in the application package for this program to ensure that you submit your application in a timely manner to the *Grants.gov* system. You can also find the Education Submission Procedures pertaining to *Grants.gov* under News and Events on the Department's G5 system home page at *www.G5.gov.* In addition, for specific guidance and procedures for submitting an application through *Grants.gov*, please refer to the *Grants.gov* Web site at: *www.grants.gov/web/grants/applicants/apply-for-grants.html.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a read-only, non-modifiable Portable Document Format (PDF). Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF (*e.g.,* Word, Excel, WordPerfect, etc.) or submit a

password-protected file, we will not review that material. Please note that this could result in your application not being considered for funding because the material in question—for example, the project narrative—is critical to a meaningful review of your proposal. For that reason, it is important to allow yourself adequate time to upload all material as PDF files. The Department will not convert material from other formats to PDF.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from *Grants.gov* an automatic notification of receipt that contains a *Grants.gov* tracking number. This notification indicates receipt by *Grants.gov* only, not receipt by the Department. *Grants.gov* will also notify you automatically by email if your application met all the *Grants.gov* validation requirements or if there were any errors (such as submission of your application by someone other than a registered Authorized Organization Representative, or inclusion of an attachment with a file name that contains special characters). You will be given an opportunity to correct any errors and resubmit, but you must still meet the deadline for submission of applications.

Once your application is successfully validated by *Grants.gov*, the Department will retrieve your application from *Grants.gov* and send you an email with a unique PR/Award number for your application.

These emails do not mean that your application is without any disqualifying errors. While your application may have been successfully validated by *Grants.gov*, it must also meet the Department's application requirements as specified in this notice and in the application instructions. Disqualifying errors could include, for instance, failure to upload attachments in a read-only, non-modifiable PDF; failure to submit a required part of the application; or failure to meet applicant eligibility requirements. It is your responsibility to ensure that your submitted application has met all of the Department's requirements.

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through *Grants.gov*, please contact the *Grants.gov* Support Desk, toll free, at 1–800–518–4726. You must obtain a *Grants.gov* Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the *Grants.gov* system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with *Grants.gov*, along with the *Grants.gov* Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that the problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. We will contact you after we determine whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the *Grants.gov* system. We will not grant you an extension if you failed to fully register to submit your application to *Grants.gov* before the application deadline date and time or if the technical problem you experienced is unrelated to the *Grants.gov* system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the *Grants.gov* system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the *Grants.gov* system;

and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement for Fulbright-Hays GPA to: Reha Mallory, Fulbright-Hays Group Projects Abroad Program, U.S. Department of Education, 400 Maryland Avenue SW., Room 3E213, Washington, DC 20202–4260. FAX: (202) 453–7502.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.021A), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

We will not consider applications postmarked after the application deadline date.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline

date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.021A), 550 12th Street SW., Room 7039, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 664.31 and are as follows: (a) Plan of operation (20 points); (b) Quality of key personnel (10 points); (c) Budget and cost effectiveness (10 points); (d) Evaluation plan (20 points); (e) Adequacy of resources (5 points); (f) Potential impact of the project on the development of the study of modern foreign languages and area studies in American education (15 points); (g) The project's relevance to the applicant's educational goals and its relationship to its program development in modern foreign languages and area studies (10 points); and (h) The extent to which direct experience abroad is necessary to achieve the project's objectives and the effectiveness with which relevant host country resources will be utilized (10 points). Additional information about these criteria is in the application package for this program.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

For FY 2017, GPA short-term project applications will be reviewed by separate panels according to world area. GPA long-term projects will be reviewed by one panel across world areas. A rank order from highest to lowest score will be developed for each of the two types of projects and will be used for funding purposes.

3. *Risk Assessment and Special Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose special conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $150,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through SAM. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. Grantees are required to use the electronic data instrument International Resource Information System (IRIS) to complete the final report. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993, the following measure will be used by the Department to evaluate the success of the GPA short-term program: The percentage of GPA short-term project participants who disseminated information about or materials from their group project abroad through more than one outreach activity within six months of returning to their home institution. The following

measure will be used by the Department to evaluate the success of the GPA long-term program: The percentage of GPA long-term project participants who increased their reading, writing, and/or listening/speaking foreign language scores by one proficiency level. The efficiency of the GPA short-term program and the GPA long-term program will be measured by considering the cost per GPA participant who increased his/her foreign language score in reading, writing, and/or listening/speaking by at least one proficiency level.

The information provided by grantees in their performance reports submitted via IRIS will be the source of data for this measure. Reporting screens for institutions can be viewed at:

http://iris.ed.gov/iris/pdfs/gpa_director.pdf and *http://iris.ed.gov/iris/pdfs/gpa_participant.pdf.*

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Reha Mallory, Fulbright-Hays Group Projects Abroad Program, U.S. Department of Education, 400 Maryland Avenue SW., Room 3E213, Washington, DC 20202–4260. FAX: (202) 453–7502 or by email: *reha.mallory@ed.gov.*

If you use a TDD or a TTY, call the Federal Relay Service, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *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 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.

Dated: December 30, 2016.

Mohamed Abdel-Kader,

Deputy Assistant Secretary for International and Foreign Languages.

[FR Doc. 2016–32046 Filed 1–5–17; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–692–000]

Algonquin Power Sanger LLC: Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding Algonquin Power Sanger LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 18, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 29, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–32044 Filed 1–5–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1789–005; ER10–1768–004; ER10–1770–004; ER10–1771–004; ER10–1793–004; ER12–1250–004; ER16–1924–002; ER16–1925–002; ER16–1926–002; ER16–2725–002.

Applicants: PSEG Energy Resources & Trade LLC, PSEG Energy Solutions LLC, PSEG Fossil LLC, PSEG New Haven LLC, PSEG Nuclear LLC, PSEG Power Connecticut LLC, Pavant Solar II LLC, Bison Solar LLC, San Isabel Solar LLC, Public Service Electric and Gas Company.

Description: Updated Market Analysis Update for Northeast Region of the PSEG Companies.

Filed Date: 12/28/16.

Accession Number: 20161228–5212.

Comments Due: 5 p.m. ET 2/27/17.

Docket Numbers: ER10–2179–033; ER10–2181–032; ER10–2182–032.

Applicants: Calvert Cliffs Nuclear Power Plant, LLC, Nine Mile Point Nuclear Station, LLC, R.E. Ginna Nuclear Power Plant, LLC.

Description: Updated Market Power Analysis for the Northeast Region of the Constellation Energy Nuclear Group entities.

Filed Date: 12/29/16.

Accession Number: 20161229–5085.

Comments Due: 5 p.m. ET 2/27/17.

Docket Numbers: ER10–2997–005; ER10–2172–028; ER10–3003–005; ER10–1048–025; ER10–2192–029; ER15–1537–006; ER15–1539–006; ER11–2056–021; ER10–2178–029;

ER14–1524–008; ER16–2194–002; ER10–3308–025; ER10–3018–005; ER10–3015–005; ER10–1020–023; ER13–1536–013; ER10–1078–023; ER10–1080–023; ER16–2708–002; ER10–1081–024; ER15–2293–002; ER14–2145–006; ER10–2180–027; ER10–1143–024; ER10–2992–005; ER10–3030–005.

Applicants: Atlantic City Electric Company, Baltimore Gas and Electric Company, Bethlehem Renewable Energy, LLC, Commonwealth Edison Company, Constellation Energy Commodities Group Maine, LLC, Constellation Energy Services, Inc., Constellation Energy Services of New York, Inc., Constellation Mystic Power, LLC, Constellation NewEnergy, Inc., Constellation Power Source Generation, LLC, Clinton Battery Utility, LLC, Criterion Power Partners, LLC, Delmarva Power & Light Company, Eastern Landfill Gas, LLC, Exelon Framingham, LLC, Exelon Generation Company, LLC, Exelon New Boston, LLC, Exelon West Medway, LLC, Exelon West Medway II, LLC, Exelon Wyman, LLC, Fair Wind Power Partners, LLC, Fourmile Wind Energy, LLC, Handsome Lake Energy, LLC, PECO Energy Company, Pepco Energy Services, Inc., Potomac Electric Power Company.

Description: Updated Market Power Analysis for the Northeast Region of the Exelon Northeast entities.

Filed Date: 12/29/16.

Accession Number: 20161229–5147.

Comments Due: 5 p.m. ET 2/27/17.

Docket Numbers: ER16–2364–001.

Applicants: Algonquin SKIC 10 Solar, LLC.

Description: Notice of Non-Material Change in Status of Algonquin SKIC 10 Solar, LLC.

Filed Date: 12/29/16.

Accession Number: 20161229–5115.

Comments Due: 5 p.m. ET 1/19/17.

Docket Numbers: ER17–696–000.

Applicants: Calpine Energy Solutions, LLC.

Description: § 205(d) Rate Filing: Notice of Succession and Revisions to Market-Based Rate Tariff to be effective 12/30/2016.

Filed Date: 12/29/16.

Accession Number: 20161229–5019.

Comments Due: 5 p.m. ET 1/19/17.

Docket Numbers: ER17–697–000.

Applicants: Tenaska Alabama Partners, L.P.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/30/2016.

Filed Date: 12/29/16.

Accession Number: 20161229–5088.

Comments Due: 5 p.m. ET 1/19/17.

Docket Numbers: ER17–698–000.

Applicants: Tenaska Alabama II Partners, L.P.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/30/2016.

Filed Date: 12/29/16.

Accession Number: 20161229–5089.

Comments Due: 5 p.m. ET 1/19/17.

Docket Numbers: ER17–699–000.

Applicants: Tenaska Georgia Partners, L.P.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/30/2016.

Filed Date: 12/29/16.

Accession Number: 20161229–5090.

Comments Due: 5 p.m. ET 1/19/17.

Docket Numbers: ER17–700–000.

Applicants: Tenaska Virginia Partners, L.P.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/30/2016.

Filed Date: 12/29/16.

Accession Number: 20161229–5091.

Comments Due: 5 p.m. ET 1/19/17.

Docket Numbers: ER17–701–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2016–12–29_SA 2985 MidAmerican-MidAmerican GIA (J499) to be effective 12/30/2016.

Filed Date: 12/29/16.

Accession Number: 20161229–5093.

Comments Due: 5 p.m. ET 1/19/17.

Docket Numbers: ER17–702–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2016–12–29_SA 2986 MidAmerican-MidAmerican GIA (J501) to be effective 12/30/2016.

Filed Date: 12/29/16.

Accession Number: 20161229–5095.

Comments Due: 5 p.m. ET 1/19/17.

Docket Numbers: ER17–703–000.

Applicants: PacifiCorp.

Description: § 205(d) Rate Filing: BPA NITSA (Yakama) Rev 7 to be effective 12/1/2016.

Filed Date: 12/29/16.

Accession Number: 20161229–5101.

Comments Due: 5 p.m. ET 1/19/17.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 29, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–32043 Filed 1–5–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

[DOE/EIS–0514]

Colusa-Sutter 500-Kilovolt Transmission Line Project, Colusa, Sutter, Yolo and Sacramento Counties, California

AGENCY: Western Area Power Administration, Department of Energy.

ACTION: Notice of additional public scoping meetings.

SUMMARY: On December 18, 2015, Western Area Power Administration (WAPA), an agency of the Department of Energy (DOE), announced the Notice of Intent to prepare an Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the proposed 500-kilovolt (kV) transmission line. This proposed Project is known as the Colusa-Sutter (CoSu) 500-kV Transmission Line Project. In that previous notice, WAPA described the schedule for scoping meetings and advised the public that comments on the scope of the EIS/EIR were due by February 16, 2016. On February 5, 2016, an additional notice was published extending the due date for comments on the scope of the EIS/EIR to April 18, 2016. By this notice, WAPA announces additional public scoping meetings and reopens the period for submitting comments on the scope of the EIS/EIR.

DATES: WAPA will accept comments on the scope of the EIS/EIR from January 6, 2017 to March 7, 2017.

ADDRESSES: Written comments on the proposed scope of the Draft EIS/EIR for this proposed Project may be mailed or emailed to Mr. Andrew M. Montaño, National Environmental Policy Act (NEPA) Document Manager, Western Area Power Administration, Headquarters, P.O. Box 281213, Lakewood, CO 80228–8213, or by email: *montano@wapa.gov.*

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your

name added to our mailing list, please contact Andrew M. Montaño, at (720) 962–7253 or at the address listed above in the **ADDRESSES** section. For the most recent information and for announcements, please visit the Project Web site at: *www.CoSuLine.com.*

For general information on DOE's NEPA review procedures or status of a NEPA review, contact Ms. Carol M. Borgstrom, Director of NEPA Policy and Compliance, GC–54, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585; telephone (202) 586–4600 or (800) 472–2756; or email: *askNEPA@hq.doe.gov.*

For general information on the Sacramento Municipal Utility District (SMUD) California Environmental Quality Act (CEQA) review procedures or status of the CEQA review, please contact Ms. Kim Crawford, Environmental Specialist, SMUD, 6201 S. Street, Mail Stop H201, Sacramento, CA 95852–1830; telephone (916) 732–5063; email: *kim.crawford@smud.org.*

SUPPLEMENTARY INFORMATION: On December 18, 2015, WAPA announced the Notice of Intent to prepare an EIS for the Colusa-Sutter (CoSu) 500-kV Transmission Line Project (80 FR 79037). An additional notice was published on February 5, 2016, announcing the extension of the scoping period to April 18, 2016 (81 FR 6257). The EIS/EIR will examine the potential environmental effects of the CoSu transmission line. WAPA will prepare the EIS/EIR with the SMUD, the lead state agency for CEQA. WAPA will be the lead Federal agency under NEPA.

WAPA and SMUD held public scoping meetings from December 2015 to April 2016 to gather public input on the proposed project. As a result of these original public scoping meetings and the scoping comments received, WAPA and SMUD decided to add additional project alternatives closer to the Sacramento area. The new study area is further described below.

Original Alternatives

1. *Northern Corridor Alternative:* Constructing a new transmission line (approximately 44 miles in length) adjacent to WAPA's existing 230-kV Olinda-O'Banion and Keswick-O'Banion double circuit transmission lines. The Northern Corridor Alternative would interconnect the existing California-Oregon Transmission Project (COTP) transmission line system near the existing COTP's Maxwell Series Compensation Substation to WAPA's CVP transmission system near the existing WAPA's O'Banion Substation. The new transmission line would require the construction of an additional substation adjacent to the existing Maxwell Series Compensation Substation and an additional substation adjacent to the existing O'Banion Substation.

2. *Southern Corridor Alternative:* Constructing a new transmission line (approximately 27 miles in length) so that it interconnects along the existing COTP transmission line system approximately 8 miles northwest of the community of Arbuckle, California, and proceeds eastwardly towards the existing O'Banion Substation. The Southern Corridor Alternative would also require the construction of an additional substation adjacent to the existing COTP transmission line northwest of Arbuckle and an additional substation adjacent to the existing O'Banion Substation.

3. *Segment 1 Alternative:* Approximately 9 miles in length and just west of the existing O'Banion Substation, this segment would provide an alternate north-to-south route for the Northern Corridor Alternative. Instead of following WAPA's existing 230-kV Olinda-O'Banion and Keswick-O'Banion double circuit transmission lines to the O'Banion substation, this segment would extend south, at a location approximately 30 miles from the Maxwell Substation, and then continue due east to connect to the O'Banion substation. Under this segment alternative, the new line would be located further away from the Sutter National Wildlife Refuge.

New Alternatives

4. *County Road 16 Alternative:* Constructing a new transmission line (approximately 27 miles in length) so that it interconnects along the existing COTP transmission line system approximately 8 miles west of the community of Dufour, California, and proceeds eastwardly towards the existing Elverta Substation. The County Road 16 Alternative would also require the construction of an additional substation adjacent to the existing COTP transmission line northwest of Dufour and an additional substation adjacent to the existing Elverta Substation.

5. *Segment 2 Alternative:* Approximately 9 miles in length and 6 miles northwest of the existing Elverta Substation, this segment would provide an alternate west-to-east route for the County Road 16 Alternative. This segment would extend north in a loop-like fashion, at a location approximately 2.5 miles north of the Sacramento International Airport, and then rejoin the County Road 16 Alternative as it continues due east to connect to the Elverta Substation. Under this segment alternative, the new line would be located further away from the Sacramento International Airport to provide sufficient clearance of transmission structures for airplanes.

6. *No Action Alternative:* WAPA will also consider a No Action Alternative in the EIS/EIR. Under the No Action Alternative, for the purpose of establishing a baseline for impact analysis and comparison in the EIS/EIR, WAPA would not construct the proposed Project and the environmental impacts associated with construction and operation would not occur.

Public Participation

The EIS/EIR process includes a public scoping period and public scoping meetings; publication, public review and hearing of the Draft EIS/EIR; publication of a Final EIS/EIR; and publication of a ROD.

WAPA and SMUD will hold six additional public scoping meetings at the following times and locations:

(1) Tuesday, January 24, 2017, from 5:00 p.m. to 8:00 p.m. at the Sutter Youth Organization Center, 7740 Butte House Road, Sutter, CA 95982;

(2) Thursday, January 26, 2017, from 5:00 p.m. to 8:00 p.m. at the Colusa Casino Community Room, 3770 California 45, Colusa, CA 95932;

(3) Tuesday, January 31, 2017, from 9:00 a.m. to 12:00 p.m. at the Woodland Community and Senior Center Banquet Rooms, 2001 East Street, Woodland, CA 95776;

(4) Tuesday, January 31, 2017, from 5:00 p.m. to 8:00 p.m. at the Woodland Community and Senior Center Banquet Rooms, 2001 East Street, Woodland, CA 95776;

(5) Thursday, February 2, 2017, from 9:00 a.m. to 12:00 p.m. at the Haggin-Grant American Legion Post 521, 6700 8th Street, Rio Linda, CA 95673; and,

(6) Thursday, February 2, 2017, from 5:00 p.m. to 8:00 p.m. at the Haggin-Grant American Legion Post 521, 6700 8th Street, Rio Linda, CA 95673.

The meetings will be informal, and attendees will be able to speak directly with both WAPA and SMUD representatives about the proposed Project. Attendees also may provide comments at these meetings. For the most recent information and for announcements, please visit the Project Web site at: *www.CoSuLine.com.*

At the conclusion of the NEPA process, WAPA will prepare a ROD. Persons interested in receiving future notices, proposed Project information, copies of the EIS/EIR, and other information on the NEPA review process should contact Mr. Montaño at

the address listed in the **ADDRESSES** section.

The purpose of the additional scoping meetings is to provide information about the proposed Project, review Project maps, answer questions, and take oral and written comments from interested parties. All meeting locations will be handicapped-accessible. Anyone needing special accommodations should contact Mr. Montaño to make arrangements.

The public will have the opportunity to provide written comments at the public scoping meetings. Written comments may also be sent to Mr. Montaño by email or U.S. Postal Service mail. To help define the scope of the EIS/EIR, comments should be received by WAPA no later than March 7, 2017. WAPA will consider any comments received from April 18, 2016 and March 7, 2017 to be timely submitted. All comments received during the public scoping period will be considered when developing project alternatives and establishing the scope of issues to be analyzed in the EIS/EIR.

Dated: December 19, 2016.

Mark A. Gabriel,

Administrator.

[FR Doc. 2017–00053 Filed 1–5–17; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OGC–2016–0778; FRL–9957–94–OGC]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA'' or the ''Act''), notice is hereby given of a proposed consent decree in *Sierra Club* v. *McCarthy,* Civil Action No. 1:16–cv–01831–EGS (D. DC). On September 15, 2016, the Sierra Club filed a complaint in the United States District Court for the District of Columbia, alleging that Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency (''EPA''), failed to perform a non-discretionary duty to grant or deny within 60 days a petition submitted by Sierra Club on May 3, 2016 requesting that EPA object to a CAA Title V permit issued by the Pennsylvania Department of Environmental Protection (''PDEP'') for the Scrubgrass Generating Co., L.P. power plant (''Scrubgrass Plant''), located in Venango County, Pennsylvania. The proposed consent decree would establish a deadline for EPA to take such action.

DATES: Written comments on the proposed consent decree must be received by February 6, 2017.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2016–0778, online at *www.regulations.gov.* For comments submitted at *www.regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.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 generally will 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.*

FOR FURTHER INFORMATION CONTACT: Charles Starrs, Air and Radiation Law Office (2322A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564–1996; email address: *starrs.charles@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

The proposed consent decree would resolve a lawsuit filed by Sierra Club seeking to compel the Administrator to take actions under CAA section 505(b)(2). Under the terms of the proposed consent decree, EPA would agree to sign its response granting or denying the petition filed by Sierra Club regarding the Scrubgrass Plant, pursuant to section 505(b)(2) of the CAA, on or before May 12, 2017.

Under the terms of the proposed consent decree, EPA would expeditiously deliver notice of EPA's response to the Office of the Federal Register for review and publication following signature of such response. In addition, the proposed consent decree outlines the procedure for the Plaintiffs to request costs of litigation, including attorney fees. See the proposed consent decree for the specific details.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who are not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this consent decree should be withdrawn, the terms of the consent decree will be affirmed.

II. Additional Information About Commenting on the Proposed Consent Decree

A. How can I get a copy of the consent decree?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2016–0778) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (''OEI'') Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *www.regulations.gov.* You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search.''

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment

contains copyrighted material, Confidential Business Information (''CBI''), or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: December 23, 2016.

Gautam Srinivasan,

Acting Associate General Counsel.

[FR Doc. 2017–00056 Filed 1–5–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9031–2]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EISs)
Filed 12/26/2016 Through 12/30/2016
Pursuant to 40 CFR 1506.9.

Notice: Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

EIS No. 20160319, Draft, BLM, CA, Central Coast Field Office Draft Resource Management Plan Amendment for the Oil and Gas Leasing and Development, Comment Period Ends: 02/21/2017, Contact: Melinda Moffitt 916–978–4376

EIS No. 20160320, Final, USFS, OR, Magone Project, Review Period Ends: 02/13/2017, Contact: Sasha Fertig 541–575–3061

EIS No. 20160321, Draft Supplement, FTA, CA, BART Silicon Valley Phase II Extension Project, Comment Period Ends: 02/20/2017, Contact: Mary Nguyen 213–202–3960

EIS No. 20160322, Final, FRA, AZ, Arizona Passenger Rail Corridor: Tucson to Phoenix, Review Period Ends: 03/10/2017, Contact: Andrea Martin 202–493–6201

EIS No. 20160323, Draft, NOAA, WI, Wisconsin—Lake Michigan National Marine Sanctuary, Comment Period Ends: 03/31/2017, Contact: Russ Green 920–459–4425

EIS No. 20160324, Draft, NOAA, MD, Mallows Bay—Potomac River National Marine Sanctuary Designation, Comment Period Ends: 03/31/2017, Contact: Paul Orlando 240–460–1978

EIS No. 20160325, Draft, FERC, VA, Atlantic Coast Pipeline and Supply Header Project, Comment Period Ends: 04/06/2017, Contact: Kevin Bowman 202–502–6287

EIS No. 20160326, Final, FERC, PA, Atlantic Sunrise Project, Review Period Ends: 02/06/2017, Contact: Joanne Wachholder 202–502–8056

EIS No. 20160327, Final Supplement, USN, CA, Land Acquisition and Airspace Establishment to Support Large-Scale Marine Air Ground Task Force Live-Fire Training Marine Corps Combat Center Twentynine Palms, Review Period Ends: 02/06/2017, Contact: Jesse Martinez 619–532–3844

EIS No. 20160328, Draft Supplement, USACE, LA, Mississippi River, Baton Rouge to the Gulf of Mexico Mississippi River-Gulf Outlet, Louisiana, New Industrial Canal Lock and Connecting Channels Project, Comment Period Ends: 02/20/2017, Contact: Mark Lahare 504–862–1344

Dated: January 3, 2017.

Dawn Roberts,

Management Analyst, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2017–00055 Filed 1–5–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2016–0751; FRL–9958–02–OAR]

Notice of Availability of the Environmental Protection Agency's Preliminary Interstate Ozone Transport Modeling Data for the 2015 Ozone National Ambient Air Quality Standard (NAAQS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability (NODA); request for public comment.

SUMMARY: The Environmental Protection Agency (EPA) is providing notice that preliminary interstate ozone transport modeling data and associated methods relative to the 2015 ozone National Ambient Air Quality Standard (NAAQS) are available for public review and comment. This information is being provided to help states develop State Implementation Plans (SIPs) to address the requirements of Clean Air Act (CAA) section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS. The information available includes: (1) Emission inventories for 2011 and 2023, supporting data used to develop those emission inventories, methods and data used to process emission inventories into a form that can be used for air quality modeling; and (2) air quality

modeling results for 2011 and 2023, base period (*i.e.,* 2009–2013) average and maximum ozone design value concentrations, projected 2023 average and maximum ozone design value concentrations, and projected 2023 ozone contributions from state-specific anthropogenic emissions and other contribution categories to ozone concentrations at individual ozone monitoring sites.

A docket has been established to facilitate public review of the data and to track comments.

DATES: Comments must be received on or before 90 days after publication in the **Federal Register**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2016–0751, to the *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. 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.*

When submitting comments, remember to:

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

2. Explain your comments, why you agree or disagree; suggest alternatives and substitute data that reflect your requested changes.

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

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

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

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

For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *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 Air and Radiation Docket and Information Center, EPA/DC, WJC West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For questions on the emissions data and on how to submit comments on the emissions-related projection methodologies, contact Alison Eyth, Air Quality Assessment Division, Environmental Protection Agency, Mail code: C339–02, 109 T.W. Alexander Drive, Research Triangle Park, NC 27709; telephone number: (919) 541–2478; fax number: (919) 541–1903; email: *eyth.alison@epa.gov.* For questions on the preliminary air quality modeling and ozone contributions and how to submit comments on the air quality modeling data and related methodologies, contact Norm Possiel, Air Quality Assessment Division, Environmental Protection Agency, Mail code: C439–01, 109 T.W. Alexander Drive, Research Triangle Park, NC 27709; telephone number: (919) 541–5692; fax number: (919) 541–0044; email: *possiel.norm@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On October 26, 2015 (80 FR 65292), the EPA published a rule revising the 8-hour ozone NAAQS from 0.075 parts per million (ppm) to a new, more protective level of 0.070 ppm. Section 110(a)(1) of the CAA requires states to submit SIPs that provide for the implementation, maintenance, and enforcement of a NAAQS within 3 years of the promulgation of a new or revised standard. Such plans are required to address the applicable requirements of CAA section 110(a)(2) and are generally referred to as ''infrastructure'' SIPs. Among the requirements in CAA section 110(a)(2) that must be addressed in these plans is the ''Good Neighbor'' provision, section 110(a)(2)(D)(i)(I), which requires states to develop SIPs that prohibit any source or other emissions activity within the state from emitting air pollutants in amounts that will contribute significantly to nonattainment or interfere with maintenance of the NAAQS in another state. With respect to the 2015 ozone NAAQS, the Good Neighbor SIPs are due within 3 years of promulgation of the revised NAAQS, or by October 26, 2018.

On October 1, 2015, when EPA Administrator McCarthy signed the ozone NAAQS revision, the agency also issued a memorandum [1] to EPA Regional Administrators communicating a process for delivering the protections afforded by the revised NAAQS, including implementing CAA requirements like the Good Neighbor provision. In that memorandum, the EPA emphasized that we will be working with state, local, federal and tribal partners to carry out the duties of ozone air quality management in a manner that maximizes common sense, flexibility and cost-effectiveness while achieving improved public health expeditiously and abiding by the legal requirements of the CAA.

The memorandum noted that the EPA believes that the Good Neighbor provision for the 2015 ozone NAAQS can be addressed in a timely fashion using the framework of the Cross-State Air Pollution Rule (CSAPR), especially given the court decisions upholding important elements of that framework.[2] The EPA also expressed its intent to issue timely information concerning interstate ozone transport for the 2015 ozone NAAQS as a first step to help

[1] Memorandum from Janet McCabe, Acting Assistant administrator, Office of Air and Radiation to Regional Administrators, Regions 1–10, ''Implementing the 2015 Ozone National Ambient Air Quality Standards,'' available at *https://www.epa.gov/sites/production/files/2015-10/documents/implementation_memo.pdf.*

[2] *See EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. 1584, 1607 (2014) (holding the EPA's use of uniform oxides of nitrogen (NO_X) stringency to apportion emission reduction responsibilities among upwind states ''is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address''); *EME Homer City Generation, L.P.* v. *EPA,* 795 F.3d 118, 135–36 (D.C. Cir. 2015) (affirming EPA's use of air quality modeling to project future nonattainment and maintenance receptors and to calculate emissions budgets, and holding that the EPA affords independent effect to the ''interfere with maintenance'' prong of the Good Neighbor provision in identifying maintenance receptors).

facilitate the development of SIPs addressing the Good Neighbor provision. The EPA recognizes that the CAA provides that states have the primary responsibility to submit timely SIPs, as well as the EPA's own backstop role to develop and promulgate Federal Implementation Plans (FIPs), as appropriate.

This notice includes preliminary air quality modeling data that will help states as they develop SIPs to address the cross-state transport of air pollution under the CAA's Good Neighbor provision as it pertains to the 2015 ozone NAAQS. These data are considered preliminary because states may choose to modify or supplement these data in developing their Good Neighbor SIPs and/or EPA may update these data for the purpose of potential future analyses or regulatory actions related to interstate ozone transport for the 2015 ozone NAAQS.

The EPA has applied what it refers to as the CSAPR framework to address the requirements of the Good Neighbor provision for regional pollutants like ozone. This framework involves a 4-step process: (1) Identifying downwind receptors that are expected to have problems attaining or maintaining clean air standards (*i.e.,* NAAQS); (2) determining which upwind states contribute to these problems in amounts sufficient to ''link'' them to the downwind air quality problems; (3) for states linked to downwind air quality problems, identifying upwind emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS by quantifying upwind reductions in ozone precursor emissions and apportioning emission reduction responsibility among upwind states; and (4) for states that are found to have emissions that significantly contribute to nonattainment or interfere with maintenance or the NAAQS downwind, adopting SIPs or FIPs that eliminate such emissions. The EPA applied this framework in the original CSAPR rulemaking (76 FR 48208) to address the Good Neighbor provision for the 1997 ozone NAAQS and the 1997 and 2006 fine particulate matter ($PM_{2.5}$) NAAQS. On October 26, 2016 (81 FR 74504), the EPA again applied this framework in an update to CSAPR (referred to as the CSAPR Update) to address the Good Neighbor provision for the 2008 ozone NAAQS. This notice provides information regarding steps 1 and 2 of the CSAPR framework for purposes of evaluating interstate transport with respect to the 2015 ozone NAAQS. This preliminary modeling to quantify contributions for the year 2023 is intended to help inform state efforts to address interstate transport with respect to the 2015 ozone NAAQS.

The year 2023 was used as the analytic year for this preliminary modeling because that year aligns with the expected attainment year for Moderate ozone nonattainment areas, given that the CAA requires the EPA to finalize area designations for the 2015 ozone NAAQS in October 2017.[3] *See North Carolina* v. *EPA,* 531 F.3d 896, 911–12 (D.C. Cir. 2008), *modified on reh'g,* 550 F.3d 1176 (holding the Good Neighbor provision requires implementation of emissions reductions be harmonized with the applicable downwind attainment dates).

As noted above, this notice meets the EPA's stated intention in the October 2015 memorandum to provide information relevant to the Good Neighbor provision for the 2015 ozone NAAQS. Specifically, this notice evaluates states' contributions to downwind ozone problems relative to the screening threshold—equivalent to 1 percent of the NAAQS—that the CSAPR framework uses to identify states ''linked'' to downwind air quality problems for further consideration to address interstate ozone transport. The EPA believes that states will find this information useful in their development of Good Neighbor SIPs for the 2015 ozone NAAQS, and we seek their comments on it.[4] The EPA believes that states may rely on this or other appropriate modeling, data or analyses to develop approvable Good Neighbor SIPs which, as noted previously, are due on October 26, 2018. States that act now to address their planning obligation pursuant to the Good Neighbor provision would benefit from improved ozone air quality both within the state and with respect to other states.

This notice provides an opportunity for review and comment on the agency's preliminary ozone transport modeling data relevant for the 2015 ozone NAAQS.

[3] *See* 42 U.S.C. 7407(d)(1)(B) (requiring the EPA to finalize designations no later than 2 years after promulgation of a new or revised NAAQS). On November 17, 2016 (81 FR 81276), the EPA proposed to retain its current approach in establishing attainment dates for each nonattainment area classification, which run from the effective date of designations. This approach is codified at 40 CFR 51.1103 for the 2008 ozone NAAQs, and the EPA proposed to retain the same approach for the 2015 ozone NAAQS. In addition, the EPA proposed the maximum attainment dates for nonattainment areas in each classification, which for Moderate ozone nonattainment is 6 years.

[4] Note that the emissions projections in this NODA are consistent with the implementation of various state and federal regulations, and that any change to the future implementation of these regulations may impact these projections and related findings.

II. Air Quality Modeling and Related Data and Methodologies

A. Base Year and Future Base Case Emissions

For this transport assessment, the EPA used a 2011-based modeling platform to develop base year and future year emissions inventories for input to air quality modeling. This platform included meteorology for 2011, base year emissions for 2011, and future year base case emissions for 2023. The 2011 and 2023 air quality modeling results were used to identify areas that are projected to be nonattainment or have problems maintaining the 2015 ozone NAAQS in 2023. Ozone source apportionment modeling for 2023 was used to quantify contributions from emissions in each state to ozone concentrations at each of the projected nonattainment and maintenance receptors in that future year.[5]

The 2011 and 2023 emissions data and the state and federal rules included in the 2023 base case are described in detail in the documents, ''Preparation of Emissions Inventories for the Version 6.3 2011 Emissions Modeling Platform''; ''Updates to Emissions Inventories for the Version 6.3, 2011 Emissions Modeling Platform for the Year 2023''; and ''EPA Base Case v.5.16 for 2023 Ozone Transport NODA Using IPM Incremental Documentation''; all of which are available in the docket for this notice.

In brief, the 2011 base year emissions and projection methodologies used here to create emissions for 2023 are similar to what was used in the final CSAPR Update. The key differences between the 2011 inventories used for the final CSAPR Update and the 2011 inventories used for the 2015 ozone NAAQS preliminary interstate transport modeling include updates to mobile source and electric generating unit (EGU) emissions, the inclusion of fire emissions in Canada and Mexico, and updated estimates of anthropogenic emissions for Mexico. The key differences in methodologies for projecting non-EGU sector emissions (*e.g.,* onroad and nonroad mobile, oil

[5] The 2023 ozone source apportionment modeling was performed using meteorology for the period May through September in order to focus on transport when 8-hour ozone concentrations are typically high at most locations. This modeling did not include high winter ozone concentrations that have been observed in certain parts of the Western U.S. which are believed to result from the combination of strong wintertime inversions, large NOx and volatile organic compound (VOC) emissions from nearby oil and gas operations, increased ultraviolet (UV) radiation intensity due to reflection off of snow-covered surfaces and potentially other local factors.

and gas, non-EGU point sources) to 2023 as compared to the methods used in the final CSAPR Update to project emissions to 2017 include (1) the use of data from the U.S. Energy Information Administration Annual Energy Outlook 2016 (AEO 2016) to project activity data for onroad mobile sources and the growth in oil and gas emissions, (2) additional general refinements to the projection of oil and gas emissions, (3) incorporation of data from the Mid-Atlantic Regional Air Management Association (MARAMA) for projection of non-EGU emissions for states in that region, and (4) updated mobile source emissions for California.

For EGUs, the EPA has included several key updates to the Integrated Planning Model (IPM) and its inputs for the agency's 2023 EGU projections used for the air quality modeling provided in this NODA. The updated IPM assumptions incorporated in the EPA's Base Case v.5.16 capture several market trends occurring in the power sector today, and the 2023 EGU projections reflect a continuation of these trends. Notably, natural gas prices remain historically low and are expected to remain low in the foreseeable future given that gas production and pipeline capacity continue to increase while storage is already at an all-time high. These factors have contributed to record-setting U.S. natural gas production levels for the fifth consecutive year in 2015 and record-setting consumption levels for the sixth consecutive year. Additionally, electricity demand growth (including retail sales and direct use) has slowed in every decade since the 1950s, from 9.8 percent per year from 1949 to 1959 to 0.5 percent per year from 2000 to 2015. This trend is projected to continue: AEO 2016 projects lower growth than projected in AEO 2015. In addition, these updated emission projections account for a continuing decline in the cost of renewable energy technologies such as wind and solar, as well as the recently extended production and investment tax credits that support their deployment. All of these factors result in decreased generation and capacity from conventional coal steam relative to EPA's EGU analyses that preceded these updated IPM inputs. Over the past 10 years, coal-fired electricity generation in the U.S. has declined from providing roughly half of the nation's supply to about one-third, and has been replaced with lower-cost sources such as natural gas, wind, and solar.

The updated EGU projections also include the Clean Power Plan (CPP), 80 FR 64662 (October 23, 2015). The modeling for the CSAPR Update did not include the CPP due to the former rule's focus on the 2017 ozone season, *see* 81 FR at 74529. In the CSAPR Update rulemaking, the agency had identified several key factors and uncertainties associated with measuring the effects of the CPP in 2017, but explained that the EPA ''continues to believe that the modeling for the CPP . . . was useful and reliable with respect to the model years analyzed for [the CPP] (*i.e.,* 2020, 2025, and 2030).'' *Id..* The period of focus for the modeling here is in the mid-2020s, which falls within the CPP's interim performance period, and the EPA therefore believes it is appropriate to include the CPP in the modeling.[6] The CPP is targeted at reducing carbon pollution, but on average, nationwide, the CPP would also reduce NO_X emissions from EGUs. The agency therefore anticipates that, if the CPP were removed from the modeling, the overall net effect could be higher levels of NO_X emissions, on average, and potentially higher ozone concentrations and contributions at receptors. However, note that NO_X emissions from EGUs represent just one part of the total NO_X inventory. In this regard, for many states it is possible that changes in EGU NO_X emissions on the order of what might be expected in 2023 due to the CPP may have limited impact on the concentration and contribution data in this NODA, which are based on total NO_X emissions.

As noted above, EGU emissions used for the air quality modeling in this NODA are based on IPM v5.16 projections. However, states may choose to use other EGU projections in developing their Good Neighbor SIPs. To continue to update and improve both EPA's and states' EGU projections, the EPA and state agencies, with the facilitation of multi-jurisdictional organizations (MJOs), have been collaborating in a technical engagement process to inform future-year emission projections for EGUs. The ongoing information exchange and data comparison have facilitated a clearer understanding of the capabilities and constraints of various tools and methods. This process will continue to inform how the EPA and states produce EGU emission projections to inform efforts to reduce ozone transport.

The EPA observes there are differences between recent emissions and generation data and the corresponding future-year projections in this NODA. The EPA's modeling directly simulates how future-year energy trends and economic signals affect the composition of the fleet. In the 2023 projections presented in this NODA, the EPA's modeling does not project the operation of a number of coal-fired and oil-fired units due to simulated future-year economic conditions, whether or not such capacity has publicly-released plans to retire.[7] Some other projection methodologies, such as the approach used by the Eastern Regional Technical Advisory Committee (ERTAC), purposefully maintain the current composition of the fleet except where operators have announced expected changes. Comparing these projections is informative because there is inherent uncertainty in anticipating any future-year composition of the EGU fleet, since analysts cannot know in advance exactly which operators will decide to retire which facilities at any given time. The EPA is soliciting comments on whether and, if so, how different projection techniques for EGUs would affect emissions and air quality in a manner that could further assist states with their analysis of transported air pollution.

B. Air Quality Modeling

For the final CSAPR Update, EPA used the Comprehensive Air Quality Model with Extensions (CAMx) v6.20 as the air quality model. After the EPA performed air quality modeling for the final CSAPR Update, Ramboll Environ, the CAMx model developer, released an updated version of CAMx (version 6.30). In addition, EPA has recently sponsored updates to the Carbon Bond chemical mechanism in CAMx v6.30 related to halogen chemistry reactions that deplete ozone in marine (*i.e.,* salt water) environments. The updated chemistry is included in a new version 6.32 which the EPA has used for this analysis. Specifically, EPA used CAMx v6.32 for the 2011 base year and 2023 future base case air quality modeling to identify receptors and quantify contributions for the 2015 NAAQS transport assessment. Information on this version of CAMx can be found in the Release Notes and User's Guide for CAMx v6.30 and in a

[6] The CPP is stayed by the Supreme Court. *West Virginia et al.* v. *EPA,* No. 15A773 (U.S. Feb. 9, 2016). It is currently unclear what adjustments, if any, will need to be made to the CPP's implementation timing in light of the stay.

[7] Note that much of this change in operation is projected to occur as early as 2020, which is the first year of the 25-year horizon over which EPA's model is optimizing. EPA's modeling adopts the assumption of perfect foresight, which implies that agents know precisely the nature and timing of conditions in future years (*e.g.,* future natural gas supply, future demand) that affect the ultimate cost of decisions along the way. With this perfect foresight, the model looks throughout the entire modeling horizon and selects the overall lowest cost solution for the power sector over that time.

technical report describing the updated halogen chemistry in version 6.32. These documents can be found in the docket for this notice.[8] Details of the 2011 and 2023 CAMx model applications are described in the ''Air Quality Modeling Technical Support Document for the 2015 Ozone NAAQS Preliminary Interstate Transport Assessment'' (AQM TSD) which is available in the docket for this notice.

C. Information Regarding Potential 2023 Nonattainment and Maintenance Sites

The ozone predictions from the 2011 and 2023 CAMx model simulations were used to project 2009–2013 average and maximum ozone design values[9] to 2023 following the approach described in the EPA's draft guidance for attainment demonstration modeling.[10] Using the approach in the final CSAPR Update, we evaluated the 2023 projected average and maximum design values in conjunction with the most recent measured ozone design values (*i.e.,* 2013–2015) to identify sites that may warrant further consideration as potential nonattainment or maintenance sites in 2023.[11] If the approach in the CSAPR Update is applied to evaluate the projected design values, those sites with 2023 average design values that exceed the NAAQS and that are currently measuring nonattainment would be considered to be nonattainment receptors in 2023. Similarly, with the CSAPR Update approach, monitoring sites with a projected 2023 maximum design value that exceeds the NAAQS would be projected to be maintenance receptors in 2023. In the CSAPR Update approach, maintenance-only receptors include both those monitoring sites where the projected 2023 average design value is below the NAAQS, but the maximum design value is above the NAAQS, and monitoring sites with projected 2023 average design values that exceed the NAAQS, but for which current design values based on measured data do not exceed the NAAQS.

The base period 2009–2013 ambient and projected 2023 average and maximum design values and 2013–2015 and preliminary 2014–2016 measured design values at individual projected 2023 nonattainment receptor sites and maintenance-only receptor sites are provided in Tables 1 and 2, respectively.[12]

TABLE 1A—2009–2013 AND 2023 AVERAGE AND MAXIMUM DESIGN VALUES AND 2013–2015 AND PRELIMINARY 2014–2016 DESIGN VALUES (DVS) AT PROJECTED NONATTAINMENT RECEPTOR SITES IN THE EAST[13]

[Units are ppb]

Site ID	County	St	2009–2013 Average DV	2009–2013 Maximum DV	2023 Average DV	2023 Maximum DV	2013–2015 DV	2014–2016 DV
240251001	Harford	MD	90.0	93	71.3	73.7	71	73
360850067	Richmond	NY	81.3	83	71.2	72.7	74	76
361030002	Suffolk	NY	83.3	85	71.3	72.7	72	72
480391004	Brazoria	TX	88.0	89	74.4	75.3	80	75
482010024	Harris	TX	80.3	83	71.1	73.5	79	79
482011034	Harris	TX	81.0	82	71.6	72.5	74	73
484392003	Tarrant	TX	87.3	90	73.9	76.2	76	73
484393009	Tarrant	TX	86.0	86	72.0	72.0	78	75
551170006	Sheboygan	WI	84.3	87	71.0	73.3	77	79

TABLE 1B—2009–2013 AND 2023 AVERAGE AND MAXIMUM DESIGN VALUES AND 2013–2015 AND PRELIMINARY 2014–2016 DESIGN VALUES AT PROJECTED NONATTAINMENT RECEPTOR SITES IN THE WEST

[Units are ppb]

Site ID	County	St	2009–2013 Average DV	2009–2013 Maximum DV	2023 Average DV	2023 Maximum DV	2013–2015 DV	2014–2016 DV
60190007	Fresno	CA	94.7	95	78.9	79.1	86	86
60190011	Fresno	CA	93.0	96	77.8	80.3	85	88
60190242	Fresno	CA	91.7	95	79.2	82.0	86	86
60194001	Fresno	CA	90.7	92	73.0	74.0	89	91
60195001	Fresno	CA	97.0	99	79.1	80.8	88	94
60250005	Imperial	CA	74.7	76	72.8	74.1	77	76
60251003	Imperial	CA	81.0	82	78.5	79.5	78	76
60290007	Kern	CA	91.7	96	76.9	80.5	81	87
60290008	Kern	CA	86.3	88	71.2	72.6	78	81
60290014	Kern	CA	87.7	89	72.7	73.8	84	84
60290232	Kern	CA	87.3	89	72.7	74.1	78	77
60311004	Kings	CA	87.0	90	71.0	73.5	80	84
60370002	Los Angeles	CA	80.0	82	73.9	75.7	82	86
60370016	Los Angeles	CA	94.0	97	86.8	89.6	92	95

[8] CAMx v6.32 is a pre-release version of CAMx v6.40 which is expected to be made public by Ramboll Environ in late 2016 or early 2017.

[9] The ozone design value for a monitoring site is the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration.

[10] The December 3, 2014 ozone, fine particulate matter, and regional haze SIP modeling guidance is available at *http://www.epa.gov/ttn/scram/guidance/guide/Draft_O3-PM-RH_Modeling_Guidance-2014.pdf.*

[11] In determining compliance with the NAAQS, ozone design values are truncated to integer values. For example, a design value of 70.9 parts per billion (ppb) is truncated to 70 ppb which is attainment. In this manner, design values at or above 71.0 ppb are considered to exceed the NAAQS.

[12] The preliminary 2014–2016 design values are based on data from the Air Quality System (AQS) and AirNow and have not been certified by state agencies. Note that for some sites the preliminary 2014–2016 design values are higher than the corresponding data for 2013–2015.

[13] In this notice, the East includes all states from Texas northward to North Dakota and eastward to the East Coast. All states in the contiguous U.S. from New Mexico northward to Montana and westward to the West Coast are considered, for this notice, to be in the West.

TABLE 1B—2009–2013 AND 2023 AVERAGE AND MAXIMUM DESIGN VALUES AND 2013–2015 AND PRELIMINARY 2014–2016 DESIGN VALUES AT PROJECTED NONATTAINMENT RECEPTOR SITES IN THE WEST—Continued

[Units are ppb]

Site ID	County	St	2009–2013 Average DV	2009–2013 Maximum DV	2023 Average DV	2023 Maximum DV	2013–2015 DV	2014–2016 DV
60371201	Los Angeles	CA	90.0	90	80.3	80.3	84	85
60371701	Los Angeles	CA	84.0	85	78.3	79.2	89	90
60376012	Los Angeles	CA	97.3	99	86.5	88.0	94	96
60379033	Los Angeles	CA	90.0	91	76.7	77.5	89	90
60392010	Madera	CA	85.0	86	71.7	72.6	81	83
60650012	Riverside	CA	97.3	99	83.0	84.4	92	93
60651016	Riverside	CA	100.7	101	85.1	85.3	98	97
60652002	Riverside	CA	84.3	85	72.2	72.8	81	81
60655001	Riverside	CA	92.3	93	79.4	80.0	87	87
60656001	Riverside	CA	94.0	98	78.4	81.7	90	91
60658001	Riverside	CA	97.0	98	86.7	87.6	92	95
60658005	Riverside	CA	92.7	94	82.9	84.1	85	91
60659001	Riverside	CA	88.3	91	73.3	75.6	84	86
60670012	Sacramento	CA	93.3	95	74.1	75.4	80	83
60710005	San Bernardino	CA	105.0	107	96.3	98.1	102	108
60710012	San Bernardino	CA	95.0	97	84.4	86.2	88	91
60710306	San Bernardino	CA	83.7	85	75.5	76.7	86	86
60711004	San Bernardino	CA	96.7	98	89.7	91.0	96	100
60712002	San Bernardino	CA	101.0	103	92.9	94.7	97	97
60714001	San Bernardino	CA	94.3	97	86.0	88.5	88	91
60714003	San Bernardino	CA	105.0	107	94.1	95.9	101	101
60719002	San Bernardino	CA	92.3	94	79.8	81.2	86	86
60719004	San Bernardino	CA	98.7	99	88.5	88.7	99	104
60990006	Stanislaus	CA	87.0	88	73.6	74.5	82	83
61070009	Tulare	CA	94.7	96	75.8	76.9	89	89
61072010	Tulare	CA	89.0	90	72.6	73.4	81	82

TABLE 2A—2009–2013 AND 2023 AVERAGE AND MAXIMUM DESIGN VALUES AND 2013–2015 AND PRELIMINARY 2014–2016 DESIGN VALUES AT PROJECTED MAINTENANCE-ONLY RECEPTOR SITES IN THE EAST

[Units are ppb]

Site ID	County	St	2009–2013 Average DV	2009–2013 Maximum DV	2023 Average DV	2023 Maximum DV	2013–2015 DV	2014–2016 DV
90013007	Fairfield	CT	84.3	89	69.4	73.2	83	81
90019003	Fairfield	CT	83.7	87	70.5	73.3	84	85
90099002	New Haven	CT	85.7	89	69.8	72.5	78	76
260050003	Allegan	MI	82.7	86	68.8	71.5	75	74
261630019	Wayne	MI	78.7	81	69.6	71.7	70	72
360810124	Queens	NY	78.0	80	69.9	71.7	69	69
481210034	Denton	TX	84.3	87	70.8	73.0	83	80
482010026	Harris	TX	77.3	80	68.6	71.0	68	68
482011039	Harris	TX	82.0	84	73.0	74.8	69	67
482011050	Harris	TX	78.3	80	69.5	71.0	71	70

TABLE 2B—2009–2013 AND 2023 AVERAGE AND MAXIMUM DESIGN VALUES AND 2013–2015 AND PRELIMINARY 2014–2016 DESIGN VALUES AT PROJECTED MAINTENANCE-ONLY RECEPTOR SITES IN THE WEST

[Units are ppb]

Site ID	County	St	2009–2013 Average DV	2009–2013 Maximum DV	2023 Average DV	2023 Maximum DV	2013–2015 DV	2014–2016 DV
60295002	Kern	CA	84.3	91	70.4	76.0	85	88
60296001	Kern	CA	84.3	86	70.6	72.0	79	81
60372005	Los Angeles	CA	78.0	82	70.6	74.3	74	83
61070006	Tulare	CA	81.7	85	69.1	71.8	84	84
61112002	Ventura	CA	81.0	83	70.7	72.4	77	77
80350004	Douglas	CO	80.7	83	69.6	71.6	79	77
80590006	Jefferson	CO	80.3	83	70.5	72.9	79	77
80590011	Jefferson	CO	78.7	82	69.7	72.7	80	80

D. Information Regarding Quantification of Ozone Contributions

The EPA performed nationwide, state-level ozone source apportionment modeling using the CAMx Ozone Source Apportionment Technology/Anthropogenic Precursor Culpability Analysis (OSAT/APCA) technique [14] to provide information regarding the expected contribution of 2023 base case NO_X and VOC emissions from all sources in each state to projected 2023 ozone concentrations at each air quality monitoring site. In the source apportionment model run, we tracked the ozone formed from each of the following contribution categories (*i.e.,* ''tags''):

- States—anthropogenic NO_X and VOC emissions from each of the contiguous 48 states and the District of Columbia tracked individually (emissions from all anthropogenic sectors in a given state were combined);
- Biogenics—biogenic NO_X and VOC emissions domain-wide (*i.e.,* not by state);
- Boundary Concentrations—concentrations transported into the modeling domain from the lateral boundaries;
- Tribes—the emissions from those tribal lands for which we have point source inventory data in the 2011 NEI (we did not model the contributions from individual tribes);
- Canada and Mexico—anthropogenic emissions from sources in the portions of Canada and Mexico included in the modeling domain (contributions from Canada and Mexico were not modeled separately);
- Fires—combined emissions from wild and prescribed fires domain-wide (*i.e.,* not by state); and
- Offshore—combined emissions from offshore marine vessels and offshore drilling platforms (*i.e.,* not by state).

The CAMx source apportionment model simulation was performed for the period May 1 through September 30 using the 2023 future base case emissions and 2011 meteorology for this time period. The hourly contributions [15] from each tag were processed to obtain the 8-hour average contributions corresponding to the time period of the 8-hour daily maximum concentration on each day in the 2023 model simulation. This step was performed for those model grid cells containing monitoring sites in order to obtain 8-hour average contributions for each day at the location of each site. The model-predicted contributions were applied in a relative sense to quantify the contributions to the 2023 average design value at each site. Additional details on the source apportionment modeling and the procedures for calculating contributions can be found in the AQM TSD. The resulting 2023 contributions from each tag to each monitoring site are provided in a file in the docket for this notice.[16] The largest contributions from each state to 2023 downwind nonattainment receptors and to downwind maintenance-only receptors are provided in Tables 3–1 and 3–2, respectively.

TABLE 3–1—LARGEST CONTRIBUTION FROM EACH STATE TO DOWNWIND 8-HOUR OZONE NONATTAINMENT RECEPTORS

[Units are ppb]

Upwind states	Largest contribution to a downwind nonattainment receptor	Upwind states	Largest contribution to a downwind nonattainment receptor
Alabama	0.37	Montana	0.09
Arizona	0.74	Nebraska	0.37
Arkansas	1.16	Nevada	0.62
California	0.19	New Hampshire	0.01
Colorado	0.32	New Jersey	11.73
Connecticut	0.43	New Mexico	0.18
Delaware	0.55	New York	0.19
District of Columbia	0.70	North Carolina	0.43
Florida	0.49	North Dakota	0.15
Georgia	0.38	Ohio	2.38
Idaho	0.07	Oklahoma	2.39
Illinois	14.92	Oregon	0.61
Indiana	7.14	Pennsylvania	9.11
Iowa	0.43	Rhode Island	0.00
Kansas	1.01	South Carolina	0.16
Kentucky	2.15	South Dakota	0.08
Louisiana	2.87	Tennessee	0.52
Maine	0.01	Texas	1.92
Maryland	1.73	Utah	0.24
Massachusetts	0.05	Vermont	0.00
Michigan	1.77	Virginia	5.04
Minnesota	0.43	Washington	0.15
Mississippi	0.56	West Virginia	2.59
Missouri	1.20	Wisconsin	0.47
		Wyoming	0.31

[14] As part of this technique, ozone formed from reactions between biogenic VOC and NO_X with anthropogenic NO_X and VOC are assigned to the anthropogenic emissions.

[15] Ozone contributions from anthropogenic emissions under ''NO_X-limited'' and ''VOC-limited'' chemical regimes were combined to obtain the net contribution from NO_X and VOC anthropogenic emissions in each state.

[16] The file containing the contributions is named: ''2015 O3 NAAQS Transport Assessment_Design Values & Contributions.''

TABLE 3–2—LARGEST CONTRIBUTION FROM EACH STATE TO DOWNWIND 8-HOUR OZONE MAINTENANCE RECEPTORS

[Units are ppb]

Upwind states	Largest contribution to a downwind maintenance receptor	Upwind states	Largest contribution to a downwind maintenance receptor
Alabama	0.48	Montana	0.11
Arizona	0.52	Nebraska	0.41
Arkansas	2.20	Nevada	0.43
California	2.03	New Hampshire	0.02
Colorado	0.25	New Jersey	8.65
Connecticut	0.36	New Mexico	0.41
Delaware	0.38	New York	15.36
District of Columbia	0.08	North Carolina	0.43
Florida	0.22	North Dakota	0.13
Georgia	0.31	Ohio	3.82
Idaho	0.16	Oklahoma	1.30
Illinois	21.69	Oregon	0.17
Indiana	6.45	Pennsylvania	6.39
Iowa	0.60	Rhode Island	0.02
Kansas	0.64	South Carolina	0.15
Kentucky	1.07	South Dakota	0.06
Louisiana	3.37	Tennessee	0.69
Maine	0.00	Texas	2.49
Maryland	2.20	Utah	1.32
Massachusetts	0.11	Vermont	0.01
Michigan	1.76	Virginia	2.03
Minnesota	0.34	Washington	0.11
Mississippi	0.65	West Virginia	0.92
Missouri	2.98	Wisconsin	1.94
		Wyoming	0.92

In CSAPR and the CSAPR Update, the EPA used a contribution screening threshold of 1 percent of the NAAQS to identify upwind states that may significantly contribute to downwind nonattainment and/or maintenance problems and which warrant further analysis to determine if emissions reductions might be required from each state to address the downwind air quality problem. The EPA determined that 1 percent was an appropriate threshold to use in the analysis for those rulemakings because there were important, even if relatively small, contributions to identified nonattainment and maintenance receptors from multiple upwind states mainly in the eastern U.S. The agency has historically found that the 1 percent threshold is appropriate for identifying interstate transport linkages for states collectively contributing to downwind ozone nonattainment or maintenance problems because that threshold captures a high percentage of the total pollution transport affecting downwind receptors.

Based on the approach used in CSAPR and the CSAPR Update, upwind states that contribute ozone in amounts at or above the 1 percent of the NAAQS threshold to a particular downwind nonattainment or maintenance receptor would be considered to be ''linked'' to that receptor in step 2 of the CSAPR framework for purposes of further analysis in step 3 to determine whether and what emissions from the upwind state contribute significantly to downwind nonattainment and interfere with maintenance of the NAAQS at the downwind receptors. For the 2015 ozone NAAQS, the value of a 1 percent threshold would be 0.70 ppb. The individual upwind state to downwind receptor ''linkages'' and contributions based on a 0.70 ppb threshold are identified in the AQM TSD for this notice.

The EPA notes that, when applying the CSAPR framework, an upwind state's linkage to a downwind receptor alone does not determine whether the state significantly contributes to nonattainment or interferes with maintenance of a NAAQS to a downwind state. While the 1 percent screening threshold has been traditionally applied to evaluate upwind state linkages in eastern states where such collective contribution was identified, the EPA noted in the CSAPR Update that, as to western states, there may be geographically specific factors to consider in determining whether the 1 percent screening threshold is appropriate. For certain receptors, where the collective contribution of emissions from one or more upwind states may not be a considerable portion of the ozone concentration at the downwind receptor, the EPA and states have considered, and could continue to consider, other factors to evaluate those states' planning obligation pursuant to the Good Neighbor provision.[17] However, where the collective contribution of emissions from one or more upwind states is responsible for a considerable portion of the downwind air quality problem, the CSAPR framework treats a contribution from an individual state at or above 1 percent of the NAAQS as significant, and this reasoning applies regardless of where the receptor is geographically located.

III. Analytic Information Available for Public Comment

The EPA has placed key information related to the air quality model applications into the electronic docket for this notice. This information includes the AQM TSD, an Excel file which contains the 2009–2013 base period and 2023 projected average and maximum ozone design values at individual monitoring sites and the

[17] *See, e.g.,* 81 FR 31513 (May 19, 2016) (approving Arizona Good Neighbor SIP addressing 2008 ozone NAAQS based on determination that upwind states would not collectively contribute to a considerable portion of the downwind air quality problem).

ozone contributions to individual monitoring sites from anthropogenic emissions in each state and from the other individual categories included in the source apportionment modeling. Also in the docket for this notice are a number of emission summaries by sector, state, county, source classification code, month, unit, day, and control program. In addition, the raw emission inventory files, ancillary data, and scripts used to develop the air quality model-ready emissions which are not in a format accepted by the electronic docket are available from the Air Emissions Modeling Web site for the Version 6.3 Platform at *https://www.epa.gov/air-emissions-modeling/2011-version-63-platform.* Electronic copies of the emissions and non-emissions air quality modeling input files, the CAMx v6.32 model code and run scripts, and the air quality modeling output files from the 2011 and 2023 air quality modeling performed for the 2015 NAAQS ozone transport assessment can be obtained by contacting Norm Possiel at *possiel.norm@epa.gov.*

The EPA is requesting comment on the components of the 2011 air quality modeling platform, the methods for projecting 2023 ozone design value concentrations and the methods for calculating ozone contributions. The EPA is also seeking comment on the methods used to project emissions to future years, where 2023 is an example of such a year. Specifically, comments are requested regarding new datasets, impacts of existing and planned federal, state, and local control programs on emissions, and new methods that could be used to prepare more representative emissions projections. That is, EPA is seeking comments on the projection approach and data sets that are potentially useful for computing projected emissions. Commenters wishing to comment on inventory projection methods should submit to the docket comments that describe an alternative approach to the existing methods, along with documentation describing why that method is an improvement over the existing method. Summaries of the base and projected future year emission inventories are provided in the docket to aid in the review of these data. As indicated above, the comment period for this notice is 90 days from the date of publication in the **Federal Register.**

Dated: December 28, 2016.

Stephen Page,

Director, Office of Air Quality Planning and Standards.

[FR Doc. 2017–00058 Filed 1–5–17; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Sunshine Act; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act, of the regular meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on January 12, 2017, from 9:00 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Dale L. Aultman, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090. Submit attendance requests via email to *VisitorRequest@FCA.gov.* See **SUPPLEMENTARY INFORMATION** for further information about attendance requests.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. Please send an email to *VisitorRequest@FCA.gov* at least 24 hours before the meeting. In your email include: Name, postal address, entity you are representing (if applicable), and telephone number. You will receive an email confirmation from us. Please be prepared to show a photo identification when you arrive. If you need assistance for accessibility reasons, or if you have any questions, contact Dale L. Aultman, Secretary to the Farm Credit Administration Board, at (703) 883–4009. The matters to be considered at the meeting are:

Open Session

A. *Approval of Minutes*

- December 8, 2016

B. *New Business*

- Draft Third Amended and Restated Market Access Agreement to be entered into by the Farm Credit System Banks and the Federal Farm Credit Banks Funding Corporation

C. *Reports*

- Auditor's Report on FCA FY 2016/2015 Financial Statements

Closed Session*

- Executive Meeting with Auditors

* Session Closed-Exempt pursuant to 5 U.S.C. Section 552b(c)(2).

Dated: January 4, 2017.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2017–00131 Filed 1–4–17; 11:15 am]

BILLING CODE 6705–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 24, 2017.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Paul James Sentry,* Verona, Wisconsin; to acquire more than 25 percent of Deerfield Financial Corporation, Madison, Wisconsin, and thereby indirectly control Bank of Deerfield, Deerfield, Wisconsin.

B. Federal Reserve Bank of Minneapolis (Jacquelyn K. Brunmeier, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Timothy Schneider, individually and as trustee of the Timothy Schneider Irrevocable Trust (''Trust''),* both in Adams, Minnesota; to acquire more than 10 percent of Adams Bancshares, Inc., and thereby indirectly control United Farmers State Bank, both in Adams, Minnesota.

C. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Clay Muegge and Chad Muegge,* both of Lamont, Oklahoma; to retain shares of State Exchange Bancshares, Inc., and thereby indirectly retain shares of State Exchange Bank, both of Lamont, Oklahoma; and for approval as members of the Muegge Family Group that controls State Exchange Bancshares, Inc.

Board of Governors of the Federal Reserve System, January 3, 2017.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2017–00032 Filed 1–5–17; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Determination Concerning a Petition to Add a Class of Employees to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention, Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice of a determination concerning a petition to add a class of employees from the Bliss & Laughlin Steel site in Buffalo, New York, to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA).

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 1090 Tusculum Avenue, MS C–46, Cincinnati, OH 45226–1938, Telephone 1–877–222–7570. Information requests can also be submitted by email to *DCAS@CDC.GOV.*

SUPPLEMENTARY INFORMATION:

Authority: [42 U.S.C. 7384q].

On December 21, 2016, the Secretary of HHS determined that the following class of employees does not meet the statutory criteria for addition to the SEC as authorized under EEOICPA:

All Atomic Weapons Employees who worked in any area at Bliss and Laughlin Steel in Buffalo, New York, from January 1, 1999, through December 31, 1999.

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2017–00017 Filed 1–5–17; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–17–17JA; Docket No. CDC–2016–0122]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on the Evaluation of ''Effectiveness of Teen Pregnancy Prevention Programs Designed Specifically for Young Males: Columbia University Young Men's Project''. The main goal of this study is to adapt, implement, and evaluate an innovative computer-assisted motivational interviewing (CAMI–TPP) intervention to engage young males in behaviors that prevent unintended teen pregnancy.

DATES: Written comments must be received on or before March 7, 2017.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0122 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

Please note: All public comment should be submitted through the Federal eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

Evaluation of ''Effectiveness of Teen Pregnancy Prevention Programs Designed Specifically for Young Males: Columbia University Young Men's Project''—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Division of Reproductive Health, Centers for Disease Control and Prevention (CDC), is seeking OMB review and approval for a new information collection to carry out an evaluation of the Columbia University Young Men's Teen Pregnancy Prevention project funded by the ''DP15–007 Effectiveness of Teen Pregnancy Prevention Programs Designed Specifically for Young Males'' cooperative agreement. Approval is being requested for three years (Years 2–4) of a 5-year project. During Year 3, a request will be made for an extension of information collection to cover Years 4–5.

Although teen birth rates (defined as live births per 1,000 15–19-year-old U.S. females) are declining, the U.S. teen birth rate remains higher than in other developed countries (Penman-Aguilar, Carter, Snead, & Kourtis, 2013). Furthermore, geographic, socioeconomic, and racial/ethnic disparities in teen birth rates persist. In 2012, non-Hispanic black and Hispanic teen birth rates were still more than two times higher than birth rates for non-Hispanic white teens (Martin, Hamilton, Osterman, Curtin, & Mathews, 2013).

In 2014 teen fatherhood occurred at a rate of 11.3 births per 1,000 men aged 15–19 (Hamilton, Martin, Osterman, Curtin, & Mathews, 2015) and resulted in approximately 156,000 births. According to the 2006–2010 National Survey of Family Growth, 15% of males fathered a child while younger than age 20 and rates of fathering a child were highest among non-Hispanic Black and Hispanic teens (Martinez, Daniels, & Chandra, 2012). Data suggest that teen fathers attend fewer years of school and are less likely to graduate from high school than teens who are not fathers (Fletcher & Wolfe, 2012). In addition, males just beyond their teen years (aged 20–24) father a higher proportion of children born to teen mothers than males aged 19 and younger (Elo, King, & Furstenburg, 1999; Males, 1995). Thus, it is important to reach both teenage as well as young adult males in their early twenties (hereafter collectively referred to as ''young men'') in teen pregnancy prevention efforts.

Initiatives to prevent teen pregnancy have focused primarily on the role of female teens; however, young men can also play an important role and should be actively engaged in preventing teen pregnancy. Partner involvement in contraceptive decision making can increase use of effective methods of pregnancy prevention, including the use of dual protection (*i.e.,* using condoms plus hormonal methods to prevent both pregnancy and sexually transmitted infections [STIs]) (Kerns 2003, Harper 2004, Kraft 2010, Cox and Cox 2010). Increased use of effective contraception may be based on improved contraception-related communication, joint responsibility and decision making between partners, as well as male partners' knowledge and attitudes about contraceptive methods (including condoms), support for use of moderately or highly effective methods, and desire for pregnancy prevention. Nevertheless, few interventions have focused on young men or been shown to be effective in reducing teen pregnancy. The HHS Teen Pregnancy Prevention Evidence Review, (*http://tppevidence review.aspe.hhs.gov/Review Protocol.aspx*) conducted in 2012 by Mathematica Policy Research on behalf of the HHS (U.S. Department of Health and Human Services, 2012) and updated in 2014 identified 35 rigorously evaluated interventions found to have an impact on sexual risk behaviors, teen pregnancy, and/or STIs. Most interventions were evaluated among young male and female participants; only one intervention was designed and evaluated specifically for males (Magura, Kang, & Shapiro 1994). Most of the 35 interventions were designed as HIV/STI prevention interventions and provide participants with information about condoms but little about other contraceptive options. They also do not address the shared responsibility of contraceptive decision making or sexual and reproductive health services.

While programs that address male-specific risk and protective factors for teen pregnancy (*e.g.,* Gottesgen & Philiber, 2001; Ricardo, Nascimento, Fonseca & Segundo, 2010; Smith, Weinman, Buzi, & Benton, 2004; Tello, Cervantes, Cordova, & Santos, 2010) have been developed, there are no published results from rigorous evaluations of these interventions. If found to be efficacious, this study will add a male-focused program to the evidence review. This information collection request aims to address this gap in the literature through a randomized controlled trial (RCT) of a computer-assisted motivational interviewing application for mobile phones to prevent fathering an unintended pregnancy (CAMI–TPP) by males aged 15 to 24 years in comparison to a control group (CAMI-Fitness).

CAMI will be conducted in a racially and ethnically diverse population of young males aged 15 to 24 years in New York City, NY. Young males will be recruited at 3 sites in New York City: The Young Men's Clinic in Washington Heights and among students at the school-based health centers of two inner-city NYC high schools—George Washington Educational Campus in Washington Heights and John F. Kennedy campus in the Bronx. Participants will be assessed at baseline, immediately post-intervention (12 weeks), and at three follow-ups (24 weeks, 36 weeks, and 60 weeks) after participation in the 12-week intervention. Participants will also complete weekly online check-ins for 60 weeks from the time of enrollment in the project. Weekly check-ins have been used in past studies to increase retention during the study period and are very brief.

The knowledge generated from this project will inform the HHS Teen Pregnancy Prevention Evidence Review. If the intervention is found to be efficacious, it will provide Teen Pregnancy Prevention grantees of the Office of Adolescent Health, CDC, and Administration for Children and Families with a new intervention to reduce the number of young men who father a teen pregnancy.

OMB approval is requested for three years. Participation is voluntary and there are no costs to respondents other than their time. The total estimated annualized burden hours are 2,598.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours (in hours)
Young men aged 15–24 years	Eligibility Screener	2,428	1	5/60	202
Consented and enrolled young men aged 15–24 years	Baseline Assessment	315	1	32/60	168
	Therapeutic Alliance Assessment.	315	2	5/60	53
	Satisfaction—Coaching	315	4	2/60	42
	Satisfaction—Weekly Check-ins.	315	1	5/60	26
	12-week Assessment	315	1	30/60	158
	Satisfaction—Assessments.	315	1	7/60	37
	24-week Assessment	315	1	28/60	147
	36-week Assessment	252	1	26/60	108
	60-week Assessment	190	1	26/60	82
Consented and enrolled young men aged 15–24 years	Weekly Check-in	315	60	5/60	1,575
Total					2,598

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2017–00004 Filed 1–5–17; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–17–17IZ; Docket No. CDC–2016–0129]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on proposed information collections for the National Center for Health Statistics (NCHS) Youth Outreach Program. This generic information collection plan would capture outreach activities involving young people (K through college) and those who support them, such as parents, teachers, counselors etc.

DATES: Written comments must be received on or before March 7, 2017.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0129 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

Please note: All public comment should be submitted through the Federal eRulemaking portal (*Regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train

personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

The National Center for Health Statistics (NCHS) Youth Outreach Program—NEW—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

NCHS is authorized to collect data under Section 306 of the Public Health Service Act (42 U.S.C. 242k). NCHS also has a history of reaching out to young people to encourage their interest in Science, Technology, Engineering and Math (STEM). Examples of past involvement include adopting local schools, speaking at local colleges, conducting a Statistics Day for high school students, and, most recently, conducting the first NCHS Data Detectives Camp for middle school students (OMB Control No. 0920–0729, The NCHS Data Detective Camp).

The success of these programs has inspired NCHS leadership and staff to want to look for new and continuing opportunities to positively impact the lives of young people and expand their interest, understanding of and involvement in the sciences. This might include hosting the Data Detectives Camp annually or bi-annually; hosting Statistics Day annually; creating youth poster sessions for professional conferences (such as the NCHS National Conference on Health Statistics or the American Statistical Association Conference etc.); hosting a statistical or health sciences etc. fair or other STEM related competitions; organizing a STEM Career Day or similar activity; developing web-based sites or materials with youth focus as well as other programs developed to meet future youth outreach needs, particularly activities that encourage STEM.

Information will be collected using a combination of methodologies appropriate to each program. These may include: Registration forms, letters of recommendation, evaluation forms; mail surveys; focus groups; automated and electronic technology (*e.g.* email, Web-based surveys); and telephone surveys.

There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden/ response (in hours)	Response burden (in hours)
Students	Questionnaires/Applications	800	1	30/60	450
Parents	Applicants Questionnaires/ Applications.	800	1	30/60	450
School Officials/Community Representatives	School Officials of Applicants	1,200	1	30/60	600
Student/Youth; Parent/Guardian; School Officials; Other.	Focus Groups	50	1	60/60	50
Student/Youth; Parent/Guardian; School Officials; Other.	Other Program Surveys	600	1	30/60	300
Total					1,850

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2017–00003 Filed 1–5–17; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: OCSE–157 Child Support Enforcement Program Annual Data Report.

OMB No.: 0970–0177.

Description: The information obtained from this form will be used to: (1) Report Child Support Enforcement activities to the Congress as required by law; (2) calculate incentive measures performance and performance indicators utilized in the program; and (3) assist the Office of Child Support Enforcement (OCSE) in monitoring and evaluating State Child Support programs.

Respondents: State, Local or Tribal Government.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
OCSE–157	54	1	7	378

Estimated Total Annual Burden Hours: 378.

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. 2017–00012 Filed 1–5–17; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Advisory Council on the National Health Service Corps; Notice of a Meeting

AGENCY: Health Resources and Service Administration (HRSA), Department of Health and Human Services.

ACTION: Notice of meeting.

SUMMARY: In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that a meeting is scheduled for National Advisory Council on the National Health Service Corps (NACNHSC). This meeting will be open to the public. Information about the NACNHSC and the agenda for this meeting can be obtained by accessing the following Web site: *http://nhsc.hrsa.gov/corpsexperience/aboutus/nationaladvisorycouncil/meetingsummaries/index.html.*

DATES: The meeting will be held on January 25, 2017, from 1:00 p.m.–4:00 p.m. EST.

ADDRESSES: This meeting will be held in a webinar and conference call format. Webinar information can be found on the Web site at: *http://nhsc.hrsa.gov/corpsexperience/aboutus/nationaladvisorycouncil/meetingsummaries/index.html.*

AGENDA: The NACNHSC will discuss the priorities of 2017. The NACNHSC final agenda will be available on the NACNHSC Web site 3 days in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: Anyone requesting information regarding the NACNHSC should contact CAPT Shari Campbell, Designated Federal Official, Bureau of Health Workforce, Health Resources and Services Administration, in one of three ways: (1) Send a request to the following address: CAPT Shari Campbell, Designated Federal Official, Bureau of Health Workforce, HRSA, 5600 Fishers Lane, Room 14N108, Rockville, Maryland 20857; (2) call (301) 594–4251; or (3) send an email to *scampbell@hrsa.gov.*

SUPPLEMENTARY INFORMATION: The NACNHSC makes recommendations with respect to their responsibilities under Subpart II, Part D of Title III of the Public Health Service Act, as amended (National Health Service Corps and Health Professional Shortage Area Designations), and shall review and comment upon regulations promulgated by the Secretary under Subpart II.

Members of the public will have the opportunity to provide comments. Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to make oral comments or provide written comments to the NACNHSC should be sent to Monica-Tia Bullock at *MBullock@hrsa.gov* by January 13, 2017. Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Monica-Tia Bullock at *MBullocak@hrsa.gov* at least 10 days prior to the meeting.

Jason E. Bennett,

Director, Division of the Executive Secretariat.

[FR Doc. 2016–32059 Filed 1–5–17; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Determination Concerning a Petition To Add a Class of Employees to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention, Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice of a determination concerning a petition to add a class of employees from the Blockson Chemical Co. site in Joliet, Illinois, to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA).

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 1090 Tusculum Avenue, MS C–46, Cincinnati, OH 45226–1938, Telephone 1–877–222–7570. Information requests can also be submitted by email to *DCAS@CDC.GOV.*

SUPPLEMENTARY INFORMATION:

Authority: [42 U.S.C.7384q].

On December 21, 2016, the Secretary of HHS determined that the following class of employees does not meet the statutory criteria for addition to the SEC as authorized under EEOICPA:

''All employees who worked in any area at the Blockson Chemical Co. site in Joliet, Illinois, during the period from July 1, 1960, through December 31, 1991.''

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2017–00018 Filed 1–5–17; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Determination Concerning a Petition To Add a Class of Employees to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention, Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: HHS gives notice of a determination concerning a petition to add a class of employees from the Westinghouse Electric Corporation in Bloomfield, NJ, to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA).

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 1090 Tusculum Avenue, MS C–46, Cincinnati, OH 45226–1938, Telephone 1–877–222–7570. Information requests can also be submitted by email to *DCAS@CDC.GOV.*

SUPPLEMENTARY INFORMATION:

Authority: [42 U.S.C. 7384q].

On December 21, 2016, the Secretary of HHS determined that the following class of employees does not meet the statutory criteria for addition to the SEC as authorized under EEOICPA:

All Atomic Weapons Employees who worked in any area at the Westinghouse Electric Corporation in Bloomfield, New Jersey, during the time periods from January 1, 1950, through January 31, 1958; June 1,

1958, through May 31, 1959; and July 1, 1959, through April 30, 2000.

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2017–00019 Filed 1–5–17; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Treatment; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given that the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Treatment (CSAT) National Advisory Council (NAC) will meet on February 1, 2017, 9:00 a.m.–4:30 p.m. (EDT).

The meeting is open and will include consideration of minutes from the SAMHSA CSAT NAC meeting of August 24, 2016, the Director's report, a budget update, discussions of CSAT's role translating science to service, and discussion of technology assisted care.

The meeting will be held at the SAMHSA 5600 Fishers Lane, Conference Room 5 A503, Rockville, MD 20857. Attendance by the public will be limited to space available and will be limited to the open sessions of the meeting. Interested persons may present data, information, or views, orally or in writing, on issues pending before the Council. Written submissions should be forwarded to the contact person on or before January 13, 2017. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations are encouraged to notify the contact person on or before January 13, 2017. Five minutes will be allotted for each presentation.

The open meeting session may be accessed via telephone. To attend on site, obtain the call-in number and access code, submit written or brief oral comments, or request special accommodations for persons with disabilities, please register on-line at *http://nac.samhsa.gov/Registration/meetingsRegistration.aspx,* or communicate with the CSAT National Advisory Council Designated Federal Officer; Tracy Goss (see contact information below).

Meeting information and a roster of Council members may be obtained by accessing the SAMHSA Committee Web site at *http://www.samhsa.gov/about-us/advisory-councils/csat-national-advisory-council* or by contacting the CSAT National Advisory Council Designated Federal Officer; Tracy Goss (see contact information below).

Council Name: SAMHSA's Center for Substance Abuse Treatment, National Advisory Council.

Date/Time/Type: February 1, 2017, 9:00 a.m.–4:30 p.m. EDT, OPEN.

Place: SAMHSA, 5600 Fishers Lane, Rockville, Maryland 20857.

Contact: Tracy Goss, Designated Federal Officer, CSAT National Advisory Council, 5600 Fishers Lane, Rockville, Maryland 20857 (mail), Telephone: (240) 276–0759, Fax: (240) 276–2252, Email: *tracy.goss@samhsa.hhs.gov.*

Dated: January 3, 2017.

Carlos Castillo,

Committee Management Officer, SAMHSA.

[FR Doc. 2017–00031 Filed 1–5–17; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2016–0026; OMB No. 1660–0115]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Environmental and Historic Preservation Screening Form

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before February 6, 2017.

ADDRESSES: 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 Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 500 C Street SW., Washington, DC 20472–3100, or email address *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: This information collection previously published in the **Federal Register** on October 26, 2016 at 81 FR 74462 with a 60 day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Environmental and Historic Preservation Screening Form.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0115.

Form Titles and Numbers: FEMA Form 024–0–1, Environmental and Historic Preservation Screening Form.

Abstract: NEPA requires that each Federal agency to examine the impact of its actions (including the actions of recipients using grant funds) on the human environment, to look at potential alternatives to that action, and to inform both decision-makers and the public of those impacts through a transparent process. This Screening Form will facilitate FEMA's review of recipient actions in FEMA's effort to comply with the environmental requirements.

Affected Public: State, Local or Tribal Government; Not-for-Profit Institutions.

Estimated Number of Respondents: 2,000.

Estimated Total Annual Burden Hours: 16,000 hours.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $796,320. There are no annual costs to respondents' operations and maintenance costs for technical services. There are no annual start-up or capital costs. The cost to the Federal Government is $5,504,580.

Dated: December 27, 2016.

Richard W. Mattison,

Records Management Program Chief, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2016–32052 Filed 1–5–17; 8:45 am]

BILLING CODE 9111–46–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2016–0029; OMB No. 1660–0112]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; FEMA Preparedness Grants: Transit Security Grant Program (TSGP)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before February 6, 2017.

ADDRESSES: 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 Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 500 C Street SW., Washington, DC 20472–3100, or email address *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: This information collection previously published in the **Federal Register** on October 12, 2016 at 81 FR 70434 with a 60 day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: FEMA Preparedness Grants: Transit Security Grant Program (TSGP).

Type of information collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0112.

Form Titles and Numbers: FEMA Form 089–4, TSGP Investment Justification Template.

Abstract: The TSGP is an important component of the Department of Homeland Security's effort to enhance the security of the Nation's critical infrastructure. The program provides funds to owners and operators of transit systems to protect critical surface transportation infrastructure and the traveling public from acts of terrorism, major disasters, and other emergencies.

Affected Public: State, Local, or Tribal Government.

Estimated Number of Respondents: 123.

Estimated Total Annual Burden Hours: 5,043 hours.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $208,981.92. There are no annual costs to respondents' operations and maintenance costs for technical services. There are no annual start-up or capital costs. The cost to the Federal Government is $774,018.00.

Dated: December 27, 2016.

Richard W. Mattison

Records Management Program Chief, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2016–32055 Filed 1–5–17; 8:45 am]

BILLING CODE 9111–46–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4235–DR; Docket ID FEMA–2016–0001]

Commonwealth of the Northern Mariana Islands; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the Commonwealth of the Northern Mariana Islands (FEMA–4235–DR), dated August 5, 2015, and related determinations.

DATES: *Effective Date:* December 21, 2016.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 21, 2016, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), in a letter to W. Craig Fugate, Administrator, Federal Emergency Management Agency, Department of Homeland Security, under Executive Order 12148, as follows:

I have determined that the damage in certain areas of the Commonwealth of the Northern Mariana Islands resulting from Typhoon Soudelor during the period of August 1–3, 2015, is of sufficient severity and magnitude that special cost sharing arrangements are warranted regarding Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act'').

Therefore, I amend my declarations of August 5, 2015, and August 24, 2015, to authorize Federal funds for hazard mitigation measures associated with sections 404 and 406 of the Stafford Act at 100 percent of total eligible costs.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–32051 Filed 1–5–17; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2016–0027; OMB No. 1660–0114]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; FEMA Preparedness Grants: Port Security Grant Program (PSGP)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before February 6, 2017.

ADDRESSES: 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 Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 500 C Street SW., Washington, DC 20472–3100, or email address *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: This proposed information collection previously published in the **Federal Register** on October 12, 2016 at 81 FR 70431 with a 60 day public comment period. FEMA received several requests for a copy of the proposed information collection via email and telephone, as well as from participants at a public meeting. FEMA provided these requesters with a copy of the proposed collection. FEMA also received one comment with formatting suggestions for the form. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: FEMA Preparedness Grants: Port Security Grant Program (PSGP).

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0114.

Form Titles and Numbers: FEMA Form 089–5, PSGP Investment Justification.

Abstract: The previous version of FEMA Form 089–5 is outdated and has become cumbersome with subsequent program explanations within the notice of funding opportunity explaining the type of information required. The revised form consolidates the requested information and provides easy to follow drop-down boxes to minimize confusion among applicants, reducing time needed to collect the information for both applicants and FEMA, and reducing the review time by FEMA and federal partners.

Affected Public: State, Local or Tribal Government; Business or other for-profit.

Estimated Number of Respondents: 597.

Estimated Total Annual Burden Hours: 17,154 hours.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $1,094,112.60. There are no annual costs to respondents' operations and maintenance costs for technical services. There are no annual start-up or capital costs. The cost to the Federal Government is $770,401.

Dated: December 27, 2016.

Richard W. Mattison,

Records Management Program Chief, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2016–32054 Filed 1–5–17; 8:45 am]

BILLING CODE 9111–46–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2016–0028; OMB No. 1660–0117]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; FEMA's Grants Reporting Tool (GRT)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before February 6, 2017.

ADDRESSES: 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 Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 500 C Street SW., Washington, DC 20472–3100, or email address *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: This information collection previously published in the **Federal Register** on October 12, 2016, 81 FR 70432 with a 60 day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: FEMA's Grants Reporting Tool (GRT).

Type of information collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0117.

Form Titles and Numbers: None.

Abstract: The GRT is a Web-based reporting system designed to help State Administrative Agencies (SAAs) meet all reporting requirements as identified in the grant guidance of FEMA's portfolio of preparedness grants sponsored by FEMA's Grant Programs Directorate (GPD). The information enables FEMA to evaluate applications

and make award decisions, monitor ongoing performance and manage the flow of Federal funds, and to appropriately close out grants or cooperative agreements. GRT supports the information collection needs of each grant program processed in the system.

Affected Public: State, Local, or Tribal Government.

Estimated Number of Respondents: 56.

Estimated Total Annual Burden Hours: 2,156 hours.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $77,659.12. There are no annual costs to respondents' operations and maintenance costs for technical services. There are no annual start-up or capital costs. The cost to the Federal Government is $1,166,604.30.

Dated: December 27, 2016.

Richard W. Mattison,

Records Management Program Chief, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2017–00006 Filed 1–5–17; 8:45 am]

BILLING CODE 9111–46–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5995–N–1]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), call the toll-free Title V information line at 800–927–7588 or send an email to *title5@hud.gov*.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: December 28, 2016.

Brian P. Fitzmaurice,

Director, Division of Community Assistance, Office of Special Needs Assistance Programs.

[FR Doc. 2016–31790 Filed 1–5–17; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2016–N166; FF08ESMF00–FXES11120800000–156]

Proposed Bakersfield Habitat Conservation Plan/Natural Community Conservation Plan, California; Scoping for Environmental Impact Statement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent; notice of public scoping meeting; request for comments.

SUMMARY: Under the National Environmental Policy Act, we, the U.S. Fish and Wildlife Service, intend to prepare a draft environmental impact statement (EIS) for the proposed habitat conservation plan/natural community conservation plan for the City of Bakersfield, hereafter referred to as the Bakersfield Habitat Conservation Plan (BHCP). The BHCP will streamline and coordinate existing processes for review and permitting of public and private activities that potentially affect covered species, while providing long-term conservation of covered species in the plan area. The draft EIS is being prepared under the Endangered Species Act of 1973, as amended, and the California Natural Community Conservation Planning Act. We announce meetings and invite comments.

DATES:

Submitting Comments: To ensure consideration, please send your written comments by February 21, 2017.

Public Meeting: A public scoping meeting will be held on Tuesday, January 24, 2017: From 5 p.m. to 7 p.m. The meeting will take place in the 3rd floor conference room, City of Bakersfield Community Development Department, 1715 Chester Avenue, Bakersfield, CA 93301.

ADDRESSES: To request further information or submit written comments, please use one of the following methods, and note that your information request or comment is in reference to the Bakersfield Habitat Conservation Plan:

- *U.S. Mail:* U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W–2605, Sacramento, CA 95825.
- *In-Person Drop-Off, Viewing, or Pickup:* Call (916) 414–6600 to make an appointment during regular business hours to drop off comments or view received comments at the above location.
- *Fax:* U.S. Fish and Wildlife Service, (916) 414–6713, Attn.: Thomas Leeman.

FOR FURTHER INFORMATION CONTACT: Justin Sloan, Senior Biologist, or Thomas Leeman, Chief, San Joaquin Valley Division, Sacramento Fish and Wildlife Office, by phone at (916) 414–6600 or by U.S. mail at the above address. If you use a telecommunications device for the deaf, please call the Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Introduction

We, the U.S. Fish and Wildlife Service (Service), intend to prepare a draft environmental impact statement (EIS) to evaluate the impacts of several alternatives related to the potential issuance of an incidental take permit (ITP), as well as impacts of the implementation of the supporting proposed habitat conservation plan/natural community conservation plan, which we will refer to as the Bakersfield Habitat Conservation Plan (BHCP). The EIS will be a joint EIS/environmental impact report (EIS/EIR), for which the Service, City of Bakersfield, and the California Department of Fish and Wildlife (CDFW) intend to gather information necessary for preparation.

The BHCP is designed to be a comprehensive regional plan that will provide long-term conservation and management of natural communities, sensitive species, and the habitats upon which those species depend, while accommodating other important uses of the land. It is intended to serve as a habitat conservation plan pursuant to the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.;* Act), and as a natural community conservation plan under the California Natural Community Conservation Planning Act.

The BHCP will address State and Federal endangered species compliance requirements for the City of Bakersfield, Kern County, California State University–Bakersfield, Bakersfield College, and individual school districts within the BHCP plan area. The plan area generally includes the San Joaquin

Valley floor portion of Kern County. The permit applicants are currently preparing a complete draft of the BHCP as an HCP/NCCP, and the permitting agencies (Service and CDFW) are assisting and will be proceeding with agency review and finalization in the coming months. The permit applicants intend to apply for a 30-year incidental take permit (ITP) from the Service. The permittees are seeking authorized incidental take of threatened and endangered species that could result from activities covered under the BHCP. We announce meetings and invite comments.

The Service will serve as the administrative lead for all actions related to this **Federal Register** notice for the EIS component of the EIS/EIR. The City of Bakersfield will serve as the State lead agency under the California Environmental Quality Act (CEQA) for the EIR component. The City of Bakersfield, in accordance with CEQA, is publishing a similar notice.

Project Summary

The plan is being prepared under the combined efforts of the City of Bakersfield and the U.S. Fish and Wildlife Service, in coordination with Kern County and the CDFW. The BHCP will streamline and coordinate existing processes for review and permitting of public and private activities that potentially affect covered species (see Covered Species), while providing long-term conservation of covered species in the plan area.

To meet this goal, the BHCP sets out a conservation strategy that includes measures to ensure that impacts to covered species and habitats related to covered activities (see Covered Activities) are avoided, minimized, and/or mitigated, as appropriate. These covered activities encompass the range of existing and future activities that the City, County, private developers, or other permittees will implement within the permit area. These activities include urban and rural development and a variety of road, water, and other needed public infrastructure, construction, and maintenance activities. The BHCP is further intended to facilitate the role and responsibility of local government in overseeing local land use planning and decision-making while protecting endangered species in the area.

Background

Section 9 of the Act (16 U.S.C. 1531 *et seq.*) prohibits the ''take'' of wildlife species listed as endangered or threatened. The Act defines the term ''take'' as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed species, or to attempt to engage in such conduct (16 U.S.C. 1532). Harm includes significant habitat modifications or degradation that actually kill or injure listed wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering (50 CFR 17.3(c)). Pursuant to section 10(a)(1)(B) of the Act, we may issue permits to authorize ''incidental take'' of listed species. ''Incidental take'' is defined by the Act as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Service regulations governing permits for threatened species and endangered species, respectively, are promulgated in 50 CFR 17.22 and 17.32.

Section 10(a)(1)(B) of the Act contains provisions for issuing such ITPs to non-Federal entities for the take of endangered and threatened species, provided the following criteria are met:

- The take will be incidental;
- The applicants will, to the maximum extent practicable, minimize and mitigate the impact of such taking;
- The applicants will develop a proposed HCP and ensure that adequate funding for the plan will be provided;
- The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- The applicants will carry out any other measures that the Service may require as being necessary or appropriate for the purposes of the HCP.

Thus, the purpose of issuing an ITP is to allow the applicants, under their respective regional authority, to authorize development while conserving the covered species and their habitat. Implementation of a multispecies HCP, rather than a species-by-species or project-by-project approach, will maximize the benefits of conservation measures for covered species and eliminate expensive and time-consuming efforts associated with processing individual ITPs for each project within the applicants' proposed plan area. The Service expects that the permit applicants will request ITP coverage for a period of 30 years.

Plan Area

The plan area proposed is 2,259,627 acres, or 3,530 square miles. This plan area was developed to ensure that the natural resources that might be affected by covered activities can be adequately assessed at a regional scale and that sufficient mitigation opportunities are available.

The northern boundary of the study area is defined by the Kern County border with Tulare and Kings Counties. The boundary encompasses land acquisition opportunities near existing protected areas on the southern San Joaquin Valley floor (*e.g.,* Buttonwillow Ecological Reserve, Semitropic Ridge Natural Area, Kern National Wildlife Refuge (NWR), Allensworth Ecological Reserve, and Pixley NWR). The western boundary of the study area runs along the shared border of Kern County and San Luis Obispo County. The southwestern boundary of the study area extends to the boundary with San Luis Obispo, Santa Barbara and Ventura Counties. The southern and southeastern boundary then follows the northern boundary of the Tehachapi Uplands Multi-Species HCP, which covers most of Tejon Ranch. The eastern boundary follows the ecological boundary between annual grassland of the San Joaquin Valley and oak woodlands.

Covered Activities

Covered activities include projects or ongoing activities that will receive incidental take authorization by the ESA and NCCP permits. Covered activities in the BHCP fall into eight general categories:

1. Urban development;
2. Transportation and circulation infrastructure;
3. Flood control;
4. Sewer and water treatment facilities;
5. Landfills;
6. Airports;
7. Conservation strategy implementation; and
8. Operations and maintenance activities in urban areas

Covered Species

Covered species are those species addressed in the proposed BHCP for which conservation actions will be implemented and for which the permit applicants will seek incidental take authorizations for a period of up to 30 years. Proposed covered species are expected to include threatened and endangered species listed under the Act, species listed under the CESA, and currently unlisted species that have the potential to become listed during the life of the BHCP and have some likelihood to occur within the BHCP plan area. The plan proposes coverage for 14 listed and non-listed species, which include 8 animal species and 6 plant species. These covered species are expected to be named on the ESA (Section 10) and NCCP Act (Section 2035) permits. The BHCP will provide long-term conservation and management of these species. The 14 covered species were identified on the

basis of an initial assessment of the effect of covered activities and conservation measures on 183 species that are listed or that could become listed during the permit term in the study area. The list of proposed covered species may change as the planning process progresses; species may be added or removed as more is learned about the nature of covered activities and their impact within the plan area.

The following federally listed endangered wildlife species are proposed to be covered by the BHCP: Blunt-nosed leopard lizard (*Gambelia silus*), least Bell's vireo (*Vireo bellii pusillus*), Buena Vista Lake shrew (*Sorex ornatus relictus*), Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*), and San Joaquin kit fox (*Vulpes macrotis mutica*).

The following unlisted wildlife species are proposed to be covered by the BHCP: Swainson's hawk (*Buteo swainsoni*), western burrowing owl (*Athene cunicularia hypugaea*), and San Joaquin antelope squirrel (*Ammospermophilus nelsoni*).

Take as defined under the Act does not apply to listed plant species, and therefore cannot be authorized under a section 10 permit. However, the permit applicants propose to include plant species on the permit in recognition of the conservation benefits provided for them under an HCP. For the purposes of the plan, certain plant species are further included to meet regulatory obligations under section 7 of the Act and CESA. All species included on an ITP would receive assurances under the Service's ''No Surprises'' regulations found in 50 CFR 17.22(b)(5) and 17.32(b)(5). The federally listed endangered San Joaquin woollythreads (*Monolopia congdonii*) and Bakersfield cactus (*Opuntia treleasei*) are proposed for inclusion in the BHCP in recognition of the conservation benefits provided for them under the BHCP. The following unlisted plant species are proposed for inclusion in the BHCP in recognition of the conservation benefits provided for them under the BHCP and the assurances permit holders would receive if they are included on a permit: Alkali mariposa-lily (*Calochortus striatus*), rose-flowered larkspur (*Delphinium purpusii*), recurved larkspur (*Delphinium recurvatum*), and Shevock's golden-aster (*Heterotheca shevockii*).

Environmental Impact Statement

Before deciding whether to issue the requested Federal ITP, the Service will prepare a draft EIS in order to analyze the environmental impacts associated with issuance of the ITP. In the EIS component of the EIS/EIR, the Service will consider the following alternatives: (1) The proposed action, which includes the issuance of take authorizations consistent with the proposed BHCP under section 10(a)(1)(B) of the Act; (2) no action (no permit issuance); and (3) a reasonable range of additional alternatives. The EIS/EIR will include a detailed analysis of the impacts of the proposed action and alternatives. The range of alternatives could include variations in impacts, conservation, permit duration, Covered Species, Covered Activities, Permit Area, or a combination of these elements.

The EIS/EIR will identify and analyze potentially significant direct, indirect, and cumulative impacts of our authorization of incidental take (permit issuance) and the implementation of the proposed BHCP on biological resources, land uses, utilities, air quality, water resources, cultural resources, socioeconomics and environmental justice, recreation, aesthetics, climate change and greenhouse gases, and other environmental issues that could occur with implementation of each alternative. The Service will also identify measures to avoid or minimize any significant effects of the proposed action on the quality of the human environment.

Following completion of the environmental review, the Service will publish a notice of availability and a request for comment on the draft EIS/EIR and the applicants' permit application, which will include the proposed the BHCP.

Request for Public Comments

We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party on this notice. We will consider these comments in developing a draft EIS/EIR and in the development of an HCP and ITP. We particularly seek comments on the following:

1. Biological information concerning species in the proposed plan area;
2. Relevant data concerning these species;
3. Additional information concerning the range, distribution, population size, and population trends of the species;
4. Current or planned activities in the subject area and their possible impacts on the species;
5. The presence of archaeological sites, buildings and structures, historic events, sacred and traditional areas, and other historic preservation concerns, which are required to be considered in project planning by the National Historic Preservation Act; and
6. Identification of any other environmental issues that should be considered with regard to the proposed development and permit action.

You may submit your comments and materials by one of the methods listed in the **ADDRESSES** section.

Public Availability of Comments

Comments and materials we receive become part of the public record associated with this action; they will be available for public inspection by appointment during normal business hours (Monday through Friday, 8 a.m. to 4:30 p.m.) at the Service's Sacramento address (see **ADDRESSES**). 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 request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Scoping Meetings

See **DATES** for the date and time of the scheduled public meeting. The purpose of the scoping meeting is to provide the public with a general understanding of the background of the proposed HCP and activities it would cover, alternative proposals under consideration for the draft EIS, and the Service's role and steps to be taken to develop the draft EIS for the proposed HCP/NCCP.

The primary purpose of these meetings and public comment period is to solicit suggestions and information on the scope of issues and alternatives for the Service to consider when drafting the EIS. Written comments will be accepted at the meeting. Comments can also be submitted by methods listed in the **ADDRESSES** section. Once the draft EIS and proposed HCP/NCCP are complete and made available for review, there will be additional opportunity for public comment on the content of these documents through additional public comment periods.

Meeting Location Accommodations

Persons needing reasonable accommodations in order to attend and participate in the public meetings

should contact Thomas Leeman at (916) 414–6600 as soon as possible. In order to allow sufficient time to process requests, please call at least one week before the public meeting. Information regarding this proposed action is available in alternative formats upon request.

Authority

We publish this notice under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1501.7, 1506.6, and 1508.22), as well as in compliance with section 10(c) of the Act (16 U.S.C. 1531 *et seq.*).

Dated: December 29, 2016.

Alexandra Pitts,

Deputy Regional Director, U.S. Fish and Wildlife Service, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2017–00002 Filed 1–5–17; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[17X.LLAKF02000.L16100000.DR0000. LXSS094L0000]

Notice of Availability of Records of Decision and Approved Resource Management Plans for the Four Subunits of the Eastern Interior Resource Management Plan and Final Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Records of Decision (RODs) for the Approved Resource Management Plans (RMPs) for the Fortymile, Draanjik, Steese, and White Mountains planning areas located in Eastern Interior Alaska. The Alaska State Director signed the RODs on December 30, 2016, which constitutes the final decision of the BLM and makes the Approved RMPs effective immediately.

ADDRESSES: Copies of the RODs/Approved RMPs are available upon request from the Field Manager, Eastern Interior Field Office, Bureau of Land Management, 222 University Avenue, Fairbanks, Alaska 99709 or via the internet at *https://www.blm.gov/programs/planning-and-nepa/plans-in-development/alaska/eastern-interior-rmp.* Copies of the RODs/Approved RMPs are available for public inspection at the Fairbanks District Office, 222 University Avenue, Fairbanks, Alaska.

FOR FURTHER INFORMATION CONTACT: Jeanie Cole; telephone: 907–474–2340; address: 222 University Avenue, Fairbanks, Alaska 99709; email: *j05cole@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Eastern Interior planning process resulted in four RODs and Approved RMPs covering approximately 6.5 million acres of BLM-administered lands in interior Alaska: 1.8 million acres under the Fortymile Approved RMP (including the Fortymile Wild and Scenic River); 1.3 million acres under the Steese Approved RMP (including the Steese National Conservation Area and Birch Creek Wild and Scenic River); 2.4 million acres under the Draanjik Approved RMP; and 1 million acres under the White Mountains Approved RMP (including the White Mountains National Recreation Area and Beaver Creek Wild and Scenic River). The Approved RMPs describe the actions and landscape-level conservation and management needed to meet desired resource conditions and objectives for upland and riparian vegetation, fish and wildlife habitats, cultural resources, water and wetland resources, wilderness characteristics, recreation, and mineral development. The Approved RMPs designate three Areas of Critical Environmental Concern (ACECs): the Salmon Fork ACEC in the Draanjik Approved RMP, and the Fortymile ACEC and the Mosquito Flats ACEC in the Fortymile Approved RMP. Additionally, four Research Natural Areas (RNAs) are carried forward as valid existing administrative designations in the Steese and White Mountains Approved RMPs: Big Windy Hot Springs (Steese), Mount Prindle (Steese and White Mountains), Limestone Jags (White Mountains), and Serpentine Slide (White Mountains) RNAs.

The Eastern Interior Field Office used the wild and scenic river inventory conducted for the Eastern Interior planning process to identify outstandingly remarkable values for Birch Creek, Beaver Creek, and Fortymile wild and scenic rivers because these values were not identified in the designating legislation. Section 2.1.3 of each Approved RMP identifies outstandingly Remarkable Values. Values for Birch Creek are scenic, recreation, and fisheries; values for Beaver Creek are scenic, recreation, geologic, fisheries, and wildlife; values for the Fortymile River vary by segment and include scenic, recreation, geologic, historic, and wildlife.

The Eastern Interior RMP/EIS was subject to extensive public review. The Environmental Protection Agency (EPA) published a Notice of Availability for the Eastern Interior Draft RMP/Draft EIS in the **Federal Register** on March 2, 2012 (77 FR 12835), beginning a 150-day public comment period that was later extended pending publication of a supplemental EIS. The EPA published the Notice of Availability of the supplemental EIS, Hardrock Mineral Leasing in the White Mountains National Recreation Area for the Eastern Interior Draft RMP (Supplement), in the **Federal Register** on January 11, 2013 (78 FR 2397), beginning a 90-day public comment period on the Supplement. The comment period for both the Eastern Interior Draft RMP/Draft EIS and the Hardrock Mineral Leasing Supplement closed on April 11, 2013. The BLM published a Notice of Availability of Additional Information on Proposed Areas of Critical Environmental Concern (ACECs) (80 FR 52) in the **Federal Register** on January 2, 2015, beginning a 60-day comment period on two proposed ACECs. That comment period closed on March 3, 2015.

The preferred alternative in the Draft RMP/EIS was Alternative C. The Proposed RMP/Final EIS added Alternative E as the Proposed RMP. This Alternative E was a revised version of Alternative C, based on public comment and tribal consultation. Alternative E represented the mix and variety of actions that the BLM believed best resolved the issues and management concerns in consideration of all values and programs. Alternative E was a minor variation of the alternatives analyzed in the Draft RMP/EIS and was within the spectrum of alternatives analyzed in the Draft. The Proposed RMP/Final EIS considered five rivers to be eligible for potential designation as Wild and Scenic Rivers, but the RODs do not determine them to be suitable for designation as Wild and Scenic Rivers, instead protecting them through other means.

The EPA published a Notice of Availability for the Eastern Interior Proposed RMP/Final EIS in the **Federal Register** on July 29, 2016. The BLM provided a 30-day protest period for the Proposed RMP/Final EIS in accordance with 43 CFR part 1610.5–2. The BLM Director received nine protest letters.

Concurrent with the protest period, the BLM made the Proposed RMP/Final EIS available to the Governor of Alaska for a 60-day consistency review as required by 43 CFR 1610.3–2(e). The Alaska Department of Natural Resources responded on behalf of the Governor with four issues. The BLM Alaska State Director determined that one of these points was within the scope of the Governor's Consistency Review Process. The BLM Alaska State Director did not find the Proposed RMP inconsistent with state or local plans, policies, or programs.

On November 8, 2016, the Governor appealed the BLM Alaska State Director's decision to not accept his recommendations to the BLM Director. In the Governor's appeal letter, the State of Alaska requested the BLM Director to reconsider the issues and recommendations raised in the Governor's Consistency Review letter. The BLM Director issued a final response to the Governor affirming the State Director's decision.

As a result of protests and internal reviews, the BLM made minor modifications, corrections, and clarifications in preparing the Approved RMPs. These modifications provide further clarification of some of the decisions and future monitoring efforts. Clarifications correct typographical errors in the Proposed RMP and clarify language of some decisions.

The following decisions are appealable under 43 CFR, part 4:

Draanjik ROD: Draanjik Travel Management Plan and limitations on placement of bait and wildlife lures (Appendix E and sections 2.2.20, and 2.2.21 of the RMP); White Mountains ROD: Designate trails and areas for UTV use, change weight limitations from gross vehicle weight rating to curb weight, allow for use of hovercraft and airboats, and limitations on placement of bait and wildlife lures (sections 2.2.16, 2.2.20, and 2.2.21 of the RMP);

Steese ROD: change weight limitations from gross vehicle weight rating to curb weight, allow for use of hovercraft and airboats, and limitations on placement of bait and wildlife lures (sections 2.2.16, 2.2.20, and 2.2.21 of the RMP);

Fortymile ROD: Establish width and weight limits on use of OHVs outside of the Fortymile WSR corridor; change weight limitations from gross vehicle weight rating to curb weight; allow for use of motorboats, hovercraft, and airboats within the Fortymile WSR; and limitations on placement of bait and wildlife lures (sections 2.2.15, 2.2.19, and 2.2.20 of the RMP). Any party adversely affected by these proposed decisions may appeal within 30 days of publication of this Notice of Availability pursuant to 43 CFR, part 4, subpart E.

The appeal should state the specific items on which the decision is being appealed. The appeal must be filed with the Eastern Interior Field Manager at the above listed address. Please consult the appropriate regulations (43 CFR, part 4, subpart E) for further appeal requirements.

Authority: 40 CFR 1506.6.

Bud Cribley,

State Director .

[FR Doc. 2016–31976 Filed 1–5–17; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCA948000.L16100000.PP0000.15XL1109AF.LXSILITI0000]

Notice of Availability of the Draft Central Coast Resource Management Plan Amendment and Draft Environmental Impact Statement for Oil and Gas Leasing and Development, California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) has prepared a Draft Resource Management Plan (RMP) Amendment and Draft Environmental Impact Statement (EIS) for Oil and Gas Leasing and Development for the Central Coast Field Office and by this notice is announcing the opening of the comment period.

DATES: To ensure that comments will be considered, the BLM must receive written comments on the Draft RMP Amendment/Draft EIS within 90 days following the date the Environmental Protection Agency publishes its notice of the Draft RMP Amendment/Draft EIS in the **Federal Register**. The BLM will announce future meetings or hearings and any other public participation activities at least 15 days in advance through public notices, media releases, and/or mailings.

ADDRESSES: You may submit comments related to the Draft Central Coast RMP Amendment and Draft EIS for Oil and Gas Leasing by any of the following methods:

- *Email: BLM_CA_OGEIS@blm.gov*
- *Fax:* 916–978–4388
- *Mail:* BLM, California State Office; Attn: CCFO O&G Leasing DEIS; 2800 Cottage Way, Rm. W–1623; Sacramento, CA 95825

Copies of the Central Coast Draft RMP Amendment and Draft EIS for Oil and Gas Leasing are available in the Central Coast Field Office, formerly the Hollister Field Office, at 940 2nd Avenue, Marina, CA 93933; the California State Office at 2800 Cottage Way, Rm. W–1623, Sacramento, CA 95825; and at the BLM's Web site *www.blm.gov/ca/eis-og.*

FOR FURTHER INFORMATION CONTACT: Melinda Moffitt, Project Manager, telephone: 916–978–4376; address: 2800 Cottage Way, Room W–1618, Sacramento, CA 95825; email: *mmoffitt@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Draft RMP Amendment and Draft EIS describe and analyze alternatives for the planning and management of oil and gas leasing and development on public lands and Federal mineral estate administered by the BLM, Central Coast Field Office (CCFO). The former Hollister Field Office (HFO) moved to a new location in Marina, California and is now called the Central Coast Field Office. The Planning Area is located in central California and comprises approximately 6.8 million acres of land. Within the Planning Area, the BLM administers approximately 284,000 acres of surface estate and 793,000 acres of Federal mineral estate. Planning decisions in the RMP will apply only to the BLM-administered public lands and Federal mineral estate in the Planning Area.

Through this RMP Amendment, the BLM is revising the existing HFO Resource Management Plan for the Southern Diablo Mountain Range and Central Coast of California (2007) to analyze the effects of alternative oil and gas management approaches on lands with Federal mineral estate. New circumstances and information regarding oil and gas exploration and development, including unconventional reservoirs and well stimulation techniques, have prompted the BLM to prepare this Draft RMP Amendment and Draft EIS.

In 2014, the BLM conducted scoping to solicit input from the public and

interested agencies on the nature and extent of issues and impacts to be addressed. Fifteen planning issues were identified through the scoping process: (1) Water resources; (2) Health and safety; (3) Vegetation and wildlife; (4) Air quality; (5) Climate change; (6) Geology and seismicity; (7) Soil resources; (8) Socioeconomics; (9) Traffic; (10) Tribal and cultural resources; (11) Environmental justice; (12) Land use; (13) Livestock grazing; (14) Recreation; and (15) Visual resources. These identified scoping issues will be used by the BLM to assist in the development of alternative management strategies for oil and gas management in the RMP Amendment.

To assist the agency decision maker and the public in focusing on appropriate solutions to planning issues, the Draft RMP Amendment and Draft EIS considers five alternative RMPs.

Alternative A. Alternative A would continue current management under the existing 2007 HFO RMP. All Federal mineral estate would be available for oil and gas leasing, except for designated wilderness, wilderness study areas, Fort Ord National Monument, and the Clear Creek Serpentine Area of Critical Environmental Concern (ACEC), which are closed under the 2007 HFO RMP. No Surface Occupancy (NSO) stipulations would be applied in ACECs and Recreation and Public Purpose (R&PP) leases. The Endangered Species stipulation from the 2007 HFO RMP would apply in all areas open to leasing.

Alternative B. Under Alternative B, Federal mineral estate within the boundaries of oil and gas fields plus a 0.5-mile buffer currently identified by the California Division of Oil, Gas, and Geothermal Resources (DOGGR) would be available for leasing. Other areas would be closed to oil and gas leasing, including all National Conservation Lands. Controlled Surface Use (CSU) stipulations would apply to all lands open to leasing.

Alternative C (Preferred Alternative). Under Alternative C, unless currently closed under the 2007 HFO RMP, Federal mineral estate would be open to leasing within high oil and gas potential areas or within the boundaries of oil and gas fields plus a 0.5-mile buffer currently identified by DOGGR, with the exception of core population areas of the kangaroo rat in the vicinity of Panoche, Griswold-Tumey and Ciervo Hills which are closed to leasing. CSU stipulations would apply to all lands open to leasing. NSO stipulations would apply to some lands open to leasing, including: (1) Threatened and endangered species critical habitat; (2) BLM-developed recreation and administrative sites; and (3) Special status split estate lands (*e.g.,* State parks, county parks, conservation easements, land trusts, and scenic designations).

Alternative D. Under Alternative D, unless currently closed under the 2007 HFO RMP, Federal mineral estate underlying BLM surface estate would be available for leasing. All Federal mineral estate underlying split estate lands and the Ciervo Panoche Natural Area (both BLM surface and split-estate lands) would be closed to leasing. CSU stipulations would apply to all lands open to leasing. NSO stipulations would be applied in ACECs and R&PP leases.

Alternative E. Under Alternative E, unless currently closed under the 2007 HFO RMP, Federal mineral estate outside of a California Department of Water Resources Bulletin 118, Groundwater Basin or Sub-basin, would be available for leasing. CSU stipulations would apply to all lands open to leasing. NSO stipulations would apply to some lands open to leasing, including: (1) 12-digit Hydrologic Unit Codes (HUCs) intersecting EPA impaired, perennial surface waters (BLM surface and split estate); (2) 12-digit HUCs intersecting non-impaired, perennial surface waters that intersect split estate; (3) 12-digit HUC subwatersheds with the highest aquatic intactness score; (4) 0.25 miles from non-impaired, perennial surface waters; and (5) 0.25 miles from eligible Wild and Scenic Rivers.

Under each action alternative, CSU stipulations would apply to all lands open to leasing. The CSU stipulations would mitigate impacts to sensitive resources such as protected, sensitive, and priority species, critical and priority habitat, cultural resources, and water resources by requiring special operational constraints on surface use to protect these resources.

ACECs. There are three ACECs managed by the CCFO. The Clear Creek Serpentine ACEC is approximately 31,000 acres, the Panoche/Coalinga ACEC is approximately 56,000 acres, and the Joaquin Rocks ACEC is approximately 8,000 acres. No boundaries of these ACECs are being modified by this Draft RMP Amendment. The Clear Creek Serpentine ACEC was closed to leasing under the 2007 HFO RMP and would remain closed under all alternatives. Under Alternative A, NSO stipulations would apply to the Panoche/Coalinga and Joaquin Rocks ACECs. Under Alternative B, only those portions of the ACECs within existing oil and gas fields—approximately 300 acres of the Joaquin Rocks ACEC and 11,000 acres of the Panoche/Coalinga ACEC—would be open to leasing with CSU stipulations. The majority of both of these ACECs would be closed under Alternative B. Under Alternative C, the Joaquin Rocks ACEC and almost half of the Panoche/Coalinga ACEC would be open to leasing with CSU stipulations; the other half of the Panoche/Coalinga ACEC would be closed to leasing. Under Alternative D, approximately 30,000 acres in the Panoche/Coalinga ACEC would be closed to leasing; NSO stipulations would apply to the remainder of the Panoche/Coalinga ACEC and to the Joaquin Rocks ACEC. Under Alternative E, the Joaquin Rocks ACEC and about half of the Panoche/Coalinga ACEC would be open to leasing with CSU stipulations. Of the remainder of the Panoche/Coalinga ACEC, roughly 14,000 acres would be closed to leasing and NSO stipulations would apply to nearly 4,000 acres.

Non-NSO leases. The Draft RMP Amendment and Draft EIS impact analysis will also address 14 leases within the CCFO that do not contain NSO stipulations (non-NSO leases), per a July 2014 Federal court settlement agreement to resolve the disputes set forth in *Center for Biological Diversity* v. *Bureau of Land Management,* Case No. 11–06174 and Case No. 13–1749. While the BLM will select a Preferred Alternative as part of its plan-level decision for determining which BLM-managed lands or subsurface Federal minerals are open or closed to oil and gas leasing, the determination for the 14 leases will be an implementation-level decision. For each of the 14 leases, the implementation decision will determine whether the leases should be issued, and, if so, whether the current stipulations are sufficient or if additional stipulations are needed.

Alternative C has been identified as the Preferred Alternative as described in 40 CFR 1502.14(e). Identification of this alternative, however, does not represent final agency direction, and the Proposed RMP may reflect changes or adjustments based on information received during public comment, new information, or changes in BLM policies or priorities. The Proposed RMP may include objectives and actions described in the other analyzed alternatives. For this reason, the BLM invites and encourages comments on all alternatives, objectives, and actions described in the Draft RMP Amendment and Draft EIS.

Please note that public comments and information submitted, including names, street addresses, and email addresses of persons who submit comments, will be available for public

review and disclosure at the above address during regular business hours (8 a.m. to 4 p.m.), Monday through Friday, except holidays.

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: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2.

James V. Scrivner,

Deputy State Director, Energy and Minerals.

[FR Doc. 2016–31975 Filed 1–5–17; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR930000.L63500000.DQ0000. LXSS081H0000.16XL1116AF; HAG 16–0122]

Notice of Availability of the Northwestern and Coastal Oregon Record of Decision/Resource Management Plan and the Southwestern Oregon Record of Decision/Resource Management Plan for Western Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) has signed the Northwestern and Coastal Oregon Record of Decision (ROD)/Resource Management Plan (RMP) and Southwestern Oregon ROD/RMP, and by this notice is announcing their availability. The Deputy Director of Operations for the Bureau of Land Management signed the RODs.

DATES: The BLM signed the Northwestern and Coastal Oregon ROD/RMP and Southwestern Oregon ROD/RMP on August 5, 2016. These RODs/RMPs were effective immediately upon signing.

ADDRESSES: Copies or notification of the electronic availability of the Northwestern and Coastal Oregon ROD/RMP and the Southwestern Oregon ROD/RMP have been sent to affected Federal, State, tribal, and local government agencies and to other stakeholders including interested parties that previously requested a copy. Copies of the RODs/RMPs are available for public inspection at the Coos Bay, Eugene, Medford, Roseburg, and Salem District Offices and the Lakeview District's Klamath Falls Field Office. Interested persons may also access the RODs/RMPs on the Internet at: *http://www.blm.gov/or/plans/rmpswesternoregon/.*

FOR FURTHER INFORMATION CONTACT: Mr. Mark Brown, Western Oregon RMPs Project Manager, telephone (503) 808–6233; address 1220 SW 3rd Avenue, (P.O. Box 2965, zip code 97208), Portland, OR, 97204; or email *blm_or_rmps_westernoregon@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact the above individual during normal business hours. The Service is available 24 hours a day, seven days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Northwestern and Coastal Oregon ROD/RMP and Southwestern Oregon ROD/RMP were developed through a collaborative planning process to design management for western Oregon BLM lands that would: produce a sustained yield of timber products, contribute to the conservation and recovery of threatened and endangered species, provide for clean water, restore fire-adapted ecosystems, provide for recreation opportunities, and coordinate management of lands surrounding the Coquille Forest with the Coquille Tribe.

The RMPs include land use allocations that reserve lands for the protection of resource values (Congressionally Reserved, District-Designated Reserve, Late-Successional Reserve, Riparian Reserve) and include land use allocations that prioritize timber harvest and multiple use management (Harvest Land Base, Eastside Management Area). The Northwestern and Coastal Oregon ROD/RMP revises the following BLM RMPs completed in 1995: Coos Bay, Eugene, Roseburg, and Salem. The Southwestern Oregon ROD/RMP revises the following BLM RMPs completed in 1995: Klamath Falls, Medford, and Roseburg. These six RMPs incorporated the land use allocations and standards and guidelines from the Northwest Forest Plan.

The decision areas for the Northwestern and Coastal Oregon ROD/RMP and Southwestern Oregon ROD/RMP encompass approximately 2.5 million acres of BLM-administered lands and 69,000 acres of split-estate lands in western Oregon.

A Notice of Availability (NOA) for the Proposed RMP/Final Environmental Impact Statement (EIS) for the RMPs for Western Oregon was published in the **Federal Register** on April 15, 2016, which initiated a 30-day protest period (81 FR 22263). The BLM initiated the 60-day Governor's Consistency Review period on March 31, 2016. The BLM received 46 timely and valid protest submissions on the Proposed RMP/Final EIS. All protests have been resolved and/or dismissed. For a full description of the issues raised during the protest period and how they were addressed, please refer to the Director's Protest Resolution Report for the Proposed RMP/Final EIS, which is available at the following Web site: *http://www.blm.gov/wo/st/en/prog/planning/planning_overview/protest_resolution/protestreports.html.*

The BLM Oregon Acting State Director received a Governor's Consistency Review letter from the State of Oregon Governor on June 14, 2016. This letter included requests for minor clarifications, which the BLM accepted. The Acting State Director issued a response to the Governor on June 23, 2016.

The Proposed RMP was selected in the RODs as the Approved RMP, with some minor modifications and clarifications based on protests received on the Proposed RMP/Final EIS, review from the Oregon State Governor's Office, and Endangered Species Act (ESA) consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service. No substantive changes to the Proposed RMP resulted from protests, the Governor's review, or ESA consultation.

Copies of the Northwestern and Coastal Oregon ROD/RMP are available upon request and are available for public inspection at:

- BLM Coos Bay District Office; 1300 Airport Lane, North Bend, OR 97459
- BLM Eugene Office; 3106 Pierce Parkway, Springfield, OR 97477
- BLM Roseburg District Office; 777 NW Garden Valley Boulevard, Roseburg, OR 97471
- BLM Salem Office; 1717 Fabry Road SE., Salem, OR 97306
- BLM Salem District—Tillamook Field Office; 4610 Third Street, Tillamook, OR 97141

- BLM Oregon/Washington State Office; 1220 SW 3rd Avenue, Portland, OR 97204
- *http://www.blm.gov/or/plans/rmpswesternoregon/.*

Copies of the Southwestern Oregon ROD/RMP are available upon request and are available for public inspection at:

- BLM Lakeview District—Klamath Falls Field Office; 2795 Anderson Avenue, Building #25, Klamath Falls, OR 97603
- BLM Medford District Office; 3040 Biddle Road, Medford, OR 97504
- BLM Medford District—Grants Pass Field Office; 2164 NE Spalding Avenue, Grants Pass, OR 97526
- BLM Roseburg District Office; 777 NW Garden Valley Boulevard, Roseburg, OR 97471
- BLM Oregon/Washington State Office; 1220 SW 3rd Avenue, Portland, OR 97204
- *http://www.blm.gov/or/plans/rmpswesternoregon/*

Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2

Jenna Whitlock,

Acting BLM Deputy Director.

[FR Doc. 2017–00064 Filed 1–5–17; 8:45 am]

BILLING CODE 4310–35–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR04310000, XXXR0680G1, RA202240000019200]

Notice of Availability and Notice of Public Meetings for the Draft Environmental Impact Statement for the Pojoaque Basin Regional Water System, Santa Fe County, New Mexico

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Reclamation has made available for public review and comment the Draft Environmental Impact Statement (DEIS) for the Pojoaque Basin Regional Water System. The DEIS analyzes the potential environmental impacts of five alternatives in planning, designing, and constructing the regional water system and alternatives for the connected actions in the Pojoaque Basin in north-central New Mexico, as authorized by the Aamodt Litigation Settlement Act (Title VI of the Claims Resolution Act of 2010; Pub. L. 111–291, Title VI; 124 Stat. 3065).

DATES: Written comments on the DEIS should be submitted on or before Monday, February 27, 2017. Four public meetings to provide information and receive oral or written comments will be held on:

1. Wednesday, February 15, 2017, 6:00 p.m. to 8:00 p.m., Santa Fe, New Mexico.
2. Thursday, February 16, 2017, 6:00 p.m. to 8:00 p.m., Tesuque, New Mexico.
3. Tuesday, February 21, 2017, 6:00 p.m. to 8:00 p.m., Nambé, New Mexico.
4. Wednesday, February 22, 2017, 6:00 p.m. to 8:00 p.m., Santa Fe, New Mexico.

ADDRESSES: Send written comments or requests for copies of the DEIS to Mr. Larry Moore, Environmental Protection Specialist, Bureau of Reclamation, Albuquerque Area Office, 555 Broadway NE., Suite 100, Albuquerque, New Mexico 87102; or via email to *pojoaquebasineis@usbr.gov.*

Public meetings will be held at the following locations:

1. Santa Fe—Pojoaque Valley High School, 1574 NM–502, Santa Fe, New Mexico 87506.
2. Tesuque—Tesuque Valley Elementary School, 1555 Bishops Lodge Road, Tesuque, New Mexico 87574.
3. Nambé—Nambe Community Center, 180A State Road 503, Nambé, New Mexico 87506.
4. Santa Fe—Santa Fe Community College, 6401 Richards Avenue, Santa Fe, New Mexico 87508.

Electronic copies of the DEIS may be viewed at the Bureau of Reclamation's Web site at *http://www.usbr.gov/uc/envdocs/eis.html,* or the Pojoaque Basin Regional Water System project Web site at *www.pojoaquebasineis.com.* Please see the **SUPPLEMENTARY INFORMATION** section for specific locations where the DEIS is available for public review and inspection.

FOR FURTHER INFORMATION CONTACT: Mr. Larry Moore, Environmental Protection Specialist, Bureau of Reclamation, *lemoore@usbr.gov,* (505) 462–3702.

SUPPLEMENTARY INFORMATION: The Bureau of Reclamation (Reclamation) prepared this DEIS in cooperation with the U.S. Bureau of Indian Affairs, U.S. Indian Health Service, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, Pueblo de San Ildefonso, Pueblo of Nambé, Pueblo of Pojoaque, Pueblo of Tesuque, New Mexico Department of Transportation, Santa Fe County, and the City of Santa Fe.

Background

The Pojoaque Basin Regional Water System (RWS) is described in and authorized by the Aamodt Litigation Settlement Act (Settlement Act). The Settlement Act authorizes and ratifies the Aamodt Litigation Settlement Agreement (Settlement Agreement), dated January 19, 2006, as conformed to the Settlement Act and amendments. The settlement parties are the United States; the State of New Mexico; Santa Fe County; City of Santa Fe; Pueblo de San Ildefonso, Pueblo of Nambé, Pueblo of Pojoaque, Pueblo of Tesuque (Settlement Pueblos); and other individuals. The Settlement Agreement resolves the water rights claims of the Settlement Pueblos.

Among other provisions, the RWS and 2,220 acre-feet per year of new water supply to the basin are included in the Settlement Agreement in exchange for the Pueblos agreeing to reduce their claims to water within the basin and to limit their priority calls against existing non-Pueblo water users. The Settlement Agreement also addresses funding for other water-related projects on the Settlement Pueblos.

Proposed Federal Action

The proposed federal action is to plan, design, and construct a regional water system in accordance with the Settlement Agreement, consisting of water diversion from the Rio Grande and water treatment facilities on the Pueblo de San Ildefonso, along with storage tanks, transmission and distribution pipelines, and well fields that are necessary to supply up to 4,000 acre-feet of water annually to customers in the Pojoaque Basin.

Purpose and Need for the Proposed Federal Action

The purpose of Reclamation's proposed action is to reliably provide a firm, safe supply of treated drinking water for distribution in the Pojoaque Basin, in compliance with the Settlement Act. The need for Reclamation's action is to reduce reliance on groundwater in the Pojoaque Basin and to allow the Settlement Pueblos to receive a portion of the water provided under the Settlement Act. Reclamation's action would also enable the Settlement Pueblos to use funding made available in the Settlement Act for certain water-related infrastructure improvements, if requested. This funding can be requested prior to substantial completion of the RWS and used for water-related improvements that would be more cost effective when implemented in conjunction with RWS construction if approved by the Secretary (Settlement Act, Section 615[d][7][A][ii]).

The DEIS Analyzes Five Alternatives

The DEIS assesses the potential environmental effects of five alternatives. These include the No Action Alternative (Alternative A), and four action alternatives (Alternatives B, C, D, and E) that vary in six main components or project elements:

1. Firm, reliable water supply.
2. Primary source water collection.
3. Water treatment.
4. Short-term storage.
5. Water transmission and distribution system, including pipelines, pumping plants, forebay tanks, and other associated facilities.
6. Electrical power service

Alternative A: The No Action Alternative

The No Action Alternative is the ''no build'' alternative. Under this alternative, the RWS would not be constructed, the Settlement Agreement would be nullified, and Aamodt litigation over water rights claims would likely resume. A firm, reliable water supply would not be provided to residents of the Pojoaque Basin. Under the No Action Alternative, the benefits of the proposed RWS would not be realized. Use of domestic wells would continue to reduce groundwater and surface water supplies in the Pojoaque Basin. The Pueblos would continue to rely on their existing separate water systems, rather than integrating their systems into one regional system.

Alternative B

Alternative B incorporates the RWS facilities and components described in a 2008 Engineering Report prepared by HKM Engineering, Inc., as updated through surveys and public input. The HKM Engineering Report served as the preliminary RWS concept for the Settlement Act. Under this alternative, the RWS would consist of these components:

1. The firm, reliable water supply would be provided by diverting surface flows from the Rio Grande, supplemented by operational planning and scheduling of San Juan-Chama Project water supplies, as well as one of the following three backup aquifer storage and recovery water supply options:

- Three deep injection and recovery wells for injecting raw or treated surface water into an aquifer and recovering it for use in the RWS; or
- Three shallow injection and recovery wells for injecting raw or treated surface water into an aquifer and recovering it for use in the RWS; or
- Three shallow passive infiltration reaches and recovery wells for infiltrating raw surface water into an aquifer and recovering it for use in the RWS.

2. A side-channel surface diversion structure and pumping plant with a sediment removal and return system on the east bank of the Rio Grande on Pueblo de San Ildefonso lands, just north of the Otowi Bridge.
3. A water treatment plant and pumping plant on the Pueblo de San Ildefonso on the south side of State Highway 502, approximately 0.75 mile east of the Otowi Bridge.
4. Eleven new short-term storage tanks in addition to 13 existing storage tanks.
5. A water transmission and distribution system including approximately 194 miles of pipelines, seven pumping plants, and pressure-reducing and flow-control valves.
6. Approximately 14.7 miles of new electrical distribution lines.

Alternative C

Under this alternative, the RWS would consist of the following major components:

1. The firm, reliable water supply would be provided by collecting flows from the hyporheic zone of the Rio Grande, supplemented by operational planning and scheduling of San Juan-Chama Project water supplies.
2. A parallel river interceptor drain in the alluvium, below the water table in the bosque and on the east side of the Rio Grande north of the Otowi Bridge.
3. A water treatment plant on the eastern portion of the Pueblo de San Ildefonso, on the east side of County Road 101D, near the El Rancho power substation.
4. Eleven new short-term storage tanks in addition to 13 existing storage tanks.
5. A water transmission and distribution system including approximately 188.9 miles of pipelines, one surge tank, six pumping plants, and pressure-reducing and flow-control valves.
6. Approximately 7 miles of new electrical distribution lines supplemented by distributed solar generation.

Alternative D

Under Alternative D, the RWS would consist of the following major components:

1. The firm, reliable water supply would be provided by collecting flows from the scheduling of San Juan-Chama Project water supplies.
2. An infiltration gallery (an estimated 180 horizontal drains to collect groundwater) on the east bank to the Rio Grande.
3. A water treatment plant on the eastern portion of the Pueblo de San Ildefonso, on the east side of County Road 101D, near the El Rancho power substation.
4. Sixteen new short-term storage tanks in addition to 13 existing tanks.
5. A water transmission and distribution system, including approximately 188.1 miles of pipelines, one surge tank, six pumping plants, and pressure-reducing and flow-control valves.
6. Approximately 6.4 miles of new electrical distribution lines, supplemented by distributed solar generation.

Alternative E: Preferred Alternative

Under this alternative, the RWS would consist of the following major components:

1. The firm, reliable water supply would be provided by collecting flows from the hyporheic zone of the Rio Grande and supplementing it with operational planning and scheduling of San Juan-Chama Project water supplies, as well as a combination of new and existing conjunctive use wells to allow water to be withdrawn when sufficient supply may not be available from the subsurface water source.
2. Four horizontal radial well collectors on the east bank of the Rio Grande, on the Pueblo de San Ildefonso, north of the Otowi Bridge.
3. A water treatment plant located on the west side of County Road 101D, north of State Highway 502.
4. Nine new short-term storage tanks, in addition to 15 existing storage tanks.
5. A water transmission and distribution system, including approximately 165.5 miles of pipelines, 6 pumping plants, and pressure-reducing and flow-control valves.
6. Approximately 6.5 miles of new overhead and buried electrical distribution lines, supplemented by distributed solar generation.

Connected Actions

The DEIS also includes analyses of three connected actions: (1) The Rio Pojoaque irrigation improvement project, (2) the Pueblo de San Ildefonso future project which consists of a wastewater system and water distribution infrastructure, and (3) the Rio Tesuque channel modification project. Each of the connected actions have been analyzed in the DEIS to the extent that the details of the projects have been developed.

Public Review and Where To Find Copies of the DEIS

The DEIS may be viewed at the Reclamation's Web site at

http://www.usbr.gov/uc/envdocs/eis.html or the RWS project Web site at *www.pojoaquebasineis.com.* Copies of the DEIS are available for public review and inspection at the following locations:

1. Bureau of Reclamation, Albuquerque Area Office, 555 Broadway NE., Suite 100, Albuquerque, New Mexico 87102.
2. Natural Resources Library, U.S. Department of the Interior, 1849 C Street NW., Main Interior Building, Washington, DC 20240–0001.
3. Santa Fe County Pojoaque Satellite Office, 5 West Gutierrez, Suite 9, Pojoaque, New Mexico 87506 (in the Pojoaque Pueblo Plaza).

Special Assistance for Public Meetings

If special assistance is required at the public meetings, please contact Ms. Mary Carlson at (505) 462–3576, or via email at *mcarlson@usbr.gov.* Please contact Ms. Carlson at least 10 working days prior to the meetings. A telephone device for the hearing impaired is available at (800) 877–8339.

Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you 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.

Dated: December 21, 2016.

Thomas M. Iseman,

Principal Deputy Assistant Secretary-Water and Science.

[FR Doc. 2016–31736 Filed 1–5–17; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Basketball Backboard Components and Products Containing the Same, DN 3191.* The Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under § 210.8(b) of the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to (19 CFR 210.8(b)) of the Commission's Rules of Practice and Procedure filed on behalf of Lifetime Products, Inc. on December 30, 2016. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain basketball backboard components and products containing the same. The complaint names as respondents Russel Brands, LLC d/b/a Spalding of Bowling Green, KY and Reliable Sports Equipment (Wujiang) Co., Ltd. of China. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3191'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation 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,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: January 3, 2017.

Katherine M. Hiner,

Acting Supervisory Attorney.

[FR Doc. 2017–00043 Filed 1–5–17; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–1033]

Certain Arrowheads With Arcuate Blades and Components Thereof Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 2, 2016, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Flying Arrow Archery, LLC of Belgrade, Montana. Supplements to the Complaint were filed on December 19, 20, and 22, 2016. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain arrowheads with arcuate blades and components thereof by reason of infringement of U.S. Patent No. 8,920,269 (''the '269 patent''); U.S. Patent No. D713,919 (''the D'919 patent''); and U.S. Patent No. D729,336 (''the D'336 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a general exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained 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 at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2016).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 30, 2016, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain arrowheads with arcuate blades and components thereof by reason of infringement of one or more of claims 5 and 25 of the '269 patent; the claim of the D'919 patent; and the claim of the D'336 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

Flying Arrow Archery, LLC, 129 Village Drive, Suite #102, Belgrade, MT 59714

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Dongguan hong Song hardware, alma iao, Dongcheng Xia Qiao road no. 5, DongGuanShi GUANGDONG 523000, China

liu, mengbao, longhuaminzhi BAOAN, Shenzhen Guangdong 518131, China

Jianfeng Mao, jingxibeilu5# YiXingShi, WuXiShi JIANGSU 214200, China

Sandum Precision Industry (China) Co., Ltd. (In-Sail), Jinxing Building 13C, Heping Industrial Park, Changyong Road, Longhua District, Shenzhen City, Guangdong Province, China 518109

Arthur Sifuentes, 30611 Ginger Trace Drive, Spring, TX 77386

Wanyuxue, Building #6 A1402, Chang Cheng E, R Hua Yuan, Baihua Futian, Shenzhen Guangdong, China 518028

Wei Ran, (SGJ–ZL) First Floor, YunXiao Road, 135, GuangZhouShi, Guangdong, BaiYunQu, GuangZhouShi, Guangdong 510403, China

YanDong, qin lao jie jiao tong yin hang jia shu yuan, 6hao lou 3 dan yuan 602, ZhengZhou, er qi, Henan, China 450000

Zhou Yang, (Jiu Jiu Youpin Cultural & Creative Park #) l, 3rd Floor Longhua, District Cytech Cytech Village, Road Bao'ban, Shenzhen Guangdong, China 518109

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Suite 401, Washington, DC 20436.

(3) For the investigation so instituted, the Chief Administrative Law Judge,

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[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *http://edis.usitc.gov*

U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: January 3, 2017.

Katherine M. Hiner,

Acting Supervisory Attorney.

[FR Doc. 2017–00047 Filed 1–5–17; 8:45 am]

BILLING CODE 7020–02–P

NATIONAL SCIENCE FOUNDATION

Notice of Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permits issued under the Antarctic Conservation of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nature McGinn, ACA Permit Officer, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Or by email: *ACApermits@nsf.gov.*

SUPPLEMENTARY INFORMATION: On November 18 and 15, 2016, the National Science Foundation published notices in the **Federal Register** of permit applications received. The permits were issued on December 28, 2016 to:

1. John Durban, Permit No. 2017–030
2. John Durban, Permit No. 2017–029

Nadene G. Kennedy,

Polar Coordination Specialist, Office of Polar Programs.

[FR Doc. 2017–00022 Filed 1–5–17; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permits issued under the Antarctic Conservation of 1978, Public Law 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nature McGinn, ACA Permit Officer, Division of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Or by email: *ACApermits@nsf.gov.*

SUPPLEMENTARY INFORMATION: On November 23, 2016 the National Science Foundation published a notice in the **Federal Register** of a permit application received. The permit was issued on December 23, 2016 to: Lisa Tauxe, Permit No. 2017–036.

Nadene G. Kennedy,

Polar Coordination Specialist, Division of Polar Programs.

[FR Doc. 2017–00021 Filed 1–5–17; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Modification Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit modification request.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of requests to modify permits issued to conduct activities regulated under the Antarctic Conservation Act of 1978. This is the required notice of a requested permit modification.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by February 6, 2017. Permit applications may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Nature McGinn, ACA Permit Officer, at the above address or *ACApermits@nsf.gov.*

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

Description of Permit Modification Requested: The Foundation issued a permit (ACA 2016–024) to Ari Friedlaender on February 8, 2016. The issued permit allows the permit holder to conduct waste management activities associated with the tagging and biopsy sampling of baleen whales in the Antarctic Peninsula region. The permit covers any accidental releases that may occur if the biopsy darts and/or tags are lost during the conduct of the research.

Now the permit holder proposes a modification to his permit to include waste management activities associated with the operation of unmanned aircraft systems (UAS) used to collect photographs of individual whales for health assessment purposes. The permit holder is requesting this modification in the unlikely event that the UAS is lost during the conduct of science missions. The UAS will be operated by experienced pilots according to protocols designed to ensure safe operations and to minimize the risk of loss of the UAS. The UAS are powered by lithium polymer batteries and do not require any fuels.

Location: Antarctic Peninsula region.

Dates: February 15, 2017–April 30, 2020.

Nadene G. Kennedy,

Polar Coordination Specialist, Office of Polar Programs.

[FR Doc. 2017–00023 Filed 1–5–17; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–461; NRC–2016–0245]

Exelon Generation Company LLC; Clinton Power Station, Unit 1

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; withdrawal by applicant.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has granted the request of Exelon Generation Company, LLC (Exelon, the licensee), to withdraw its application dated August 11, 2016, for a proposed amendment to Facility Operating License No. NPF–62. The proposed amendment request would have eliminated the on-shift positions not needed for storage of the spent fuel in the spent fuel pool during the initial decommissioning period and the emergency response organization positions not needed to respond to credible events. Additionally the licensee proposed to revise the emergency action levels (EALs) to reflect those conditions applicable when the unit is in a permanently defueled condition.

ADDRESSES: Please refer to Docket ID NRC–2016–0245 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0245. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select "*ADAMS Public Documents*" and then select "*Begin Web-based ADAMS Search.*" For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Eva A. Brown, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2315, email: *Eva.Brown@nrc.gov*

SUPPLEMENTARY INFORMATION: The NRC has granted the request of Exelon to withdraw its application dated August 11, 2016 (ADAMS Accession No. ML16224A895), for a proposed amendment to Facility Operating License No. NPF–62 for the Clinton Power Station, Unit 1, located in DeWitt County, Illinois. The proposed amendment request would eliminated the on-shift positions not needed for storage of the spent fuel in the spent fuel pool during the initial decommissioning period and the emergency response organization positions not needed to respond to credible events. Additionally the licensee is proposing to revise the EALs to reflect those conditions applicable when the unit is in a permanently defueled condition. The Commission has previously issued a proposed finding that the amendment involves no significant hazards consideration published in the **Federal Register** on December 6, 2016 (81 FR 87970). However, by letter dated December 14, 2016 (ADAMS Accession No. ML16349A314), the licensee requested to withdraw the proposed amendment.

Dated at Rockville, Maryland, this 27th day of December 2016.

For the Nuclear Regulatory Commission.

John G. Lamb,

Senior Project Manager, Special Projects and Process Branch, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2017–00046 Filed 1–5–17; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2017–0001]

Sunshine Act Meeting Notice

DATES: Week of January 2, 2017.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public.

Week of January 2, 2017—Tentative

Wednesday, January 4, 2017

3:15 p.m. Affirmation Session (Public Meeting) (Tentative)

Florida Power & Light Co. (Turkey Point Nuclear Generating Units 6 and 7), Postponement of Mandatory Hearing (Tentative).

* * * * *

The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Glenn Ellmers at 301–415–0442 or via email at *Glenn.Ellmers@nrc.gov.*

* * * * *

ADDITIONAL INFORMATION:

By a vote of 3–0 on January 4, 2017, the Commission determined pursuant to U.S.C. 552b(e) and '9.107(a) of the Commission's rules that the above referenced Affirmation Session be held with less than one week notice to the public. The meeting is scheduled on January 4, 2017.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0739, by videophone at 240–428–3217, or by email at *Kimberly.Meyer-Chambers@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301–415–1969), or email *Brenda.Akstulewicz@nrc.gov* or *Patricia.Jimenez@nrc.gov.*

Dated: January 4, 2017.

Glenn Ellmers,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2017–00164 Filed 1–4–17; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–461; NRC–2016–0207]

Exelon Generation Company LLC; Clinton Power Station, Unit 1

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; withdrawal by applicant.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has granted the request of Exelon Generation Company, LLC (Exelon, the licensee), to withdraw its application dated July 28, 2016, for a proposed amendment to Facility Operating License No. NPF–62. The proposed amendment request would have changed the organization, staffing, and training requirements contained in Section 5.0 of the Technical Specifications after the license no longer authorizes operation of the reactor or placement or retention of fuel in the reactor pressure vessel.

ADDRESSES: Please refer to Docket ID NRC–2016–0207 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0207. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Eva A. Brown, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–2315, email: *Eva.Brown@nrc.gov*

SUPPLEMENTARY INFORMATION: The NRC has granted the request of Exelon to withdraw its application dated July 28, 2016, as supplemented by letter dated November 4, 2016 (ADAMS Accession Nos. ML16210A300 and ML16309A013, respectively), for a proposed amendment to Facility Operating License No. NPF–62 for the Clinton Power Station, Unit 1, located in DeWitt County, Illinois. The proposed amendment request would have changed the organization, staffing, and training requirements contained in Section 5.0 of the Technical Specifications after the licensee submits both certifications in accordance with Title 10 of the Code of Federal Regulations, Sections 50.82(a)(1)(i) and 50.82(a)(1)(ii).

The Commission has previously issued a proposed finding that the amendment involves no significant hazards consideration published in the **Federal Register** on October 11, 2016 (81 FR 70179). However, by letter dated December 14, 2016 (ADAMS Accession No. ML16349A314), the licensee requested to withdraw the proposed amendment.

Dated at Rockville, Maryland, this 27th day of December 2016.

For the Nuclear Regulatory Commission.

John G. Lamb,

Senior Project Manager, Special Projects and Process Branch, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2017–00045 Filed 1–5–17; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. ACR2016; Order No. 3718]

Postal Service Performance Report and Performance Plan

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: On December 29, 2016, the Postal Service filed the FY 2016 Performance Report and FY 2017 Performance Plan with its FY 2016 Annual Compliance Report. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* February 8, 2017. *Reply Comments are due:* February 22, 2017.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Background
III. Request for Comments
IV. Ordering Paragraphs

I. Introduction

Each fiscal year, the Postal Service must discuss its performance goals in its annual performance plan and annual performance report. 39 U.S.C. 2803 and 2804. The Postal Service must submit its most recent annual performance plan and annual performance report to the Commission. *Id.* 3652(g). On December 29, 2016, the Postal Service filed its FY 2016 Annual Report to Congress in Docket No. ACR2016.[1] The FY 2016 Annual Report includes the FY 2016 Annual Performance Report and the FY 2017 Annual Performance Plan. FY 2016 Annual Report at 11–29.

Each year, the Commission must evaluate whether the Postal Service met the performance goals established in the annual performance plan and annual performance report. 39 U.S.C. 3653(d). The Commission may also ''provide recommendations to the Postal Service related to the protection or promotion of public policy objectives set out in'' title 39. *Id.*

II. Background

In past years, the Commission evaluated whether the Postal Service met its performance goals in the Annual Compliance Determination (ACD). The Commission later determined that its evaluation of the Postal Service's performance under 39 U.S.C. 3653(d) is distinguishable from its determination of compliance or non-compliance in the ACD under 39 U.S.C. 3653(b). In Docket Nos. ACR2013, ACR2014, and ACR2015, the Commission issued separate reports evaluating whether the Postal Service met its performance goals.[2] By issuing separate reports, the

[1] United States Postal Service FY2016 Annual Report to Congress, Library Reference USPS–FY16–17, December 29, 2016 (FY 2016 Annual Report).

[2] Docket No. ACR2013, Postal Regulatory Commission, Review of Postal Service FY 2013

Continued

Commission provided more in-depth analysis of the Postal Service's progress toward meetings its performance goals and plans to improve performance in future years.

As it did in recent years, the Commission will evaluate whether the Postal Service met its FY 2016 performance goals in a report separate from the FY 2016 ACD. To facilitate this review, the Commission invites public comment on the following issues:

- Did the Postal Service meet its performance goals in FY 2016?
- Do the FY 2016 Annual Performance Report and the FY 2017 Annual Performance Plan meet applicable statutory requirements, including 39 U.S.C. 2803 and 2804?
- What recommendations should the Commission provide to the Postal Service that relate to protecting or promoting public policy objectives in title 39?
- What recommendations or observations should the Commission make concerning the Postal Service's strategic initiatives? [3]
- What other matters are relevant to the Commission's analysis of the FY 2016 Annual Performance Report and the FY 2017 Annual Performance Plan under 39 U.S.C. 3653(d)?

III. Request for Comments

Comments by interested persons are due no later than February 8, 2017. Reply comments are due no later than February 22, 2017. Pursuant to 39 U.S.C. 505, Katalin K. Clendenin is appointed to serve as Public Representative to represent the interests of the general public in this docket with respect to issues related to the Commission's analysis of the FY 2016 Annual Performance Report and the FY 2017 Annual Performance Plan.

IV. Ordering Paragraphs

It is ordered:

1. The Commission invites public comment on the Postal Service's FY 2016 Annual Performance Report and FY 2017 Annual Performance Plan.

2. Pursuant to 39 U.S.C. 505, the Commission appoints Katalin K. Clendenin to serve as Public Representative to represent the interests of the general public in this proceeding with respect to issues related to the Commission's analysis of the FY 2016 Annual Performance Report and the FY 2017 Annual Performance Plan.

3. Comments are due no later than February 8, 2017.

4. Reply comments are due no later than February 22, 2017.

5. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Stacy L. Ruble,

Secretary.

[FR Doc. 2017–00024 Filed 1–5–17; 8:45 am]

BILLING CODE 7710–FW–P

Performance Report and FY 2014 Performance Plan, July 7, 2014; Docket No. ACR2014, Postal Regulatory Commission, Analysis of the Postal Service's FY 2014 Program Performance Report and FY 2015 Performance Plan, July 7, 2015; Docket No. ACR2015, Postal Regulatory Commission, Analysis of the Postal Service's FY 2015 Annual Performance Report and FY 2016 Performance Plan, May 4, 2016.

[3] *See* FY 2016 Annual Report at 69–71.

POSTAL REGULATORY COMMISSION

[Docket No. ACR2016; Order No. 3717]

FY 2016 Annual Compliance Report

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Postal Service has filed an Annual Compliance Report on the costs, revenues, rates, and quality of service associated with its products in fiscal year 2016. Within 90 days, the Commission must evaluate that information and issue its determination as to whether rates were in compliance with title 39, chapter 36, and whether service standards in effect were met. To assist in this, the Commission seeks public comments on the Postal Service's Annual Compliance Report.

DATES: *Comments are due:* February 2, 2017.

Reply Comments are due: February 13, 2017.

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:

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I. Introduction
II. Overview of the Postal Service's FY 2016 ACR
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I. Introduction

On December 29, 2016, the United States Postal Service (Postal Service) filed with the Commission, pursuant to 39 U.S.C. 3652, its Annual Compliance Report (ACR) for fiscal year (FY) 2016.[1] Section 3652 requires submission of data and information on the costs, revenues, rates, and quality of service associated with postal products within 90 days of the closing of each fiscal year. In conformance with other statutory provisions and Commission rules, the ACR includes the Postal Service's FY 2016 Comprehensive Statement, its FY 2016 annual report to the Secretary of the Treasury on the Competitive Products Fund, and certain related Competitive Products Fund material. *See respectively,* 39 U.S.C. 3652(g), 39 U.S.C. 2011(i), and 39 CFR 3060.20–23. In line with past practice, some of the material in the FY 2016 ACR appears in non-public annexes.

The filing begins a review process that results in an Annual Compliance Determination (ACD) issued by the Commission to determine whether Postal Service products offered during FY 2016 were in compliance with applicable title 39 requirements.

II. Overview of the Postal Service's FY 2016 ACR

Contents of the filing. The Postal Service's FY 2016 ACR consists of a 94-page narrative; extensive additional material appended as separate folders and identified in Attachment One; and an application for non-public treatment of certain materials, along with supporting rationale, filed as Attachment Two. The filing also includes the Comprehensive Statement,[2] Report to the Secretary of the Treasury, and information on the Competitive Products Fund filed in response to Commission rules. This material has been filed electronically with the Commission, and some also has been filed in hard copy form.

Scope of the filing. The material appended to the narrative consists of: (1) Domestic product costing material filed on an annual basis summarized in the Cost and Revenue Analysis (CRA); (2) comparable international costing material summarized in the International Cost and Revenue Analysis (ICRA); (3) worksharing-related cost studies; and (4) billing determinant

[1] United States Postal Service FY 2016 Annual Compliance Report, December 29, 2016 (FY 2016 ACR). Public portions of the Postal Service's filing are available on the Commission's Web site at *http://www.prc.gov*.

[2] In years prior to 2013, the Commission reviewed the Postal Service's reports prepared pursuant to 39 U.S.C. 2803 and 39 U.S.C. 2804 (filed as the Comprehensive Statement by the Postal Service) in its ACD. However, as it did last year, the Commission intends to issue a separate notice soliciting comments on the comprehensive statement and provide its related analysis in a separate report from the ACD.

information for both domestic and international mail. FY 2016 ACR at 2. Inclusion of these four data sets is consistent with the Postal Service's past ACR practices. As with past ACRs, the Postal Service has split certain materials into public and non-public versions. *Id.* at 2–3.

''*Roadmap*'' *document.* A roadmap to the FY 2016 ACR can be found in Library Reference USPS–FY16–9. This document provides brief descriptions of the materials submitted, as well as the flow of inputs and outputs among them; a discussion of differences in methodology relative to Commission methodologies in last year's ACD; and a list of special studies and a discussion of obsolescence, as required by Commission rule 3050.12. *Id.* at 3.

Methodology. The Postal Service states that it has adhered to the methodologies historically used by the Commission subject to changes identified and discussed in Library Reference USPS–FY16–9 and in prefaces accompanying the appended folders. *Id.* at 4. The Postal Service notes that one noteworthy methodological change regarding product costs was discussed by the Commission in Order No. 3506.[3] Going forward, the Postal Service's calculation of attributable costs will be changing to include a product's inframarginal costs developed as part of the estimation of a product's incremental costs. FY 2016 ACR at 4. However, the Postal Service states that several complications associated with the change have precluded it from including the new inframarginal cost component into the CRA this year. *Id.* at 5–7. However, it has included additional information, including estimates on product specific incremental costs, to Library Reference USPS–FY16–NP10. It has also created a new library reference, USPS–FY16–43, to present the incremental costs for market dominant products. *Id.* at 7–8.

Market dominant product-by-product costs, revenues, and volumes. Comprehensive cost, revenue, and volume data for all market dominant products of general applicability are shown directly in the FY 2016 CRA or ICRA. *Id.* at 11.

The FY 2016 ACR includes a discussion by class of each market dominant product, including costs, revenues, and volumes, workshare discounts, and passthroughs responsive to 39 U.S.C. 3652(b), and FY 2016 incentive programs. *Id.* at 12–66.[4]

In response to the Commission's FY 2010 ACD directives, the Postal Service states that it is providing information regarding: (a) All operational changes designed to reduce flats costs and the estimated financial effects of such changes (*id.* at 27–34); (b) all costing methodology improvements made in FY 2016[5] and the estimated financial effects of such changes (*id.* at 27–31); and (c) a statement summarizing the historical and current year subsidy of the flats product (*id.* at 36–38). In addition, the Postal Service states that in the next general market dominant price change, it plans to increase the price of Standard Mail Flats by at least CPI times 1.05. *Id.* at 37. In the FY 2015 ACD, the Commission directed the Postal Service to submit a report addressing several topics related to Periodicals pricing.[6] The Postal Service states that it provided a response to that directive on July 26, 2016. FY 2016 ACR at 53. Additionally, the Postal Service provides an updated version of the Periodicals pricing report in Library Reference USPS–FY16–44. *Id.*

Flats directive. The Postal Service notes that the Commission directed the Postal Service to submit a detailed report addressing the measurement of cost and service performance issues for flat-shaped products in the FY 2015 ACD.[7] The Postal Service states that its initial report addressing flats issues was filed on July 26, 2016, and additional responses were provided by the Postal Service in response to a Commission Information Request. FY 2016 ACR at 54.

Market dominant negotiated service agreements. The FY 2016 ACR presents information on the PHI Acquisitions, Inc. negotiated service agreement, the only market dominant negotiated service agreement in effect in FY 2016. *Id.* at 64–66.

Service performance. The Postal Service notes that the Commission issued rules on periodic reporting of service performance measurement and customer satisfaction in FY 2010. Responsive information appears in Library Reference USPS–FY16–29. *Id.* at 67.

Customer satisfaction. The FY 2016 ACR discusses the Postal Service's approach for measuring customer experience and satisfaction; describes the methodology; presents a table with survey results; compares the results from FY 2015 to FY 2016; and provides information regarding customer access to postal services. *Id.* at 70–81.

Competitive products. The FY 2016 ACR provides costs, revenues, and volumes for competitive products of general applicability in the FY 2016 CRA or ICRA. For competitive products not of general applicability, data are provided in non-public Library References USPS–FY16–NP2 and USPS–FY16–NP27. *Id.* at 82. The FY 2016 ACR also addresses the competitive product pricing standards of 39 U.S.C. 3633. *Id.* at 82–90.

Market tests; nonpostal services. The Postal Service discusses the four competitive market tests conducted during FY 2016, and nonpostal services. *Id.* at 91–92.

III. Procedural Steps

Statutory requirements. Section 3653 of title 39 requires the Commission to provide interested persons with an opportunity to comment on the ACR and to appoint an officer of the Commission (Public Representative) to represent the interests of the general public. The Commission hereby solicits public comment on the Postal Service's FY 2016 ACR and on whether any rates or fees in effect during FY 2016 (for products individually or collectively) were not in compliance with applicable provisions of chapter 36 of title 39 (or regulations promulgated thereunder). Commenters addressing market dominant products are referred in particular to the applicable requirements (39 U.S.C. 3622(d) and (e) and 39 U.S.C. 3626); objectives (39 U.S.C. 3622(b)); and factors (39 U.S.C. 3622(c)). Commenters addressing competitive products are referred to 39 U.S.C. 3633.

The Commission also invites public comment on the cost coverage matters the Postal Service addresses in its filing; service performance results; levels of customer satisfaction achieved; and such other matters that may be relevant to the Commission's review.

Access to filing. The Commission has posted the publicly available portions of the FY 2016 ACR on its Web site at *http://www.prc.gov.*

[3] *Id.; see* Docket No. RM2016–2, Order Concerning United Parcel Service, Inc.'s Proposed Changes to Postal Service Costing Methodologies (UPS Proposals One, Two, and Three), September 9, 2016 (Order No. 3506).

[4] The Postal Service states that it ''would be inefficient and unduly disruptive . . . to immediately adjust prices to correct passthroughs that exceed 100 percent.'' *Id.* at 11. It further states its intent to address such passthroughs in its next general price adjustment. *Id.*

[5] The Postal Service notes that, in FY 2016, no rulemaking dockets resulted in costing methodology changes affecting Standard Mail Flats costs. *Id.* at 34. However, the Postal Service discusses several related developments required to foster a better understanding of the observed trend in reported costs for Standard Mail Flats. *Id.* at 34–36.

[6] *See* Docket No. ACR2015, Annual Compliance Determination, March 28, 2016, at 23–24 (FY 2015 ACD).

[7] *Id.; see* Docket No. ACR2015, FY 2015 ACD at 180–181.

Comment deadlines. Comments by interested persons are due on or before February 2, 2017. Reply comments are due on or before February 13, 2017. The Commission, upon completion of its review of the FY 2016 ACR, comments, and other data and information submitted in this proceeding, will issue its ACD.

Public Representative. James Waclawski is designated to serve as the Public Representative to represent the interests of the general public in this proceeding. Neither the Public Representative nor any additional persons assigned to assist him shall participate in or advise as to any Commission decision in this proceeding other than in their designated capacity.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. ACR2016 to consider matters raised by the United States Postal Service's FY 2016 Annual Compliance Report.
2. Pursuant to 39 U.S.C. 505, the Commission appoints James Waclawski as an officer of the Commission (Public Representative) in this proceeding to represent the interests of the general public.
3. Comments on the United States Postal Service's FY 2016 Annual Compliance Report to the Commission are due on or before February 2, 2017.
4. Reply comments are due on or before February 13, 2017.
5. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–32053 Filed 1–5–17; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79714; File No. SR–NYSEArca–2016–136]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, Amending NYSE Arca Equities Rule 7.35 To Provide for Widened Auction Collars for the Core Open Auction on Volatile Trading Days

December 30, 2016.

I. Introduction

On September 28, 2016, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to widen Auction Collars for the Core Open Auction on volatile trading days. The proposed rule change was published for comment in the **Federal Register** on October 14, 2016.[3] On November 23, 2016, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[4] On December 12, 2016, the Exchange filed Amendment No. 1 to its proposed rule change.[5] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Equities Rule 7.35 to widen Auction Collars [6] for the Core Open Auction on volatile trading days. Currently, Rule 7.35(a)(10)(A) provides that the price collar threshold for the Core Open Auction is 10% for securities with an Auction Reference Price [7] of $25.00 or less, 5% for securities with an Auction Reference Price greater than $25.00 but less than or equal to $50.00, and 3% for securities with an Auction Reference Price greater than $50.00.

Under the proposal, if as of 9:00 a.m. Eastern Time, the E-mini S&P 500 Futures are +/− 2% from the prior day's closing price of the E-mini S&P 500 Futures, or if the Exchange determines that it is necessary or appropriate for the maintenance of a fair and orderly market, the Auction Collar for the Core Open Auction would be 10%, regardless of the Auction Reference Price. If the Exchange determines to widen Auction Collars under the ''fair and orderly'' provision, the Exchange would announce by Trader Update the widened collars before the Core Open Auction.[8]

III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[9] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,[10] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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 Commission notes that, according to the Exchange, the proposed Auction Collars would allow for additional price movement during periods of market-wide volatility, and at the same time continue to prevent auctions from occurring at prices significantly away from the Auction Reference Price.[11] The Exchange also states its belief that widening the Auction Collars could reduce the possibility of securities triggering multiple trading pauses under

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 79068 (October 7, 2016), 81 FR 71127 (''Notice'').

[4] *See* Securities Exchange Act Release No. 79388, 81 FR 86368 (November 30, 2016). The Commission designated January 12, 2017, as the date by which it shall approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

[5] In Amendment No. 1, the Exchange replaced all references in the filing to Rule 7.35P with Rule 7.35, as the Exchange recently amended its rules to eliminate the ''P'' modifier. *See* Securities Exchange Act Release No. 79078 (October 11, 2016), 81 FR 71559 (October 17, 2016) (SR–NYSEArca–2016–135). The Exchange also corrected a typographical error in the proposed text in Rule 7.35(a)(10)(A). Finally, the Exchange provided additional details regarding its authority under the proposal to widen Auction Collars when it determines that it is necessary or appropriate for the maintenance of a fair and orderly market, and represented that if it were to widen Auction Collars under this authority, it would announce by Trader Update such widened collars before the Core Open Auction. Because Amendment No. 1 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment (Amendment No. 1 is available at: *https://www.sec.gov/comments/sr-nysearca-2016-136/nysearca2016136-1.pdf*).

[6] *See* NYSE Arca Equities Rule 7.35(a)(10) (defining ''Auction Collar'' to mean the price collar thresholds for the Indicative Match Price for the Core Open Auction, Trading Halt Auction, or Closing Auction).

[7] *See* NYSE Arca Equities Rule 7.35(a)(8)(A) (defining ''Auction Reference Price'' for the Core Open Auction to mean the midpoint of the Auction NBBO or, if the Auction NBBO is locked, the locked price, and if there is no Auction NBBO, the prior trading day's Official Closing Price).

[8] *See* Amendment No. 1, *supra* note 5.

[9] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b)(5).

[11] *See* Notice, *supra* note 3, at 71127.

the Regulation NMS Plan to Address Extraordinary Market Volatility.[12]

Moreover, according to the Exchange, the proposal would permit it to widen Auction Collars under the ''fair and orderly'' provision when the E-Mini S&P 500 Futures are not +/-2% from the prior day's closing price as of 9:00 a.m. Eastern Time, but widening the Auction Collars would otherwise be warranted.[13] The Exchange also states that the ''fair and orderly'' provision would be invoked for unusual circumstances.[14] According to the Exchange, using 2016 as an example, if the proposed rule had been in place, the Exchange would have widened Auction Collars on only two days (*i.e.,* June 24, 2016, the day after the ''Brexit'' vote, and November 9, 2016, the day after the U.S. Presidential election).[15] Of these two days, the Exchange would have invoked the ''fair and orderly'' provision only for November 9 because, by 9:00 a.m., the futures markets had returned to within 2% of the prior day's closing price.[16] However, because of the overall volume of trading and uncertainty in the market that day, the Exchange believed it was appropriate to widen the Auction Collars.[17]

Based on the Exchange's representations, the Commission believes that the proposed rule change, as modified by Amendment No. 1, would help to promote orderly and efficient Core Open Auctions on volatile days and would provide transparency on such days regarding the Core Open Auction parameters. Based on the foregoing, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act[18] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[19] that the proposed rule change (SR–NYSEArca–2016–136), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–32037 Filed 1–5–17; 8:45 am]

BILLING CODE 8011–01–P

[12] *See id.* at 71128.

[13] *See* Amendment No. 1, *supra* note 5.

[14] *See id.*

[15] *See id.* The Exchange filed proposed rule changes to temporarily widen Auction Collars for the Core Open Auction on these two days. *See* Securities Exchange Act Release Nos. 78152 (June 24, 2016), 81 FR 42781 (June 30, 2016) (SR–NYSEArca–2016–90) and 79275 (November 9, 2016), 81 FR 80703 (November 16, 2016) (SR–NYSEArca–2016–146).

[16] *See* Amendment No. 1, *supra* note 5.

[17] *See id.*

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78s(b)(2).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79717; File No. SR–NYSEMKT–2016–123]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE MKT Equities Price List and the NYSE Amex Options Fee Schedule To Modify the Fees Related to Four Bundles of Co-Location Services in Connection With the Exchange's Co-Location Services

December 30, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 19, 2016, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE MKT Equities Price List (''Price List'') and the NYSE Amex Options Fee Schedule (''Fee Schedule'') to modify the fees related to four bundles of co-location services (''Partial Cabinet Solution bundles'') in connection with the Exchange's co-location services. The Exchange proposes to implement the fee changes effective January 1, 2017. The proposed change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Exchange's Price List and Fee Schedule to modify the fees related to Partial Cabinet Solution bundles in connection with the Exchange's co-location services.[4] Currently, the Exchange offers Users[5] that purchase a Partial Cabinet Solution bundle on or before December 31, 2016 a 50% reduction in the monthly recurring charges (''MRC'') for the first 12 months.[6] The Exchange now proposes to extend that 50% reduction until December 31, 2017. The Exchange proposes to implement the fee changes effective January 1, 2017.

The Exchange offers the four Partial Cabinet Solution bundles in order to attract smaller Users, including those with minimal power or cabinet space demands or those for which the costs attendant with having a dedicated

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in 2010. *See* Securities Exchange Act Release No. 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR–NYSEAmex–2010–80) (the ''Original Co-location Filing''). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users.

[5] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR–NYSEMKT–2015–67). As specified in the Price List and Fee Schedule, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates New York Stock Exchange LLC (''NYSE LLC'') and NYSE Arca, Inc. (''NYSE Arca'' and, together with NYSE LLC, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70176 (August 13, 2013), 78 FR 50471 (August 19, 2013) (SR–NYSEMKT–2013–67).

[6] *See* Securities Exchange Act Release No. 77071 (Feb. 5, 2016), 81 FR 7382 (Feb. 11, 2016) (SR–NYSEMKT–2015–89).

cabinet or greater network connection bandwidth are too burdensome.[7] Under the proposed change, such smaller Users will be able to avail themselves of the reduction until December 31, 2017. Specifically, the Exchange proposes to modify its Price List and Fee Schedule so that they read as follows:

Type of service	Description	Amount of charge
Partial Cabinet Solution bundles ..... Note: A User and its Affiliates are limited to one Partial Cabinet Solution bundle at a time. A User and its Affiliates must have an Aggregate Cabinet Footprint of 2 kW or less to qualify for a Partial Cabinet Solution bundle. See Note 2 under "General Notes".	Option A: 1 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $3,000 monthly for first 12 months of service, and $6,000 monthly thereafter. • For Users that order after December 31, 2017: $6,000 monthly.
	Option B: 2 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $3,500 monthly for first 12 months of service, and $7,000 monthly thereafter. • For Users that order after December 31, 2017: $7,000 monthly.
	Option C: 1 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $7,000 monthly for first 12 months of service, and $14,000 monthly thereafter. • For Users that order after December 31, 2017: $14,000 monthly.
	Option D: 2 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $7,500 monthly for first 12 months of service, and $15,000 monthly thereafter. • For Users that order after December 31, 2017: $15,000 monthly.

The Exchange is not proposing any other changes to the Partial Cabinet Solution bundles other than this proposed extension of the 50% reduction in the MRC. Users that purchase a Partial Cabinet Solution bundle would still be subject to a 90-day minimum commitment, after which period they are subject to a 60-day rolling time period.[8]

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (*e.g.,* a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;[9] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.[10]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Sections 6(b)(5) of the Act,[12] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule changes provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, because the Exchange proposes to offer the 50% reduction in the MRC to all Users equally. As is currently the case, the purchase of any colocation service (including Partial Cabinet Solution bundles) is completely voluntary. All Users that order a bundle on or before December 31, 2017 would have their MRC reduced by 50% for the first 12 months.

The Exchange believes that extending the 50% reduction in the MRC for Partial Cabinet Solution bundles is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because the Partial Cabinet Solution bundles would continue to offer four different Partial Cabinet Solution bundles with options with respect to cabinet footprint and network connections. Users that require

[7] *See id* at 7384.

[8] *See id.*

[9] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[10] *See* SR–NYSEMKT–2013–67, *supra* note 5, at 50471. The Exchange's affiliates have also submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2016–91 and SR–NYSEArca–2016–168.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

other sizes or combinations of cabinets, network connections and cross connects could still request them.

In addition, the Exchange believes that its proposal would remove impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because the proposed extension of the 50% reduction in MRC would continue to make it more cost effective for Users to utilize co-location by creating a convenient way to create a colocation environment, through four Partial Cabinet Solution bundles with options with respect to cabinet footprint and network connections. The Exchange expects that such Users would include those with minimal power or cabinet space demands and Users for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[13] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that it is reasonable that Users that order a Partial Cabinet Solution bundle on or before December 31, 2017 would have their MRC reduced by 50% for the first 12 months because it is reasonable to continue to offer such reduction as an incentive to Users to utilize the service. As noted above, the Exchange anticipates that Users of the Partial Cabinet Solution bundles would include those with minimum power or cabinet space demands and Users for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome. The Exchange believes that it is reasonable to continue to have a reduced minimum commitment period for the Partial Cabinet Solution bundle to further reduce the cost commitment for such Users as a continued incentive to Users to utilize the new service.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[14] 26 the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because, in addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.* the same products and services are available to all Users, and the extension of the 50% reduction for the MRC for the Partial Cabinet Solution bundles would apply to all Users).

The Exchange believes that extending the 50% reduction in the MRC will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because such access will continue to satisfy User demand for cost effective options for smaller Users that choose to utilize co-location. All Users that order a bundle on or before December 31, 2017 would have their MRC reduced by 50% for the first 12 months. Providing entities with the additional option of the Partial Cabinet Solution bundle will allow them to select the relationship and type of service that better corresponds to their needs and resources.

The proposed changes will also enhance competition by making it more cost effective for Users that purchase a Partial Cabinet Solution bundle to utilize co-location by creating a convenient way to create a colocation environment, through Partial Cabinet Solution bundles with options with respect to cabinet footprint and network connections at a reduced MRC for the first 12 months. Such Users may choose to pass on such cost savings to their customers.

The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange. In such an environment, the Exchange must continually review, and consider adjusting, its services and related fees and credits to remain competitive with other exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [15] of the Act and subparagraph (f)(2) of Rule 19b–4 [16] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [17] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[13] 15 U.S.C. 78f(b)(4).

[14] 15 U.S.C. 78f(b)(8).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(2).

[17] 15 U.S.C. 78s(b)(2)(B).

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File No. SR–NYSEMKT–2016–123 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 No. SR–NYSEMKT–2016–123. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSEMKT–2016–123, and should be submitted on or before January 27, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–32040 Filed 1–5–17; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–32407]

Notice of Applications For Deregistration Under Section 8(f) of the Investment Company Act of 1940

December 30, 2016.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of December 2016. A copy of each application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 24, 2017, and should be accompanied by proof of service on 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.

ADDRESS: The Commission: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

FOR FURTHER INFORMATION CONTACT: Hae-Sung Lee, Attorney-Adviser, at (202) 551–7345 or Chief Counsel's Office at (202) 551–6821; SEC, Division of Investment Management, Chief Counsel's Office, 100 F Street NE., Washington, DC 20549–8010.

Davlin Philanthropic Funds [File No. 811–22178]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On September 30, 2016, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $5,159 incurred in connection with the liquidation were paid by applicant's investment adviser.

Filing Date: The application was filed on October 18, 2016.

Applicant's Address: 44 River Road, Suite A, Wayland, Massachusetts 01778.

AllianceBernstein Income Fund, Inc. [File No. 811–05207]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has transferred its assets to AB Income Fund, a series of AB Bond Fund, Inc., and, on April 22, 2016, made a final distribution to its shareholders based on net asset value. Expenses of $723,279 incurred in connection with the reorganization were paid by applicant and applicant's investment adviser.

Filing Date: The application was filed on November 18, 2016.

Applicant's Address: 1345 Avenue of the Americas, New York, NY 10105.

Destra Investment Trust II [File No. 811–22523]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant has transferred its assets to Destra Investment Trust, and, on September 30, 2016, made a final distribution to its shareholders based on net asset value. Expenses of $32,000 incurred in connection with the reorganization were paid by applicant's investment adviser.

Filing Date: The application was filed on November 22, 2016.

Applicant's Address: One North Wacker Drive, 48th Floor, Chicago, IL 60606.

Realty Capital Income Funds Trust [File No. 811–22785]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant has transferred its assets to SCM Trust, and, on November 7, 2016, made a final distribution to its shareholders based on net asset value. Expenses of $82,000 incurred in connection with the reorganization were paid by applicant's investment adviser.

Filing Date: The application was filed on November 22, 2016.

Applicant's Address: 405 Park Avenue, 14th Floor, New York, NY 10022.

AIP Series Trust [File No. 811–22789]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On May 25, 2016, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $9,264 incurred in connection with the liquidation were paid by applicant.

Filing Dates: The application was filed on October 28, 2016, and amended on November 28, 2016.

Applicant's Address: c/o Morgan Stanley AIP GP LP, 522 Fifth Avenue, New York, New York 10036.

Montgomery Street Income Securities, Inc. [File No. 811–02340]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 29, 2015 applicant made a liquidating distribution to its transfer agent, based on net asset value. The applicant's transfer agent began making liquidating distributions to shareholders on January 4, 2016 and will continue to make liquidating distributions to shareholders pursuant to a Plan of Dissolution and Liquidation. If the applicant's transfer agent is unable to make a distribution due to inability to locate shareholders to whom distributions are payable, the transfer agent will manage the distributions in accordance with applicable abandoned property laws. Expenses of $347,689 incurred in connection with the liquidation were paid by applicant.

Filing Dates: The application was filed on November 1, 2016, and amended on November 28, 2016.

Applicant's Address: c/o Atlantic Fund Administration, LLC, Three Canal Plaza, Suite 600, Portland, Maine 04101.

Stralem Fund [File No. 811–01920]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to a corresponding series of Ultimus Managers Trust and, on October 14, 2016, made a final distribution to its shareholders based on net asset value. Expenses of $110,700 incurred in connection with the reorganization were paid by applicant's investment adviser.

Filing Dates: The application was filed on October 28, 2016, and amended on November 28, 2016.

Applicant's Address: 225 Pictoria Drive, Suite 450, Cincinnati, Ohio 45246.

First Trust Dividend & Income Fund [File No. 811–22080]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to First Trust High Income ETF, a series of First Trust Exchange-Traded Fund VI, and, on October 21, 2016, made a final distribution to its shareholders based on net asset value. Expenses of $375,115 incurred in connection with the reorganization were paid by applicant, applicant's investment adviser, and the acquiring fund.

Filing Dates: The application was filed on October 31, 2016, and amended on November 30, 2016.

Applicant's Address: 120 East Liberty Drive, Suite 400, Wheaton, Illinois 60187.

BPV Family of Funds [File No. 811–22588]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On August 29, 2016, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of approximately $118,949 incurred in connection with the liquidation were paid by applicant.

Filing Date: The application was filed on December 1, 2016.

Applicant's Address: c/o BPV Capital Management, LLC, 9202 Northshore Dr., Suite 300, Knoxville, Tennessee 37922.

Western Asset Emerging Markets Income Fund Inc. [File No. 811–07066]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Western Asset Emerging Markets Income Fund Inc. and, on October 31, 2008, made a final distribution to its shareholders based on net asset value. Expenses of $105,000 incurred in connection with the reorganization were paid by applicant, Legg Mason, Inc., and the acquiring fund.

Filing Dates: The application was filed on October 21, 2016, and amended on December 7, 2016.

Applicant's Address: 55 Water Street, New York, New York 10041.

Western Asset Emerging Markets Floating Rate Fund Inc. [File No. 811–08338]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Western Asset Emerging Markets Debt Fund Inc. and, on September 14, 2009, made a final distribution to its shareholders based on net asset value. Expenses of $105,000 incurred in connection with the reorganization were paid by applicant, Legg Mason, Inc., and the acquiring fund.

Filing Dates: The application was filed on October 21, 2016, and amended on December 7, 2016.

Applicant's Address: 55 Water Street, New York, New York 10041.

Western Asset High Income Fund Inc. [File No. 811–07162]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Western Asset High Income Opportunity Fund Inc. and, on June 24, 2013, made a final distribution to its shareholders based on net asset value. Expenses of $176,000 incurred in connection with the reorganization were paid by applicant and applicant's investment adviser.

Filing Dates: The application was filed on October 21, 2016, and amended on December 7, 2016.

Applicant's Address: 620 Eighth Avenue, 49th Floor, New York, New York 10018.

Western Asset Municipal Partners Fund II Inc. [File No. 811–07812]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Western Asset Municipal Partners Fund Inc. and, on June 23, 2007, made a final distribution to its shareholders based on net asset value. Expenses of $195,000 incurred in connection with the reorganization were paid by applicant and the acquiring fund.

Filing Dates: The application was filed on October 21, 2016, and amended on December 7, 2016.

Applicant's Address: 125 Broad Street, New York, New York 10004.

Westport Funds [File No. 811–08359]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant has transferred its assets to Hennessy Cornerstone Mid Cap 30 Fund, a series of Hennessy Funds Trust, and, on September 22, 2016, made a final distribution to its shareholders based on net asset value. Expenses of approximately $380,873 incurred in connection with the reorganization were paid by applicant's investment adviser and the acquiring fund's investment adviser.

Filing Dates: The application was filed on November 10, 2016, and amended on December 14, 2016.

Applicant's Address: 253 Riverside Avenue, Westport, Connecticut 06880.

City National Rochdale International Trade Fixed Income Fund [File No. 811–22552]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On November 18,

2016, applicant made a final liquidating distribution to its shareholders, based on net asset value. Expenses of $33,332 incurred in connection with the liquidation were paid by applicant.

Filing Dates: The application was filed on December 23, 2014, and amended on December 7, 2016 and December 22, 2016.

Applicant's Address: 400 Park Avenue, New York, New York 10022.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–32041 Filed 1–5–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79713; File No. SR–NYSEARCA–2016–166]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Equities Rule 7.35(d)(4)

December 30, 2016.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 16, 2016, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Equities Rule 7.35(d)(4) to provide that the Exchange would not report an Official Closing Price, as defined under NYSE Arca Equities Rule 1.1(gg)(1), if there were no consolidated last-sale eligible trades on a trading day. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Equities Rule 7.35(d)(4) to provide that the Exchange would not report an Official Closing Price, as defined under NYSE Arca Equities Rule 1.1(gg)(1), if there were no consolidated last-sale eligible trades on a trading day. This proposed rule change would not change how the Official Closing Price would be determined and disseminated if the Exchange is unable to conduct a closing transaction in one or more securities due to a systems or technical issue, as described in NYSE Arca Equities Rules 1.1(gg)(2)–(4).

The Exchange reports an Official Closing Price to the securities information processor (''SIP'') as an ''M'' sale condition.[4] As set forth in the SIP Specifications, a price reported to the SIP by an exchange under the ''M'' sale condition, which is called the ''Market Center Official Close,'' is not used for purposes of determining a consolidated last sale price or the high or low price of a security and does not include any volume information. Each exchange determines what price could be reported to the SIP as its ''Market Center Official Close.'' As provided for in Rule 7.35(d)(4), the Exchange publishes an Official Closing Price for all securities that trade on the NYSE Arca Marketplace. The term ''Official Closing Price'' is defined in Rule 1.1(gg).

The Exchange is proposing to amend NYSE Arca Equities Rule 7.35(d)(4) to provide that an Official Closing Price, as defined in NYSE Arca Equities Rule 1.1(gg)(1), would not be reported for a security if there were no consolidated last-sale eligible trades in such security on a trading day.[5] The Exchange does not believe that it should publish an Official Closing Price to the SIP as an ''M'' value if there has not been a consolidated last-sale eligible trade in a security on a trading day. For example, based on feedback from industry participants, the Exchange understands that certain market participants, such as index providers and mutual funds, follow a different method of determining a security's closing price when there have not been any last-sale eligible trades on a trading day. Under these circumstances, the Exchange understands that an Official Closing Price reported to the SIP as an ''M'' sale condition that differs from how an industry market participant may determine such value for its own purposes could lead to confusion if a market participant's systems read the ''M'' value published by the SIP that differs from their calculation.

Accordingly, this proposed rule change is intended to amend NYSE Arca Equities Rule 7.35(d)(4) to provide that the Exchange would not report an Official Closing Price, as defined in Rule 1.1(gg)(1), in a security as an ''M'' sale condition to the SIP if there were no consolidated last-sale eligible trades in such security on a trading day. And, as noted above, this proposed rule change would not alter how the Official Closing Price would be disseminated under NYSE Arca Equities Rules 1.1(gg)(2)–(4).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(5) of the Act,[7] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in

[4] For a description of all sale conditions that are reportable to the SIP, including the ''M'' and ''6'' sale conditions, see the Consolidated Tape System Participant Communications Interface Specification, dated September 15, 2016, at 87, available here: *https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/cts_input_spec.pdf,* and the UTP Plan Trade Data Feed Direct Subscriber Interface Specification, dated November 2015, at 7–3, available here: *http://www.utpplan.com/DOC/utdfspecification.pdf* (together, ''SIP Specifications''). A trade reported to the SIP as a Market Center Closing Trade with a ''6'' sale condition includes volume information, is included in the consolidated last sale, and is included in the high or low price of a security. The Exchange reports to the SIP closing auction trades of a round lot or more with a ''6'' sale condition.

[5] The Exchange also proposes to amend NYSE Arca Equities Rule 7.35(d)(4) to provide that the Exchange would ''report'' an Official Closing Price, rather than ''publish'' an ''Official Closing Price,'' because the SIP, and not the Exchange, publishes the Official Closing Price.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide transparency of when the Exchange's would not report a price to the SIP as an ''M'' sale condition. The Exchange believes that the proposed rule change is consistent with the Act because the ''M'' sale condition does not contribute to the consolidated last sale price for a security, the high or low price of a security, or reported volume for a security, and therefore is an informational value. The Exchange further believes that this proposed rule change is consistent with the protection of investors and the public interest because it would reduce confusion by eliminating publication to the SIP of a price that may conflict with how an index provider or mutual fund determines that value for a security if there are no consolidated last-sale eligible trades on a trading day. Finally, the Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would apply only when the Exchange is fully operational. If the Exchange is unable to conduct a closing transaction due to a systems or technical issue, current NYSE Arca Equities Rule 1.1(gg)(2)–(4) would govern, with no change.

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 proposed rule change is not designed to address any competitive issues, but rather to specify that the Exchange would not be required to report an Official Closing Price to the SIP as an ''M'' sale condition if there has not been a consolidated last-sale eligible trade on a trading day.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [8] and Rule 19b–4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [10] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange believes that waiving the operative delay would be consistent with the protection of investors and the public interest because it would make transparent that the Exchange would not report an ''M'' sale condition to the SIP for a security if there has not been a last-sale eligible trade on a trading day. The Exchange further believes that the proposed rule change is consistent with the protection of investors and the public interest because it would not change how an Official Closing Price would be disseminated under NYSE Arca Equities Rules 1.1(gg)(2)–(4). The Commission believes that the proposed rule change is consistent with the protection of investors and the public interest because it clarifies the Exchange's reporting practices while maintaining its procedures for reporting and disseminating an Official Closing Price. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [13] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2016–166 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–NYSEARCA–2016–166. 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

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] For purposes only of waiving the operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78s(b)(2)(B).

printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2016–166, and should be submitted on or before January 27, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–32036 Filed 1–5–17; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79716; File No. SR–NYSEArca–2016–168]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE Arca Options Fee Schedule and the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services To Modify the Fees Related to Four Bundles of Co-Location Services in Connection With the Exchange's Co-Location Services

December 30, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 19, 2016, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule (the ''Options Fee Schedule'') and the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (the ''Equities Fee Schedule'' and, together with the Options Fee Schedule, the ''Fee Schedules'') to modify the fees related to four bundles of co-location services (''Partial Cabinet Solution bundles'') in connection with the Exchange's co-location services. The Exchange proposes to implement the fee changes effective January 1, 2017. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Exchange's Fee Schedules to modify the fees related to Partial Cabinet Solution bundles in connection with the Exchange's co-location services.[4] Currently, the Exchange offers Users[5] that purchase a Partial Cabinet Solution bundle on or before December 31, 2016 a 50% reduction in the monthly recurring charges (''MRC'') for the first 12 months.[6] The Exchange now proposes to extend that 50% reduction until December 31, 2017. The Exchange proposes to implement the fee changes effective January 1, 2017.

The Exchange offers the four Partial Cabinet Solution bundles in order to attract smaller Users, including those with minimal power or cabinet space demands or those for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome.[7] Under the proposed change, such smaller Users will be able to avail themselves of the reduction until December 31, 2017. Specifically, the Exchange proposes to modify its Fee Schedules so that they read as follows:

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in 2010. See Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR–NYSEArca–2010–100) (the ''Original Co-location Filing''). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users.

[5] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76010 (September 29, 2015), 80 FR 60197 (October 5, 2015) (SR–NYSEArca–2015–82). As specified in the Fee Schedules, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates New York Stock Exchange LLC (''NYSE LLC'') and NYSE MKT LLC (''NYSE MKT and, together with NYSE LLC, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70173 (August 13, 2013), 78 FR 50459 (August 19, 2013) (SR–NYSEArca–2013–80).

[6] *See* Securities Exchange Act Release No. 77070 (Feb. 5, 2016), 81 FR 7401 (Feb. 11, 2016) (SR–NYSEArca–2015–102).

[7] *See id* at 7402.

Type of service	Description	Amount of charge
Partial Cabinet Solution bundles ..... Note: A User and its Affiliates are limited to one Partial Cabinet Solution bundle at a time. A User and its Affiliates must have an Aggregate Cabinet Footprint of 2 kW or less to qualify for a Partial Cabinet Solution bundle. See Note 2 under "General Notes".	Option A: 1 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $3,000 monthly for first 12 months of service, and $6,000 monthly thereafter. • For Users that order after December 31, 2017: $6,000 monthly.
	Option B: 2 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $3,500 monthly for first 12 months of service, and $7,000 monthly thereafter. • For Users that order after December 31, 2017: $7,000 monthly.
	Option C: 1 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $7,000 monthly for first 12 months of service, and $14,000 monthly thereafter. • For Users that order after December 31, 2017: $14,000 monthly.
	Option D: 2 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $7,500 monthly for first 12 months of service, and $15,000 monthly thereafter. • For Users that order after December 31, 2017: $15,000 monthly.

The Exchange is not proposing any other changes to the Partial Cabinet Solution bundles other than this proposed extension of the 50% reduction in the MRC. Users that purchase a Partial Cabinet Solution bundle would still be subject to a 90-day minimum commitment, after which period they are subject to a 60-day rolling time period.[8]

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (*e.g.,* a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;[9] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.[10]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Sections 6(b)(5) of the Act,[12] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule changes provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, because the Exchange proposes to offer the 50% reduction in the MRC to all Users equally. As is currently the case, the purchase of any colocation service (including Partial Cabinet Solution bundles) is completely voluntary. All Users that order a bundle on or before December 31, 2017 would have their MRC reduced by 50% for the first 12 months.

The Exchange believes that extending the 50% reduction in the MRC for Partial Cabinet Solution bundles is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because the Partial Cabinet Solution bundles would continue to offer four different Partial Cabinet Solution bundles with options with respect to cabinet footprint and network connections. Users that require other sizes or combinations of cabinets, network connections and cross connects could still request them.

In addition, the Exchange believes that its proposal would remove impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because the proposed extension of the 50% reduction in MRC would continue to make it more cost effective for Users to utilize co-location by creating a convenient way to create a colocation environment, through four Partial Cabinet Solution bundles with

[8] *See id.*

[9] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[10] *See* SR–NYSEArca–2013–80, *supra* note 5, at 50459. The Exchange's affiliates have also submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2016–91 and SR–NYSEMKT–2016–123.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

options with respect to cabinet footprint and network connections. The Exchange expects that such Users would include those with minimal power or cabinet space demands and Users for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[13] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that it is reasonable that Users that order a Partial Cabinet Solution bundle on or before December 31, 2017 would have their MRC reduced by 50% for the first 12 months because it is reasonable to continue to offer such reduction as an incentive to Users to utilize the service. As noted above, the Exchange anticipates that Users of the Partial Cabinet Solution bundles would include those with minimum power or cabinet space demands and Users for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome. The Exchange believes that it is reasonable to continue to have a reduced minimum commitment period for the Partial Cabinet Solution bundle to further reduce the cost commitment for such Users as a continued incentive to Users to utilize the new service.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[14] 26 the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because, in addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.* the same products and services are available to all Users, and the extension of the 50% reduction for the MRC for the Partial Cabinet Solution bundles would apply to all Users).

The Exchange believes that extending the 50% reduction in the MRC will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because such access will continue to satisfy User demand for cost effective options for smaller Users that choose to utilize co-location. All Users that order a bundle on or before December 31, 2017 would have their MRC reduced by 50% for the first 12 months. Providing entities with the additional option of the Partial Cabinet Solution bundle will allow them to select the relationship and type of service that better corresponds to their needs and resources.

The proposed changes will also enhance competition by making it more cost effective for Users that purchase a Partial Cabinet Solution bundle to utilize co-location by creating a convenient way to create a colocation environment, through Partial Cabinet Solution bundles with options with respect to cabinet footprint and network connections at a reduced MRC for the first 12 months. Such Users may choose to pass on such cost savings to their customers.

The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange. In such an environment, the Exchange must continually review, and consider adjusting, its services and related fees and credits to remain competitive with other exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[15] of the Act and subparagraph (f)(2) of Rule 19b–4[16] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[17] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File No. SR–NYSEArca–2016–168 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 No. SR–NYSEArca–2016–168. This file

[13] 15 U.S.C. 78f(b)(4).

[14] 15 U.S.C. 78f(b)(8).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(2).

[17] 15 U.S.C. 78s(b)(2)(B).

number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSEArca–2016–168, and should be submitted on or before January 27, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–32039 Filed 1–5–17; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79715; File No. SR–NYSE–2016–91]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Price List to Modify the Fees Related to Four Bundles of Co-Location Services in Connection with the Exchange's Co-Location Services

December 30, 2016.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 19, 2016, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Price List to modify the fees related to four bundles of co-location services (''Partial Cabinet Solution bundles'') in connection with the Exchange's co-location services. The Exchange proposes to implement the fee changes effective January 1, 2017. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Exchange's Price List to modify the fees related to Partial Cabinet Solution bundles in connection with the Exchange's co-location services.[4] Currently, the Exchange offers Users [5] that purchase a Partial Cabinet Solution bundle on or before December 31, 2016 a 50% reduction in the monthly recurring charges (''MRC'') for the first 12 months.[6] The Exchange now proposes to extend that 50% reduction until December 31, 2017. The Exchange proposes to implement the fee changes effective January 1, 2017.

The Exchange offers the four Partial Cabinet Solution bundles in order to attract smaller Users, including those with minimal power or cabinet space demands or those for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome.[7] Under the proposed change, such smaller Users will be able to avail themselves of the reduction until December 31, 2017. Specifically, the Exchange proposes to modify its Price List so that it reads as follows:

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (''Commission'') in 2010. *See* Securities Exchange Act Release No. 62960 (Sept. 21, 2010), 75 FR 59310 (Sept. 27, 2010) (SR–NYSE–2010–56) (the ''Original Co-location Filing''). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users.

[5] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76008 (Sept. 29, 2015), 80 FR 60190 (Oct. 5, 2015) (SR–NYSE–2015–40). As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE MKT LLC and NYSE Arca, Inc. *See* Securities Exchange Act Release No. 70206 (Aug. 15, 2013), 78 FR 51765 (Aug. 21, 2013) (SR–NYSE–2013–59).

[6] *See* Securities Exchange Act Release No. 77072 (Feb. 5, 2016), 81 FR 7394 (Feb. 11, 2016) (SR–NYSE–2015–53).

[7] *See id* at 7396.

Type of service	Description	Amount of charge
Partial Cabinet Solution bundles ..... Note: A User and its Affiliates are limited to one Partial Cabinet Solution bundle at a time. A User and its Affiliates must have an Aggregate Cabinet Footprint of 2 kW or less to qualify for a Partial Cabinet Solution bundle. See Note 2 under "General Notes".	Option A: 1 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $3,000 monthly for first 12 months of service, and $6,000 monthly thereafter. • For Users that order after December 31, 2017: $6,000 monthly.
	Option B: 2 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $3,500 monthly for first 12 months of service, and $7,000 monthly thereafter. • For Users that order after December 31, 2017: $7,000 monthly.
	Option C: 1 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $7,000 monthly for first 12 months of service, and $14,000 monthly thereafter. • For Users that order after December 31, 2017: $14,000 monthly.
	Option D: 2 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2017: $7,500 monthly for first 12 months of service, and $15,000 monthly thereafter. • For Users that order after December 31, 2017: $15,000 monthly.

The Exchange is not proposing any other changes to the Partial Cabinet Solution bundles other than this proposed extension of the 50% reduction in the MRC. Users that purchase a Partial Cabinet Solution bundle would still be subject to a 90-day minimum commitment, after which period they are subject to a 60-day rolling time period.[8]

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (*e.g.,* a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;[9] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.[10]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Sections 6(b)(5) of the Act,[12] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule changes provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, because the Exchange proposes to offer the 50% reduction in the MRC to all Users equally. As is currently the case, the purchase of any colocation service (including Partial Cabinet Solution bundles) is completely voluntary. All Users that order a bundle on or before December 31, 2017 would have their MRC reduced by 50% for the first 12 months.

The Exchange believes that extending the 50% reduction in the MRC for Partial Cabinet Solution bundles is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because the Partial Cabinet Solution bundles would continue to offer four different Partial Cabinet Solution bundles with options with respect to cabinet footprint and network connections. Users that require other sizes or combinations of cabinets, network connections and cross connects could still request them.

In addition, the Exchange believes that its proposal would remove impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because the proposed extension of the 50% reduction in MRC would continue to make it more cost

[8] *See id.*

[9] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[10] *See* SR–NYSE–2013–59, *supra* note 5, at 51766. The Exchange's affiliates have also submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSEMKT–2016–123 and SR–NYSEArca–2016–168. A separate fee filing by the Exchange that is effective January 3, 2017 will not affect this filing. *See* SR–NYSE–2016–89.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

effective for Users to utilize co-location by creating a convenient way to create a colocation environment, through four Partial Cabinet Solution bundles with options with respect to cabinet footprint and network connections. The Exchange expects that such Users would include those with minimal power or cabinet space demands and Users for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[13] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that it is reasonable that Users that order a Partial Cabinet Solution bundle on or before December 31, 2017 would have their MRC reduced by 50% for the first 12 months because it is reasonable to continue to offer such reduction as an incentive to Users to utilize the service. As noted above, the Exchange anticipates that Users of the Partial Cabinet Solution bundles would include those with minimum power or cabinet space demands and Users for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome. The Exchange believes that it is reasonable to continue to have a reduced minimum commitment period for the Partial Cabinet Solution bundle to further reduce the cost commitment for such Users as a continued incentive to Users to utilize the new service.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[14] 26 the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because, in addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.* the same products and services are available to all Users, and the extension of the 50% reduction for the MRC for the Partial Cabinet Solution bundles would apply to all Users).

The Exchange believes that extending the 50% reduction in the MRC will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because such access will continue to satisfy User demand for cost effective options for smaller Users that choose to utilize co-location. All Users that order a bundle on or before December 31, 2017 would have their MRC reduced by 50% for the first 12 months. Providing entities with the additional option of the Partial Cabinet Solution bundle will allow them to select the relationship and type of service that better corresponds to their needs and resources.

The proposed changes will also enhance competition by making it more cost effective for Users that purchase a Partial Cabinet Solution bundle to utilize co-location by creating a convenient way to create a colocation environment, through Partial Cabinet Solution bundles with options with respect to cabinet footprint and network connections at a reduced MRC for the first 12 months. Such Users may choose to pass on such cost savings to their customers.

The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange. In such an environment, the Exchange must continually review, and consider adjusting, its services and related fees and credits to remain competitive with other exchanges.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [15] of the Act and subparagraph (f)(2) of Rule 19b–4 [16] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [17] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–NYSE–2016–91 on the subject line.

[13] 15 U.S.C. 78f(b)(4).

[14] 15 U.S.C. 78f(b)(8).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(2).

[17] 15 U.S.C. 78s(b)(2)(B).

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 No. SR–NYSE–2016–91. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NYSE–2016–91, and should be submitted on or before January 27, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–32038 Filed 1–5–17; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36080]

Decatur Central Railroad, L.L.C.—Change in Operator Exemption—Decatur Junction Railway Co.

Decatur Central Railroad, L.L.C. (DC), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to assume operations of a rail line located between milepost 14.22 in Cisco, Piatt County, Ill., and milepost 27.63 (Green's Switch) near Decatur, Macon County, Ill., a distance of approximately 13 miles (the Line). The Line is currently leased to and operated by Decatur Junction Railway Co. (DJRC), which consents to the proposed change in operators. DC will become a rail carrier as a result of this transaction.

DC describes itself as a joint venture between OmniTRAX Holdings Combined, Inc. and Topflight Grain Cooperative, Inc., which each own 50% of DC. DJRC has agreed to relinquish to DC, and DC has agreed to assume, the exclusive common carrier obligation over the Line.

DC states that the agreement by which it will assume operations does not contain any provision that prohibits DC from interchanging traffic with a third party or limits DC's ability to interchange traffic with a third party railroad.

DC certifies that the proposed transaction will not result in DC's becoming a Class II or Class I rail carrier. DC will become a Class III carrier upon consummation of the proposed transaction, but the projected annual revenue of DC will not exceed $5 million. Under 49 CFR 1150.32(b), a change in operator requires that notice be given to shippers. DC certifies that it has provided notice of the proposed change in operator to the only shipper on the Line.

The earliest this transaction can be consummated is January 21, 2017, the effective date of the exemption.[1]

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than January 13, 2017 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36080, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Karl Morell, Karl Morell & Associates, Suite 225, 655 Fifteenth Street NW., Washington, DC 20005.

[1] DC filed its verified notice of exemption on December 8, 2016, and supplemented it by letter filed on December 22, 2016. The date of DC's supplement will be considered the filing date for purposes of calculating the effective date of the exemption.

Board decisions and notices are available on our Web site at *WWW.STB.GOV.*

Decided: January 3, 2017.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Raina S. Contee,

Clearance Clerk.

[FR Doc. 2017–00020 Filed 1–5–17; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 55 (Sub-No. 769X)]

CSX Transportation, Inc.—Discontinuance of Service Exemption—in Boone County, W. Va.

CSX Transportation, Inc. (CSXT), filed a verified notice of exemption under 49 CFR pt. 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over an approximately 9.9-mile rail line on CSXT's Southern Region, Florence Division, Seth Subdivision, between milepost CLN 0.3 and milepost CLN 10.2 in Boone County, W. Va. (the Line). The Line traverses United States Postal Service Zip Code 25181. There is one station on the Line, Prenter, located at milepost CLN 10 (FSAC 82243/OPSL 64790).[1]

CSXT has certified that: (1) No local traffic has moved over the Line for at least two years; (2) because the Line is not a through route, no overhead traffic has operated, and, therefore, none needs to be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the Line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the Line is pending either with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

[1] CSXT states that the Prenter station can be closed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) to subsidize continued rail service has been received, this exemption will be effective on February 7, 2017, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA to subsidize continued rail service under 49 CFR 1152.27(c)(2)[2] must be filed by January 13, 2017.[3] Petitions to reopen must be filed by January 26, 2017, with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSXT's representative: Louis E. Gitomer, Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

If the verified notice contains false or misleading information, the exemption is void ab initio.

Board decisions and notices are available on our Web site at ''*WWW.STB.GOV.*''

Decided: January 3, 2017.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2017–00014 Filed 1–5–17; 8:45 am]

BILLING CODE 4915–01–P

[2] Each OFA must be accompanied by the filing fee, which is currently set at $1,700. *See* 49 CFR 1002.2(f)(25).

[3] Because this is a discontinuance proceeding and not an abandonment, interim trail use/rail banking and public use conditions are not appropriate. Because there will be an environmental review during abandonment, this discontinuance does not require an environmental review.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0443]

Hours of Service of Drivers: Dillon Transportation LLC; Application for Exemption

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

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that it has received an application from Dillon Transportation LLC (Dillon) for an exemption from certain provisions of the Agency's hours-of-service (HOS) regulations. Dillon proposes that its team drivers be granted an exemption from the HOS rules pertaining to use of a sleeper berth (SB). Dillon proposes that its team drivers be allowed to take the equivalent of 10 consecutive hours off duty by splitting SB time into two periods totaling 10 hours, provided neither of the two periods is less than 3 hours. FMCSA requests public comment on Dillon's application for exemption.

DATES: Comments must be received on or before February 6, 2017.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–2016–0443 by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* See the *Public Participation and Request for Comments* section below for further information.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the *Privacy Act* heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The on-line FDMS is available 24 hours each day, 365 days each year.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: For information concerning this notice, please contact Mr. Thomas Yager, Chief, FMCSA Driver and Carrier Operations Division; 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:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2016–0443), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to *www.regulations.gov* and put the docket number, ''FMCSA–2016–0443'' in the ''Keyword'' box, and click ''Search.'' When the new screen appears, click on ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period and may grant or not grant this application based on your comments.

II. Legal Basis

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)).

III. Request for Exemption

Dillon states that it operates a fleet of 103 vehicles with 50 team drivers. Dillon is a privately-owned and operated company that delivers products to 48 states from a diversified customer base, and is known for their high level of service as an on-time carrier. They recruit only experienced, professional drivers. Dillon operates on a routine weekly cycle; each workweek contains a regular subset of daily cycles dispatching and returning long, medium and short range trips. According to Dillon, the majority of the fleet drivers are home weekly with 34–48 hours off. The fact that some divers stay out longer is their choice to do so; Dillon does not require their drivers to stay on the road for more than 5 days.

Dillon's tractors are equipped with double-bunk sleepers in the event both drivers need or want to rest at the same time. Drivers are allowed to make their own decisions about when and where to take short rest breaks based on their personal needs and preferences in conformance with regulatory requirements. Dillon asserts that it takes safety, health and wellness seriously, and only hires well-qualified drivers who go through a comprehensive orientation/new-hire training program. Dillon's trucks are all equipped with electronic logging devices for monitoring hours-of-service (HOS) compliance.

Dillon requests an exemption from the current regulations for its operations to eliminate the requirement that SB time include a period of at least 8 but less than 10 consecutive hours in the SB and a separate period of at least 2 but less than 10 consecutive hours either in the SB or off duty, or any combination thereof (49 CFR 395.1(g)(1)(ii)(A)(1) and (2)). Dillon proposes that its team drivers be allowed to split SB time into two periods totaling at least 10 hours, provided neither of the two periods is less than 3 hours in length. The drivers would be able to choose between either a 3/7, 4/6, or 5/5 ''split'' hour break to complete the required 10 hour break. The exemption would be limited to drivers in team operations. The request by Dillon is for a 2-year exemption period.

Dillon states that it is common knowledge that sleeping in a moving vehicle is more difficult than for a single driver who is able to stop the truck during their sleeper time. According to Dillon, having the flexibility to switch with a partner allows each driver to take advantage of shorter driver periods when they feel fatigued even though they have available driving time. This will result in a more flexible work pattern improving personal and vehicular safety. The exemption request would not apply to trips driven by a single driver.

Dillon identified some countermeasures it would take to maintain safe operations if the exemption is granted. The safeguards would include, but not be limited to:

- Drive time would be reduced from 11 hours to 10 hours. Team drivers would be limited to 10 hours of driving prior to completing their required 10 hours total SB. Solo drivers will continue to operate under current HOS regulations.
- Dillon trucks are equipped with Qualcomm communications and electronic logging. Their drivers will continue to utilize Qualcomm electronic communications and tracking to maintain HOS compliance.
- All of Dillon's tractors are equipped with speed limiters.

Dillon believes that by allowing its team drivers to exercise flexibility in their SB requirements, they will experience better quality rest as a result of this exemption. To support its request for the exemption, Dillon cited the results of a recent study conducted by Gregory Belenky, MD at the Sleep and Performance Research Center, which concluded that when consolidated nighttime sleep is not possible, split sleeper berth time is preferable to consolidated daytime sleep (*www.fmcsa.dot.gov/facts-research/briefs/12-003-Split-Sleep*).

A copy of Dillon's application for exemption is available for review in the docket for this notice.

Issued on: December 29, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2017–00011 Filed 1–5–17; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0032]

Commercial Driver's License Standards: Application for Exemption; Daimler Trucks North America (Daimler)

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

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that Daimler Trucks North America (Daimler) has requested an exemption for one commercial motor vehicle (CMV) driver, Kai Zeuner, from the Federal requirement to hold a commercial driver's license (CDL) issued by one of the States. This project engineer holds a valid German commercial license and wants to test-drive Daimler vehicles on U.S. roads to better understand product requirements for these systems in ''real world'' environments, and verify results. Daimler believes the requirements for a German commercial license ensure that holders of the license will likely achieve a level of safety equal to or greater than that of drivers who hold a U.S. State-issued CDL.

DATES: Comments must be received on or before February 6, 2017.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2012–0032 using any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the *Privacy Act* heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at

any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The on-line FDMS is available 24 hours each day, 365 days each year.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION 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:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2012–0032), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to *www.regulations.gov* and put the docket number, ''FMCSA–2012–0032'' in the ''Keyword'' box, and click ''Search.'' When the new screen appears, click on ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period and may grant or not grant this application based on your comments.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from the Federal Motor Carrier Safety Regulations. 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 the safety analyses and the public comments, 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 reason for the grant or denial, and, if granted, the specific person or class of persons receiving the exemption, and the regulatory provision or provisions from which exemption is granted. The notice must also specify the effective period of the exemption (up to 5 years), and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

Request for Exemption

Daimler has applied for an exemption for one of its engineers from 49 CFR 383.23, which prescribes licensing requirements for drivers operating CMVs in interstate or intrastate commerce. This driver, Kai Zeuner, holds a valid German commercial license but is unable to obtain a CDL in any of the U.S. States due to residency requirements. A copy of the application is in Docket No. FMCSA–2012–0032.

The exemption would allow Mr. Zeuner to operate CMVs in interstate or intrastate commerce to support Daimler field tests designed to meet future vehicle safety and environmental requirements and to develop improved safety and emission technologies. According to Daimler, Mr. Zeuner will typically drive for no more than 6 hours per day for 2 consecutive days, and 10 percent of the test driving will be on two-lane State highways, while 90 percent will be on interstate highways. The driving will consist of no more than 200 miles per day, for a total of 400 miles during a two-day period on a quarterly basis. He will in all cases be accompanied by a holder of a U.S. CDL who is familiar with the routes to be traveled. Daimler requests that the exemption cover the maximum allowable duration.

Daimler has explained in prior exemption requests that the German knowledge and skills tests and training program ensure that Daimler's drivers operating under the exemption will achieve a level of safety that is equivalent to, or greater than, the level of safety obtained by complying with the U.S. requirement for a CDL.

IV. Method To Ensure an Equivalent or Greater Level of Safety

FMCSA has previously determined that the process for obtaining a German commercial license is comparable to, or as effective as, the requirements of part 383, and adequately assesses the driver's ability to operate CMVs in the U.S. Since 2012, FMCSA has granted Daimler drivers similar exemptions [May 25, 2012 (77 FR 31422); July 22, 2014 (79 FR 42626); March 27, 2015 (80 FR 16511); October 5, 2015 (80 FR 60220); December 7, 2015 (80 FR 76059); December 21, 2015 (80 FR 79410)].

Issued on: December 29, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2017–00010 Filed 1–5–17; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Designation of 3 Individuals and 2 Entities Pursuant to Executive Order 13581, ''Blocking Property of Transnational Criminal Organizations''

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of 3 individuals and 2 entities whose property and interests in property are blocked pursuant to Executive Order 13581 of July 24, 2011, ''Blocking Property of Transnational Criminal Organizations.''

DATES: The designations by the Acting Director of OFAC, pursuant to Executive Order 13581, of the 3 individuals and 2 entities identified in this notice were effective on December 30, 2016.

FOR FURTHER INFORMATION CONTACT: The Department of the Treasury's Office of

Foreign Assets Control: Assistant Director for Licensing, tel.: 202–622–2480, Assistant Director for Regulatory Affairs, tel.: 202–622–4855, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; or the Department of the Treasury's Office of the Chief Counsel (Foreign Assets Control), Office of the General Counsel, tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*www.treas.gov/ofac*).

Background

On July 24, 2011, the President issued Executive Order 13581, ''Blocking Property of Transnational Criminal Organizations'' (the ''Order''), pursuant to, *inter alia,* the International Emergency Economic Powers Act (50 U.S.C. 1701–06). The Order was effective at 12:01 a.m. eastern daylight time on July 25, 2011. In the Order, the President declared a national emergency to deal with the threat that significant transnational criminal organizations pose to the national security, foreign policy, and economy of the United States.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person, of persons listed in the Annex to the Order and of persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to satisfy certain criteria set forth in the Order.

On December 30, 2016, the Acting Director of OFAC, in consultation with the Attorney General and the Secretary of State, designated, pursuant to one or more of the criteria set forth in subparagraphs (a)(ii)(A) through (a)(ii)(C) of Section 1 of the Order, 3 individuals and 2 entities whose property and interests in property are blocked pursuant to the Order.

The listings for these individuals and entities on OFAC's List of Specially Designated Nationals and Blocked Persons appear as follows:

Individuals

1. IKEDA, Takashi (Japanese: 池田孝志); DOB 21 Jan 1945 (individual) [TCO] (Linked To: KOBE YAMAGUCHI-GUMI).

2. INOUE, Kunio (Japanese: 井上邦雄), 26-14 Hanakuma-cho Chuo-ku, Kobe-shi, Hyogo-ken, Japan (Japanese: 二十六番十四号花隈町中央区, 神戸市, 兵庫県, Japan); DOB 22 Aug 1948 (individual) [TCO] (Linked To: KOBE YAMAGUCHI-GUMI).

3. TERAOKA, Osamu (Japanese: 寺岡修); DOB 22 Mar 1949 (individual) [TCO] (Linked To: KOBE YAMAGUCHI-GUMI).

Entities

1. KOBE YAMAGUCHI-GUMI (Japanese: 神戸山口組), 88-1 Shizuki, Awaji-shi, Hyogo-ken, Japan (Japanese: 八十八番地一志筑, 淡路市, 兵庫県, Japan) [TCO] (Linked To: YAKUZA).

2. YAMAKEN-GUMI (Japanese: 山健組) (a.k.a. FOURTH GENERATION YAMAKEN-GUMI (Japanese: 四代目山健組); a.k.a. YONDAIME YAMAKEN-GUMI), 26-4 Hanakuma-cho Chuo-ku, Kobe-shi, Hyogo-ken 650-0013, Japan (Japanese: 26-4 花隈町中央区, 神戸市, 兵庫県 650-0013, Japan) [TCO] (Linked To: KOBE YAMAGUCHI-GUMI; Linked To: INOUE, Kunio).

Dated: December 30, 2016.

John E. Smith,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2017–00001 Filed 1–5–17; 8:45 am]

BILLING CODE 4810–AL–P

FEDERAL REGISTER

Vol. 82 Friday,

No. 4 January 6, 2017

Part II

Department of Energy

10 CFR Part 430

Energy Conservation Program: Energy Conservation Standards for Residential Central Air Conditioners and Heat Pumps; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket Number EERE–2014–BT–STD–0048]

RIN 1904–AD37

Energy Conservation Program: Energy Conservation Standards for Residential Central Air Conditioners and Heat Pumps

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Direct final rule.

SUMMARY: The Energy Policy and Conservation Act of 1975 (EPCA), as amended, prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including residential central air conditioners and heat pumps. EPCA also requires the U.S. Department of Energy (DOE) to periodically determine whether more-stringent, amended standards would be technologically feasible and economically justified, and would save a significant amount of energy. In this direct final rule, DOE adopts amended energy conservation standards for residential central air conditioners and heat pumps.

DATES: The effective date of this rule is May 8, 2017 unless adverse comment is received by April 26, 2017. If adverse comments are received that DOE determines may provide a reasonable basis for withdrawal of the direct final rule, a timely withdrawal of this rule will be published in the **Federal Register.** If no such adverse comments are received, compliance with the amended standards in this final rule will be required for central air conditioners and heat pumps as specified in this final rule starting on January 1, 2023.

ADDRESSES: 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, such as those containing information that is exempt from public disclosure, may not be publicly available.

A link to the docket Web page for residential central air conditioners and heat pumps can be found at: *www1.eere.energy.gov/buildings/appliance_standards/rulemaking.aspx/ruleid/72.* The *www.regulations.gov* Web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to submit a comment or review other public comments and the docket, contact the Appliance and Equipment Standards staff at (202) 586–6636 or by email: *Appliance_Standards_Public_Meetings@ee.doe.gov.*

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I. Synopsis of the Direct Final Rule

Title III, Part B [1] of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles.[2] These products include central air conditioners (CACs) and heat pumps (HPs), the subject of this rulemaking. (42 U.S.C. 6292(a)(3))

Pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)(B)) The statute also provides that not later than six years after issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended or a notice of proposed rulemaking including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1)) Once complete, this rulemaking will satisfy these statutory requirements.

In light of the above and under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this direct final rule amending the energy conservation standards for residential central air conditioners and heat pumps. The amendments outlined in this document reflect the culmination of a DOE rulemaking that included the following notices and stakeholder comments thereon: November 2014 request for information (RFI) (79 FR 65603 (Nov. 5, 2014)); August 2015 notice of data availability (NODA) (80 FR 52206 (August 28, 2015)); and the 2015–2016 Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) central air conditioners and heat pumps working group negotiations, hereinafter referred to as ''the Negotiations'' (80 FR 40938 (July 14, 2015)). See section II.B.2 for a detailed history of the current rulemaking.

The consensus reached by the CAC/HP ASRAC Working Group, hereinafter referred to as ''the CAC/HP Working Group,'' on amended energy conservation standards is outlined in the ASRAC Working Group Term Sheet, hereinafter referred to as ''the Term Sheet.'' (ASRAC Working Group Term Sheet, Docket No. EERE–2014–BT–STD–0048, No. 0076) After carefully considering the Term Sheet, DOE determined that the recommendations contained therein are compliant with 42 U.S.C. 6295(o), as required by 42 U.S.C. 6295(p)(4)(A)(i) for the issuance of a direct final rule. As required by 42 U.S.C. 6295(p)(4)(A)(i), DOE is simultaneously publishing a NOPR proposing that the identical standard levels contained in this direct final rule be adopted. Consistent with the statute, DOE is providing a 110-day public comment period on the direct final rule. (42 U.S.C. 6295(p)(4)(B)) If DOE determines that any comments received provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o), DOE will continue the rulemaking under the NOPR. (42 U.S.C. 6295(p)(4)(C)) See section II.A for more details on DOE's statutory authority.

This direct final rule documents DOE's analyses to objectively and independently evaluate the energy savings potential, technological feasibility, and economic justification of the standard levels recommended in the Term Sheet, as per the requirements of 42 U.S.C. 6295(o).

DOE conducted separate test procedure rulemakings simultaneously with the energy conservation standard rulemaking to amend the DOE central air conditioners and heat pumps test procedure. The amended DOE CAC/HP test procedure and associated rulemakings are discussed in detail in section III.F. As per the request of the CAC/HP Working Group, the analyses documented in this direct final rule are based on the DOE test procedure at the time of the 2015–2016 Negotiations. Efficiency levels selected on the basis of these analyses were then translated to efficiency levels based on the amended test procedure. This methodology was first advocated by Carrier/United Technologies Corporation (UTC) and adopted by stakeholders during the Negotiations. (ASRAC Public Meeting, No. 87 at p. 48) This methodology is also reflected in the Term Sheet. Recommendation #8 of the Term Sheet includes standard levels based on the test procedure at the time of the 2015–2016 Negotiations. (ASRAC Term Sheet, No. 76 at pp. 4–5) The standard levels established by this direct final rule are translated levels based on the test procedure established by the test procedure final rule issued by DOE on November 30, 2016, hereinafter referred to as the ''November 2016 test procedure final rule,'' (which is codified in 10 CFR part 430, subpart B, appendix M1).[3] (Docket No. EERE–2016–BT–TP–0029)

Ultimately, DOE found that the standard levels recommended in the Term Sheet would result in significant energy savings and are technologically feasible and economically justified. Table I–1 documents the amended standards for central air conditioners and heat pumps based on the DOE test procedure at the time of the 2015–2016 Negotiations. The amended standards correspond to the recommended trial standard level (TSL) (as described in section V.A) and are expressed in terms of Seasonal Energy Efficiency Ratio (SEER), Energy Efficiency Ratio (EER), and Heating Seasonal Performance Factor (HSPF). The amended standards are the same as those recommended by the Working Group. These amended standards apply to all central air conditioners and heat pumps listed in Table I–1 and manufactured in, or imported into, the United States starting on January 1, 2023. The amended

[1] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[2] All references to EPCA in this document refer to the statute as amended through the Energy Efficiency Improvement Act of 2015 (EEIA 2015), Public Law 114–11 (April 30, 2015).

[3] The test procedure final rule issued by DOE on November 30, 2016 is accessible via the DOE Web site at: *http://energy.gov/eere/buildings/downloads/issuance-2016-11-30-energy-conservation-program-test-procedures-central-air.*

standards listed in the table below result in less energy consumption than the current standards, which remain in effect until January 1, 2023.

TABLE I–1—AMENDED ENERGY CONSERVATION STANDARDS FOR RESIDENTIAL CENTRAL AIR CONDITIONERS AND HEAT PUMPS BASED ON THE DOE TEST PROCEDURE AT THE TIME OF THE 2015–2016 NEGOTIATIONS (RECOMMENDED TSL)

Product class	National		Southeast *	Southwest **	
	SEER	HSPF	SEER	SEER	EER
Split-System Air Conditioners with a Certified Cooling Capacity <45,000 Btu/h	14		15	15	* * * 12.2/10.2
Split-System Air Conditioners with a Certified Cooling Capacity ≥45,000 Btu/h	14		14.5	14.5	* * * 11.7/10.2
Split-System Heat Pumps	15	8.8			
Single-Package Air Conditioners †	14				11.0
Single-Package Heat Pumps †	14	8.0			
Space-Constrained Air Conditioners †	12				
Space-Constrained Heat Pumps †	12	7.4			
Small-Duct High-Velocity Systems †	12	7.2			

* Southeast includes: The states of Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virginia, the District of Columbia, and the U.S. territories.
** Southwest includes the states of Arizona, California, Nevada, and New Mexico.
*** The 10.2 EER amended energy conservation standard applies to split-system air conditioners with a seasonal energy efficiency ratio greater than or equal to 16.
† The energy conservation standards for single-package, small-duct high-velocity and space-constrained product classes remain unchanged from current levels.

DOE notes that the amended standard levels presented in Table I–1 are in terms of the test procedure that was in place at the time of the CAC/HP Working Group Negotiations. That test procedure did not include the amendments adopted in the November 2016 TP final rule, which are outlined in section III.F. In section V.C, the amended standard levels are translated to and presented in terms of the test procedure established by the November 2016 test procedure final rule. Accordingly, the standard levels included in the regulatory text of this direct final rule are presented in terms of the test procedure established by the November 2016 test procedure final rule.

DOE is not amending the off mode standards for central air conditioners and heat pumps at this time. The June 2011 direct final rule included the first standards for off mode electric power consumption, with a compliance date of January 1, 2015. 76 FR 37408 (June 27, 2011); 10 CFR 430.32(c)(5). However, DOE subsequently issued an enforcement policy statement on July 8, 2014 regarding off mode standards for central air conditioners and heat pumps specifying that DOE would not assert its civil penalty authority for violation of the off mode standard until 180 days following publication of a final rule establishing a test method for measuring off mode electrical power consumption.[4] DOE established this test method in a final rule published on June 8, 2016 (''June 2016 test procedure final rule''). 81 FR 36992. As a result, the standards for off mode will be enforceable beginning on December 5, 2016. DOE finds it is not feasible to consider amending standards for which compliance has yet to begin.

A. Benefits and Costs to Consumers

Table I–2 presents DOE's evaluation of the economic impacts of the energy conservation standards on consumers of central air conditioners and heat pumps, as measured by the average life-cycle cost (LCC) savings and the simple payback period (PBP).[5] The average LCC savings are positive for all product classes. The PBP for each product class falls well below the average lifetime of the product, which is estimated to be 21 years for central air conditioners and 15 years for heat pumps (see section IV.G of this document).

TABLE I–2—IMPACTS OF AMENDED ENERGY CONSERVATION STANDARDS ON CONSUMERS OF RESIDENTIAL CENTRAL AIR CONDITIONERS AND HEAT PUMPS (RECOMMENDED TSL)

Product class	Average LCC savings (2015$)	Simple payback period (years)
Split-System Air Conditioners *	N: $43	N: 10.5.
	HD: $150	HD: 7.6.
	HH: $39	HH: 7.7.
Split-System Heat Pumps	$131	4.9.
Packaged Air Conditioners **	N/A	N/A.
Packaged Heat Pumps **	N/A	N/A.
Space-Constrained Air Conditioners **	N/A	N/A.
Small-Duct High-Velocity Air Conditioners **	N/A	N/A.

* N = Northern region; HD = Hot-dry region; HH = Hot-humid region.
** The standard levels for Packaged Air Conditioners, Packaged Heat Pumps, Space-Constrained Air Conditioners, and Small-Duct High-Velocity Air Conditioners are at the baseline level in the Recommended TSL, so there is no impact on consumers.

[4] Available at: *http://energy.gov/sites/prod/files/2014/07/f17/EnforcementPolicyStatement-cacoffmode.pdf* (Last accessed July 1, 2016).

[5] The average LCC savings are measured relative to the estimated efficiency distribution in the no-new-standards case, which depicts the market in the compliance year in the absence of amended standards (see section IV.F.3.f). The simple PBP, which is designed to compare specific efficiency levels, is measured relative to the baseline model (see section IV.C.2).

DOE's analysis of the impacts of the amended standards on consumers is described in further detail in section IV.F of this document.

B. Impact on Manufacturers

The industry net present value (INPV) is the sum of the discounted cash flows to the industry from the base year through the end of the 30-year analysis period.[6] Using a real discount rate of 11.0 percent,[7] DOE estimates that the INPV for manufacturers of residential central air conditioners and heat pumps is $4,496.1 million in 2015$. Under the amended standards, DOE expects the change in INPV to range from approximately –15.4 percent to –2.5 percent, which corresponds to approximately –$692.3 million to –$114.2 million (in 2015$). In order to bring products into compliance with proposed standards, DOE expects the industry to incur $342.6 million in conversion costs.

DOE's analysis of the impacts of the amended standards on manufacturers is described in further detail in sections IV.J and V.B.2 of this direct final rule.

C. National Benefits and Costs[8]

DOE's analyses indicate that the energy conservation standards being adopted in this direct final rule for central air conditioners and heat pumps would save a significant amount of energy. Relative to the case without amended standards (referred to as the ''no-new-standards case''), the lifetime energy savings for central air conditioners and heat pumps purchased in the 30-year period that begins in the anticipated first full year of compliance with the amended standards (2023–2052) amount to 3.2 quadrillion British thermal units (Btu), or ''quads.''[9] This represents a savings of 2.6 percent relative to the energy use of these products in the no-new-standards case.

The cumulative national net present value (NPV) of total consumer costs and savings for the amended standards for central air conditioners and heat pumps ranges from $2.5 billion (at a 7-percent discount rate) to $12.2 billion (at a 3-percent discount rate). This NPV expresses the estimated total value of future operating-cost savings minus the estimated increased product and installation costs for central air conditioners and heat pumps purchased in 2023–2052.

In addition, the standards for central air conditioners and heat pumps that are being adopted in this direct final rule are expected to yield significant environmental benefits. DOE estimates the standards to result in cumulative emission reductions (over the same period as for energy savings) of 188.3 million metric tons (Mt)[10] of carbon dioxide (CO_2), 100.8 thousand tons of sulfur dioxide (SO_2), 350.3 thousand tons of nitrogen oxides (NO_X), 842.4 thousand tons of methane (CH_4), 2.114 thousand tons of nitrous oxide (N_2O), and 0.372 tons of mercury (Hg).[11] The cumulative reduction in CO_2 emissions through 2030 amounts to 13.3 Mt, which is equivalent to the emissions resulting from the annual electricity use of 1.2 million homes.

The value of the CO_2 reductions is calculated using a range of values per metric ton of CO_2 (otherwise known as the Social Cost of Carbon, or SCC) developed by a recent Federal interagency process.[12] The derivation of the SCC values is discussed in section IV.L. Using discount rates appropriate for each set of SCC values (see Table I.3), DOE estimates the present monetary value of the CO_2 emissions reduction (not including CO_2-equivalent emissions of other gases with global warming potential) is between $1.1 billion and $16.9 billion with a value of $5.5 billion using the central SCC case represented by $40.6/t in 2015. DOE also estimates the present monetary value of the NO_X emissions reduction to be $0.2 billion at a 7-percent discount rate and $0.5 billion at a 3-percent discount rate.[13] DOE is investigating appropriate valuation of the reduction in other emissions, and did not include any such values in this rulemaking.

Table I–3 summarizes the economic benefits and costs expected to result from the amended energy conservation standards for central air conditioners and heat pumps.

TABLE I–3—SUMMARY OF ECONOMIC BENEFITS AND COSTS OF AMENDED ENERGY CONSERVATION STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS (RECOMMENDED TSL) *

Category	Present value (billion 2015$)	Discount rate (%)
Benefits		
Consumer Operating Cost Savings	8.6	7

[6] In contrast to the NIA, which uses an end date of 2050 for TSLs 1, 3 and 4, and an end date of 2052 for TSL 2, the MIA maintains the same end date (2050) for all TSLs. This is done to enable clear comparison of INPV impacts across TSLs. See chapter 12 of the direct final rule TSD for a more detailed discussion of this assumption.

[7] DOE estimated preliminary financial metrics, including the industry discount rate, based on publicly available financial information, including Securities and Exchange Commission (''SEC'') filings and S&P bond ratings. DOE presented the preliminary financial metrics to manufacturers in MIA interviews. DOE adjusted those values based on feedback from manufacturers. The complete set of financial metrics and more detail about the methodology can be found in chapter 12 of the final rule TSD. Additionally, DOE provides a sensitivity analysis based on an alternative discount rate in chapter 12 of the TSD. Using an 8% discount rate, the change in INPV ranges from –16.6 to –1.3 percent at the adopted level.

[8] All monetary values in this document are expressed in 2015 dollars and, where appropriate, are discounted to 2016 unless explicitly stated otherwise.

[9] The quantity refers to full-fuel-cycle (FFC) energy savings. FFC energy savings includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and, thus, presents a more complete picture of the impacts of energy efficiency standards. For more information on the FFC metric, see section IV.H.4.

[10] A metric ton is equivalent to 1.1 short tons. Results for emissions other than CO_2 are presented in short tons.

[11] DOE calculated emissions reductions relative to the no-new-standards case, which reflects key assumptions in the *Annual Energy Outlook 2015* (*AEO 2015*) Reference case. *AEO 2015* generally represents current legislation and environmental regulations for which implementing regulations were available as of October 31, 2014.

[12] United States Government-Interagency Working Group on Social Cost of Carbon, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* (May 2013; Revised July 2015) (Available at: *https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-tsd-final-july-2015.pdf).*

[13] DOE estimated the monetized value of NO_X emissions reductions using benefit-per-ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule,* published in August 2015 by EPA's Office of Air Quality Planning and Standards. (Available at: *http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis.*) See section IV.L.2 for further discussion. The U.S. Supreme Court has stayed the rule implementing the Clean Power Plan until the current litigation against it concludes. *Chamber of Commerce, et al.* v. *EPA, et al.,* Order in Pending Case, 577 U.S. _____((2016). However, the benefit-per-ton estimates established in the Regulatory Impact Analysis for the Clean Power Plan are based on scientific studies that remain valid irrespective of the legal status of the Clean Power Plan. DOE is primarily using a national benefit-per-ton estimate for NO_X emitted from the Electricity Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.,* 2009). If the benefit-per-ton estimates were based on the Six Cities study (Lepuele *et al.,* 2011), the values would be nearly two-and-a-half times larger.

TABLE I–3—SUMMARY OF ECONOMIC BENEFITS AND COSTS OF AMENDED ENERGY CONSERVATION STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS (RECOMMENDED TSL) *—Continued

Category	Present value (billion 2015$)	Discount rate (%)
	24.4	3
CO_2 Reduction (using mean SCC at 5% discount rate) **	1.1	5
CO_2 Reduction (using mean SCC at 3% discount rate) **	5.5	3
CO_2 Reduction (using mean SCC at 2.5% discount rate) **	8.9	2.5
CO_2 Reduction (using 95th-percentile SCC at 3% discount rate) **	16.9	3
NO_X Reduction †	0.2	7
	0.5	3
Total Benefits ††	14.3	7
	30.5	3
Costs		
Consumer Incremental Installed Costs	6.1	7
	12.3	3
Total Net Benefits		
Including CO_2 and NO_X Emissions Reduction Monetized Value ††	8.2	7
	18.2	3

* This table presents the costs and benefits associated with central air conditioners and heat pumps shipped in 2023–2052. These results include benefits to consumers which accrue after 2052 from the products purchased in 2023–2052. The incremental installed costs include incremental equipment cost as well as installation costs. The CO_2 reduction benefits are global benefits due to actions that occur nationally.

** The interagency group selected four sets of SCC values for use in regulatory analyses. Three sets of values are based on the average SCC from the integrated assessment models, at discount rates of 5%, 3%, and 2.5%. For example, for 2015 emissions, these values are $12.4/t, $40.6/t, and $63.2/t, in 2015$, respectively. The fourth set ($118/t in 2015$ for 2015 emissions), which represents the 95th percentile of the SCC distribution calculated using a 3% discount rate, is included to represent higher-than-expected impacts from temperature change further out in the tails of the SCC distribution. The SCC values are emission year specific. See section IV.L.1 of this document for more details.

† DOE estimated the monetized value of NO_X emissions reductions using benefit-per-ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule,* published in August 2015 by EPA's Office of Air Quality Planning and Standards. (Available at: *http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis.*) See section IV.L.2 for further discussion. *DOE* is primarily using a national benefit-per-ton estimate for NO_X emitted from the Electricity Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.,* 2009). If the benefit-per-ton estimates were based on the Six Cities study (Lepuele *et al.,* 2011), the values would be nearly two-and-a-half times larger.

†† Total Benefits for both the 3% and 7% cases are derived using the series corresponding to average SCC with a 3-percent discount rate ($40.6/t in 2015).

The benefits and costs of the amended energy conservation standards, for central air conditioners and heat pumps sold in 2023–2052, can also be expressed in terms of annualized values. The monetary values for the total annualized net benefits are the sum of: (1) The national economic value of the benefits in reduced operating costs, minus (2) the increases in product purchase and installation costs, plus (3) the value of the benefits of CO_2 and NO_X emission reductions, all annualized.[14]

The national operating savings are domestic private U.S. consumer monetary savings that occur as a result of purchasing the covered products. The national operating cost savings is measured for the lifetime of central air conditioners and heat pumps shipped in 2023–2052. The CO_2 reduction is a benefit that accrues globally due to decreased domestic energy consumption that is expected to result from this rule. Because CO_2 emissions have a very long residence time in the atmosphere, the SCC values in future years reflect future CO_2-emissions impacts that continue well beyond 2100 through 2300.

Estimates of annualized benefits and costs of the amended standards are shown in Table I–4. The results under the primary estimate are as follows. Using a 7-percent discount rate for benefits and costs other than CO_2 reduction (for which DOE used a 3-percent discount rate along with the average SCC series that uses a 3-percent discount rate ($40.6/t in 2015)),[15] the estimated cost of the central air conditioners and heat pumps standards adopted in this rule is $741 million per year in increased equipment costs, while the estimated benefits are $1,041 million per year in reduced equipment operating costs, $337 million per year in CO_2 reductions, and $22 million per year in reduced NO_X emissions. In this case, the net benefit amounts to $659 million per year. Using a 3-percent discount rate for all benefits and costs and the average SCC series that uses a 3-percent discount rate ($40.6/t in 2015), the estimated cost of the central air conditioners and heat pumps standards being adopted in this rule is $747 million per year in increased equipment costs, while the estimated benefits are $1,488 million per year in reduced equipment operating costs, $337 million per year in CO_2 reductions, and $32 million per year in reduced NO_X emissions. In this case, the net benefit would amount to $1,110 million per year.

[14] To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2016, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (*e.g.,* 2020 or 2030), and then discounted the present value from each year to 2016. The calculation uses discount rates of 3 and 7 percent for all costs and benefits except for the value of CO_2 reductions, for which DOE used case-specific discount rates, as shown in Table I–4. Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in the compliance year, that yields the same present value.

[15] DOE used a 3-percent discount rate because the SCC values for the series used in the calculation were derived using a 3-percent discount rate (see section IV.L).

TABLE I–4—ANNUALIZED BENEFITS AND COSTS OF AMENDED ENERGY CONSERVATION STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS (RECOMMENDED TSL)

	Discount rate (%)	Primary estimate *	Low-net-benefits estimate *	High-net-benefits estimate *
		(million 2015$/year)		
Benefits				
Consumer Operating Cost Savings	7	1,041	1,005	1,147.
	3	1,488	1,425	1,653.
CO_2 Reduction (using mean SCC at 5% discount rate) **	5	100	100	100.
CO_2 Reduction (using mean SCC at 3% discount rate) **	3	337	337	337.
CO_2 Reduction (using mean SCC at 2.5% discount rate) **	2.5	494	494	494.
CO_2 Reduction (using 95th-percentile SCC at 3% discount rate) **	3	1,027	1,027	1,027.
NO_X Reduction †	7	22	22	49.
	3	32	32	73.
Total Benefits ††	7 plus CO_2 range.	1,163 to 2,090	1,127 to 2,054	1,296 to 2,223.
	7	1,400	1,364	1,533.
	3 plus CO_2 range.	1,620 to 2,547	1,557 to 2,484	1,826 to 2,753.
	3	1,857	1,794	2,063.
Costs				
Consumer Incremental Installed Costs	7	741	784	723.
	3	747	799	725.
Net Benefits				
Total ††	7 plus CO_2 range.	422 to 1,349	342 to 1,269	573 to 1,500.
	7	659	580	810.
	3 plus CO_2 range.	873 to 1,800	757 to 1,684	1,100 to 2,028.
	3	1,110	994	1,338.

* This table presents the annualized costs and benefits associated with central air conditioners and heat pumps shipped in 2023–2052. These results include benefits to consumers which accrue after 2052 from the products purchased in 2023–2052. The incremental installed costs include incremental equipment cost as well as installation costs. The CO_2 reduction benefits are global benefits due to actions that occur nationally. The Primary, Low-Net-Benefits, and High-Net-Benefits Estimates utilize projections of energy prices from the *AEO 2015* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental product costs reflect a modest decline rate for projected product prices in the Primary Estimate, a constant rate in the Low-Net-Benefits Estimate, and a higher decline rate in the High-Net-Benefits Estimate. The methods used to derive projected price trends are explained in section IV.F.1. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

** The CO_2 reduction benefits are calculated using 4 different sets of SCC values. The first three use the average SCC calculated using 5%, 3%, and 2.5% discount rates, respectively. The fourth represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The SCC values are emission year specific. See section IV.L.1 for more details

† DOE estimated the monetized value of NO_X emissions reductions using benefit-per-ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule,* published in August 2015 by EPA's Office of Air Quality Planning and Standards. (Available at: *http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis.*) See section IV.L.2 for further discussion. For the Primary Estimate and Low-Net-Benefits Estimate, DOE used a national benefit-per-ton estimate for NO_X emitted from the Electric Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski *et al.,* 2009). For the High-Net-Benefits Estimate, the benefit-per-ton estimates were based on the Six Cities study (Lepuele *et al.,* 2011); these are nearly two-and-a-half times larger than those from the ACS study.

†† Total Benefits for both the 3% and 7% cases are presented using only the average SCC with a 3-percent discount rate. In the rows labeled "7% plus CO_2 range" and "3% plus CO_2 range," the operating cost and NO_X benefits are calculated using the labeled discount rate, and those values are added to the full range of CO_2 values.

DOE's analysis of the national impacts of the adopted standards is described in further detail in section IV.H of this direct final rule.

D. Conclusion

DOE has determined that the statement containing recommendations with respect to energy conservation standards for central air conditioners and heat pumps was submitted jointly by interested persons that are fairly representative of relevant points of view, in accordance with 42 U.S.C. 6295(p)(4)(A). After considering the analysis and weighing the benefits and burdens, DOE has determined that the recommended standards are in accordance with 42 U.S.C. 6295(o), which contains the criteria for prescribing new or amended standards. Specifically, the Secretary has determined that the adoption of the recommended standards would result in the significant conservation of energy and is technologically feasible and economically justified. In determining whether the recommended standards are economically justified, the Secretary has determined that the benefits of the recommended standards exceed the burdens. Namely, the Secretary has concluded that the recommended standards, when considering the benefits of energy savings, positive NPV of consumer benefits, emission reductions, the estimated monetary value of the emissions reductions, and positive average LCC savings, would yield benefits outweighing the negative impacts on some consumers and on manufacturers, including the conversion

costs that could result in a reduction in INPV for manufacturers.

Under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this direct final rule amending the energy conservation standards for residential central air conditioners and heat pumps. Consistent with this authority, DOE is also publishing elsewhere in this **Federal Register** a notice of proposed rulemaking proposing standards that are identical to those contained in this direct final rule. See 42 U.S.C. 6295(p)(4)(A)(i).

II. Introduction

The following sections briefly discuss the statutory authority underlying this direct final rule, as well as the historical background related to the establishment of standards for residential central air conditioners and heat pumps.

A. Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances (collectively referred to as ''covered products''), which includes the residential central air conditioners and heat pumps that are the subject of this rulemaking. (42 U.S.C. 6292(a)(3))

Pursuant to EPCA, DOE's energy conservation program for covered products consists essentially of four parts: (1) Testing; (2) labeling; (3) the establishment of Federal energy conservation standards; and (4) certification and enforcement procedures. The Federal Trade Commission (FTC) is primarily responsible for labeling, and DOE implements the remainder of the program. Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product prior to the adoption of a new or amended energy conservation standard. (42 U.S.C. 6295(o)(3)(A) and (r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedures for central air conditioners and heat pumps appear at title 10 of the Code of Federal Regulations (CFR) part 430, subpart B, appendix M and M1.

The National Appliance Energy Conservation Act of 1987 (NAECA; Pub. L. 100–12) included amendments to EPCA that established the original energy conservation standards for central air conditioners and heat pumps. (42 U.S.C. 6295(d)(1)–(2)) EPCA, as amended, also requires DOE to conduct two cycles of rulemakings to determine whether to amend the energy conservation standards for central air conditioners and heat pumps. (42 U.S.C. 6295(d)(3)) The first cycle culminated in a final rule published in the **Federal Register** on August 17, 2004 (the August 2004 Rule), which prescribed energy conservation standards for central air conditioners and heat pumps manufactured or imported on and after January 23, 2006. 69 FR 50997. DOE completed the second of the two rulemaking cycles by issuing a direct final rule on June 6, 2011 (2011 Direct Final Rule), which was published in the **Federal Register** on June 27, 2011. 76 FR 37408. The 2011 Direct Final Rule (June 2011 DFR) amended standards for central air conditioners and heat pumps manufactured on or after January 1, 2015.

EPCA requires DOE to periodically review its already established energy conservation standards for a covered product. Not later than six years after issuance of any final rule establishing or amending a standard, DOE must publish a notice of determination that standards for the product do not need to be amended, or a notice of proposed rulemaking including new proposed standards. (42 U.S.C. 6295(m)(1)) Pursuant to this requirement, the next review that DOE would need to conduct must occur no later than six years from the issuance of the 2011 direct final rule. This direct final rule fulfills that requirement.

DOE must follow specific statutory criteria for prescribing new or amended standards for covered products, including residential central air conditioners and heat pumps. Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) and (3)(B)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)) Moreover, DOE may not prescribe a standard: (1) For certain products, including residential central air conditioners and heat pumps, if no test procedure has been established for the product, or (2) if DOE determines by rule that the proposed standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) In deciding whether a proposed standard is economically justified, after receiving comments on the proposed standard, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination by, to the greatest extent practicable, considering the following seven factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary of Energy (Secretary) considers relevant. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

DOE notes that the current energy conservation standards for central air conditioners and heat pumps (set forth at 10 CFR 430.32(c)) contain requirements for seasonal energy efficiency ratio (SEER), heating seasonal performance factor (HSPF), energy efficiency ratio (EER), and average off mode power consumption. Standards based upon the latter two metrics were newly adopted in the June 27, 2011 DFR for the reasons stated in that rulemaking. 76 FR 37408. As discussed below in section II.B.1 and section II.B.3, DOE has chosen to specify performance standards based on EER and SEER for only the southwest region of the country. Pursuant to its mandate under 42 U.S.C. 6295(m)(1), this DOE rulemaking has considered amending the existing energy conservation standards for central air conditioners and heat pumps, and DOE is adopting the amended standards contained in this direct final rule.

EPCA, as codified, also contains what is known as an ''anti-backsliding''

provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of evidence that the standard is likely to result in the unavailability in the United States of any covered product type (or class) or performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) DOE generally considers these criteria as part of its analysis but consistently conducts a more thorough analysis of a given standard's projected impacts that extends beyond this presumption.

Additionally, 42 U.S.C. 6295(q)(1) specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. In this case, DOE must specify a different standard level for a type or class of covered product that has the same function or intended use, if DOE determines that products within such group: (A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature that other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE must consider such factors as the utility to the consumer of the feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Under 42 U.S.C. 6295(o)(6), which was added to EPCA by section 306(a) of the Energy Independence and Security Act of 2007 (EISA 2007; Public Law. 110–140), DOE may consider the establishment of regional standards for central air conditioners and heat pumps. Specifically, in addition to a base national standard for a product, DOE may for central air conditioners and heat pumps, establish one or two more-restrictive regional standards. (42 U.S.C. 6295(o)(6)(B)) The regions must include only contiguous States (with the exception of Alaska and Hawaii, which may be included in regions with which they are not contiguous), and each State may be placed in only one region (*i.e.,* an entire State cannot simultaneously be placed in two regions, nor can it be divided between two regions). (42 U.S.C. 6295(o)(6)(C)) Further, DOE can establish the additional regional standards only: (1) Where doing so would produce significant energy savings in comparison to a single national standard, (2) if the regional standards are economically justified, and (3) after considering the impact of these standards on consumers, manufacturers, and other market participants, including product distributors, dealers, contractors, and installers. (42 U.S.C. 6295(o)(6)(D))

Federal energy conservation requirements generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions set forth under 42 U.S.C. 6297(d).

Pursuant to further amendments to EPCA contained in EISA 2007, Pub. L. 110–140, any final rule for new or amended energy conservation standards promulgated after July 1, 2010, is required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)-(B)) The SEER and HSPF metrics for central air conditioners and heat pumps already account for standby mode energy use, and the current standards include limits on off mode energy use. Section III.E further discusses standby mode and off mode energy use.

As mentioned previously, EISA 2007 amended EPCA, in relevant part, to grant DOE authority to issue a final rule (hereinafter referred to as a ''direct final rule'') establishing an energy conservation standard on receipt of a statement submitted jointly by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered products, States, and efficiency advocates), as determined by the Secretary, that contains recommendations with respect to an energy or water conservation standard that are in accordance with the provisions of 42 U.S.C. 6295(o). (42 U.S.C. 6295(p)(4)) Pursuant to 42 U.S.C. 6295(p)(4), the Secretary must also determine whether a jointly-submitted recommendation for an energy or water conservation standard satisfies 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B), as applicable.

A notice of proposed rulemaking (NOPR) that proposes an identical energy efficiency standard must be published simultaneously with the direct final rule, and DOE must provide a public comment period of at least 110 days on this proposal. (42 U.S.C. 6295(p)(4)(A)–(B)) While DOE typically provides a comment period of 60 days on proposed standards, in this case, DOE provides a comment period of the same length as the comment period on the direct final rule—*i.e.* 110 days. Based on the comments received during this period, the direct final rule will either become effective, or DOE will withdraw it not later than 120 days after its issuance if (1) one or more adverse comments is received, and (2) DOE determines that those comments, when viewed in light of the rulemaking record related to the direct final rule, provide a reasonable basis for withdrawal of the direct final rule under 42 U.S.C. 6295(o) and for DOE to continue this rulemaking under the NOPR. (42 U.S.C. 6295(p)(4)(C)) Receipt of an alternative joint recommendation may also trigger a DOE withdrawal of the direct final rule in the same manner. *Id.*

Typical of other rulemakings, it is the substance, rather than the quantity, of comments that will ultimately determine whether a direct final rule will be withdrawn. To this end, the substance of any adverse comment(s) received will be weighed against the anticipated benefits of the jointly-submitted recommendations and the likelihood that further consideration of the comment(s) would change the results of the rulemaking. DOE notes that, to the extent an adverse comment had been previously raised and addressed in the rulemaking proceeding, such a submission will not typically provide a basis for withdrawal of a direct final rule. Nevertheless, if the Secretary makes such a determination, DOE must withdraw the direct final rule

and proceed with the simultaneously-published NOPR. DOE must publish in the **Federal Register** the reason why the direct final rule was withdrawn. *Id.*

B. Background

1. Current Standards

This section briefly summarizes the history leading up to and including the conception of the current standards for residential air conditioners and heat pumps. Congress initially prescribed statutory standard levels for residential central air conditioners and heat pumps through amendments to EPCA included in the National Appliance Energy Conservation Act of 1987 (NAECA), Public Law 100–12. (42 U.S.C. 6295(d)(1)–(2)) DOE was required to subsequently conduct two rounds of rulemaking to consider amended standards for these products. (42 U.S.C. 6295(d)(3)) The first cycle culminated in a final rule published in the **Federal Register** on August 17, 2004 (the August 2004 final rule). The August 2004 final rule prescribed energy conservation standards for central air conditioners and heat pumps manufactured or imported on and after January 23, 2006. 69 FR 50997.

DOE completed the second of the two rulemaking cycles by publishing a direct final rule on June 27, 2011. 76 FR 37408. The June 2011 DFR combined the rulemakings for residential furnaces, central air conditioners, and heat pumps; divided the country into three regions for CAC/HP: Southeast ''hot humid'' region, southwest ''hot-dry'' region, and northern ''rest of country'' (national standard); and amended standards, including different standards for each region, for central air conditioners and heat pumps manufactured on or after January 1, 2015.

On October 31, 2011, DOE published a notice of effective date and compliance dates for the direct final rule responding to comments it received. 76 FR 67037. Ultimately, DOE determined that the comments received in response to the direct final rule for amended energy conservation standards for residential central air conditioners and heat pumps did not provide a reasonable basis for withdrawal of the DFR. *Id.*

The current standards, which differ by region, were published in the June 27, 2011 DFR. 76 FR 37408, 37546–47. These standards are codified in DOE's regulations in the Code of Federal Regulations (CFR) at 10 CFR 430.32(c)(2)–(5). The standards consist of a minimum SEER for each class of air conditioner and a minimum SEER and HSPF for each class of heat pump. 10 CFR 430.32(c)(2)–(3). In addition, the June 2011 DFR also established regional standards on EER for the southwest region [16] for split-system air conditioner and single-package air conditioner product classes. 10 CFR 430.32(c)(4). All covered central air conditioners and heat pumps were also required to meet standards for average off mode electrical power consumption. 10 CFR 430.32(c)(5). DOE's current regulatory requirements for central air conditioners and heat pumps are listed in Table II.1.

TABLE II–1—ENERGY CONSERVATION STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS MANUFACTURED ON OR AFTER JANUARY 1, 2015 †

Product class	National standard levels	Southeastern region †† standard levels	Southwestern region ‡ standard levels
Split-system air conditioners	SEER = 13	SEER = 14	SEER = 14 EER = 12.2 (for units with a rated cooling capacity less than 45,000 Btu/h) EER = 11.7 (for units with a rated cooling capacity equal to or greater than 45,000 Btu/h)
Split-system heat pumps	SEER = 14 HSPF = 8.2		
Single-package air conditioners	SEER = 14	SEER = 14	SEER = 14 EER = 11.0
Single-package heat pumps	SEER = 14 HSPF = 8.0		
Small-duct, high-velocity systems ‡‡	SEER = 12 HSPF = 7.2		
Space-constrained products—air conditioners ‡‡	SEER = 12		
Space-constrained products—heat pumps ‡‡	SEER = 12 HSPF = 7.4		

† ''SEER'' is Seasonal Energy Efficiency Ratio; ''EER'' is Energy Efficiency Ratio; ''HSPF'' is Heating Seasonal Performance Factor; and ''Btu/h'' is British thermal units per hour.

†† The Southeastern region for central air conditioners contains the following States: Alabama,, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia, and the District of Columbia.

‡ The Southwestern region for central air conditioners contains the States of Arizona, California, Nevada, and New Mexico.

‡‡ DOE did not amend energy conservation standards for these product classes.

The June 2011 DFR also established off mode energy conservation standards for residential central air conditioners and heat pumps, as summarized in Table II.2 and described in section III.E.

[16] The 2011 Direct Final Rule divides the United States into three different climate zones based on the number of heating degree days: Southeast region, southwest region, and the north (also referred to as ''rest of the country'') which represents the national standard.

TABLE II–2—OFF MODE ENERGY CONSERVATION STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS MANUFACTURED ON OR AFTER JANUARY 1, 2015 *

Product class	Off mode standard levels †
Split-system air conditioners	$P_{W,OFF}$ = 30 watts.
Split-system heat pumps	$P_{W,OFF}$ = 33 watts.
Single-package air conditioners	$P_{W,OFF}$ = 30 watts.
Single-package heat pumps	$P_{W,OFF}$ = 33 watts.
Small-duct, high-velocity systems	$P_{W,OFF}$ = 30 watts.
Space-constrained air conditioners	$P_{W,OFF}$ = 30 watts.
Space-constrained heat pumps	$P_{W,OFF}$ = 33 watts.

* "$P_{W,OFF}$" is off mode electrical power consumption for central air conditioners and heat pumps.
† DOE is not adopting a separate standby mode standard level for central air conditioners and heat pumps, because standby mode power consumption for these products is already regulated by SEER and HSPF.

2. History of the Current CAC/HP Rulemaking

This section provides an overview of the history of the current central air conditioner and heat pump rulemaking following the June 2011 DFR up to this direct final rule.

Following DOE's adoption of the June 2011 DFR, the American Public Gas Association (APGA) filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit, seeking to invalidate the June 2011 DFR as it pertained to non-weatherized gas furnaces (NWGFs) and mobile home gas furnaces (MHGFs). Petition for Review, *American Public Gas Association, et al.* v. *Department of Energy, et al.,* No. 11–1485 (D.C. Cir. filed Dec. 23, 2011). APGA requested the court to vacate and remand the direct final rule for further notice and comment rulemaking, with its main arguments being that DOE inappropriately banned noncondensing furnaces in the northern region and adopted a standard that would cause significant fuel switching without economic justification.[17]

On April 24, 2014, the Court granted a motion that approved a settlement agreement reached between DOE, APGA, and the various intervenors.[18] Under this settlement agreement, DOE agreed to a court vacatur and remand of the regional standards for non-weatherized natural gas and mobile home furnaces and to use best efforts to complete a new standards rulemaking for those products within two years. Accordingly, the Court's order vacated the June 2011 DFR in part (*i.e.,* those portions relating to NWGFs and MHGFs) and remanded to the agency for further rulemaking. Notwithstanding this litigation, the regional standards for residential central air conditioners and heat pumps contained in the June 27, 2011 DFR went into effect as originally scheduled with a compliance date of January 1, 2015. Around this time, DOE also decided to initiate a negotiated rulemaking with stakeholders on regional standards enforcement for central air conditioners and heat pumps.

On August 26, 2014, DOE published a notice of open meetings for the central air conditioner and heat pump regional standards enforcement working group, which was tasked to discuss and reach consensus on a proposed rule[19] for the enforcement of regional standards for split-system and single-package air conditioners. 79 FR 50856. This working group was scheduled to periodically convene from August through October of 2014. DOE issued a final rule on central air conditioner and heat pump regional standards enforcement on July 14, 2016. 81 FR 45387.

According to the Energy Policy and Conservation Act's 6-year review requirement (42 U.S.C. 6295(m)(1)), DOE must publish a notice of proposed rulemaking to propose new standards for residential central air conditioner and heat pump products or a notice of determination that the existing standards do not need to be amended by June 6, 2017. On November 5, 2014, DOE initiated efforts pursuant to the 6-year lookback requirement by publishing a request for information (RFI) regarding central air conditioners and heat pumps to solicit comments on whether to amend the current energy conservation standards for residential central air conditioner and heat pump products. 79 FR 65603. The November 2014 RFI also described the procedural and analytical approaches that DOE anticipated using in order to evaluate potential amended energy conservation standards for central air conditioners and heat pumps.

On August 28, 2015, DOE published a notice of data availability (NODA) describing analysis to be used in support of the central air conditioners and heat pumps standards rulemaking. 80 FR 52206. The analysis for this notice provided the results of a series of DOE provisional analyses regarding potential energy savings and economic impacts of amending the central air conditioner and heat pump energy conservation standards. These analyses were conducted for the following categories: Engineering, consumer impacts, national impacts, and manufacturer impacts.

In response to the November 2014 RFI, Lennox formally requested that DOE convene a negotiated rulemaking to address potential amendments to the current standards, which would help ensure that all stakeholders have input into the discussion, analysis, and outcome of the rulemaking. (Lennox, No. 22) Other key industry stakeholders made similar suggestions. (American Council for an Energy-Efficient Economy, No. 23; Air Conditioning Contractors of America, No. 25; Heating, Air Conditioning & Refrigeration Distributors International, No. 26) ASRAC carefully evaluated this request, and the Committee voted to charter a working group to support the negotiated rulemaking effort requested by these parties.

Subsequently, DOE determined that the complexity of the CAC/HP rulemaking necessitated a combined effort to address these equipment types to ensure a comprehensive vetting of all issues and related analyses to support any final rule setting standards. To this end, DOE solicited the public for membership nominations to the CAC/HP Working Group that would be formed under the ASRAC charter by issuing a Notice of Intent to Establish the Central Air Conditioners and Heat Pumps Working Group To Negotiate a

[17] Brief for Petitioner, American Public Gas Association, et al. v. Department of Energy, et al., No. 11–1485 (D.C. Cir. filed May 14, 2012). See also: *http://www.achrnews.com/ext/resources/2013/06-2013/06-03-13/APGA-Petition-DC-Cir_11-1485.pdf.*

[18] See: *http://www.acca.org/wp-content/uploads/2014/03/joint-motion-to-vacate-and-remand-2014-to-file.pdf.*

[19] More details on the issues considered can be found in the docket: *http://www.regulations.gov/#!documentDetail;D=EERE-2011-BT-CE-0077-0070.*

Notice of Proposed Rulemaking for Energy Conservation Standards. 80 FR 40938 (July 14, 2015). The CAC/HP Working Group was established under ASRAC in accordance with the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act—with the purpose of discussing and, if possible, reaching consensus on a set of energy conservation standards to propose/finalize for CACs and HPs. The CAC/HP Working Group was to consist of fairly representative parties having a defined stake in the outcome of the proposed standards, and would consult, as appropriate, with a range of experts on technical issues.

DOE received 26 nominations for membership. Ultimately, the CAC/HP Working Group consisted of 15 members, including one member from ASRAC and one DOE representative.[20] The CAC/HP Working Group met ten times (nine times in-person and once by teleconference). The meetings were held on August 26, 2015, September 10, 2015, September 28–29, 2015, October 13–14, 2015, October 26–27, 2015. November 18–19, 2015, December 1–2, 2015, December 16–17, 2015, January 11–12, 2016, and a webinar on January 19, 2016.

During the CAC/HP Working Group discussions, participants discussed setting new standards for single-package air conditioners. Specifically, arguments were made against raising the standard level for single-package systems due to the unavailability of full product lines, which span the entire range of cooling capacities, with efficiencies that are only modestly greater (*i.e.,* 15 SEER) than the current standard level (*i.e.,* 14 SEER). (ASRAC Public Meeting, No. 80 at pp. 75–6) After being informed that the national energy savings from a 15 SEER standard for single-package systems would be small (*i.e.,* approximately 0.1 quads), the Working Group agreed not to recommend raising the standards for these product classes. (ASRAC Public Meeting, No. 80 at pp. 90–91). In addition, some parties wanted the Group to recommend a level for standards for split-system heat pumps that would encourage use of two-speed equipment (*i.e.,* greater than 15 SEER), but the manufacturer representatives objected to this proposal due to two primary concerns: (1) Only a single compressor manufacturer supplies two-stage compressors, thereby creating the possibility of a limited or constrained supply of the most critical component of a two-speed system and (2) the likelihood, in replacement installations, that the utilization of existing thermostat control wiring could result in the use of only high-speed, thereby eliminating the efficiency gain resulting from low-speed operation during part-load conditions.

The CAC/HP Working Group successfully reached consensus on recommended energy conservation standards, as well as test procedure amendments for CACs and HPs. On January 19, 2016, the CAC/HP Working Group submitted the Term Sheet to ASRAC outlining its recommendations, which ASRAC subsequently adopted.[21]

3. 2015–2016 ASRAC CAC/HP Working Group Recommended Standard Levels

This section summarizes the standard levels recommended in the Term Sheet submitted by the CAC/HP Working Group for CAC/HP standards and the subsequent procedural steps taken by DOE. Recommendation #8 of the Term Sheet recommends standard levels based on the test procedure at the time of the 2015–2016 Negotiations. (ASRAC Term Sheet, No. 76 at pp. 4–5) These recommended standard levels are presented in Table II–3. Note that the test procedure at the time of the 2015–2016 Negotiations did not include the amendments adopted in the November 2016 test procedure final rule, which are outlined in section III.F. Recommendation #9 tabulates the translated standard levels based on the amended test procedure (ASRAC Term Sheet, No. 76 at p. 5). Details of the other Term Sheet recommendations can be found in the Term Sheet posted in the docket.[22]

TABLE II–3—RECOMMENDED AMENDED ENERGY CONSERVATION STANDARDS FOR RESIDENTIAL CENTRAL AIR CONDITIONERS AND HEAT PUMPS AS DETERMINED BY THE DOE TEST PROCEDURE AT THE TIME OF THE 2015–2016 ASRAC NEGOTIATIONS

[Recommended TSL]

Product class	National		Southeast *	Southwest **	
	SEER	HSPF	SEER	SEER	EER ***
Split-System Air Conditioners with a Certified Cooling Capacity <45,000 Btu/h	14	.....	15	15	**** 12.2/10.2
Split-System Air Conditioners with a Certified Cooling Capacity ≥45,000 Btu/h	14	.....	14.5	14.5	**** 11.7/10.2
Split-System Heat Pumps	15	8.8	.....	.....	.....
Single-Package Air Conditioners and Heat Pumps	14	8.0	.....	.....	11.0

* Southeast includes: The states of Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virginia, the District of Columbia, and the U.S. territories.

** Southwest includes the states of Arizona, California, Nevada, and New Mexico.

*** EER requirements only apply to air conditioners, not heat pumps within each product class.

**** The 10.2 EER amended energy conservation standard applies to split-system air conditioners with a seasonal energy efficiency ratio greater than or equal to 16.

Note: The energy conservation standards for small-duct high velocity and space-constrained remain unchanged from current levels.

[20] The group members were Tony Bouza (U.S. Department of Energy), Marshall Hunt (Pacific Gas & Electric Company, San Diego Gas & Electric Company, Southern California Edison, and Southern California Gas Company), Andrew deLaski (Appliance Standards Awareness Project and ASRAC representative), Meg Waltner (Natural Resources Defense Council), John Hurst (Lennox), Karen Meyers (Rheem Manufacturing Company), Charles McCrudden (Air Conditioning Contractors of America), Harvey Sachs (American Council for an Energy Efficient Economy), Russell Tharp (Goodman Manufacturing), Karim Amrane (Air-Conditioning, Heating, and Refrigeration Institute), Don Brundage (Southern Company), Kristen Driskell (California Energy Commission), John Gibbons (United Technologies), Steve Porter (Johnstone Supply), and Jim Vershaw (Ingersoll Rand).

[21] Available at (copy and paste into browser): *https://www.regulations.gov/document?D=EERE-2014-BT-STD-0048-0076.*

[22] Available at (copy and paste into browser): *https://www.regulations.gov/document?D=EERE-2014-BT-STD-0048-0076.*

After carefully considering the consensus recommendations for amending the energy conservation standards for CACs and HPs submitted by the CAC/HP Working Group and adopted by ASRAC, DOE has determined that these recommendations are in accordance with the statutory requirements of 42 U.S.C. 6295(p)(4) for the issuance of a direct final rule.

More specifically, these recommendations comprise a statement submitted by interested persons who are fairly representative of relevant points of view on this matter. In reaching this determination, DOE took into consideration the fact that the CAC/HP Working Group, in conjunction with ASRAC members who approved the recommendations, consisted of representatives of manufacturers of the covered equipment at issue, States, and efficiency advocates—all of which are groups specifically identified by Congress as relevant parties to any consensus recommendation. (42 U.S.C. 6295(p)(4)(A)) As delineated above, the Term Sheet was signed and submitted by a broad cross-section of interests, including the manufacturers who produce the subject products, trade associations representing these manufacturers and installation contractors, environmental and energy-efficiency advocacy organizations, and electric utility companies. Although States were not direct signatories to the Term Sheet, the ASRAC Committee approving the CAC/HP Working Group's recommendations included at least two members representing States—one representing the National Association of State Energy Officials (NASEO) and one representing the State of California.[23] Moreover, DOE does not read the statute as requiring a statement submitted by all interested parties before the Department may proceed with issuance of a direct final rule. By explicit language of the statute, the Secretary has the discretion to determine when a joint recommendation for an energy or water conservation standard has met the requirement for representativeness (*i.e.,* ''as determined by the Secretary''). *Id.*

DOE also evaluated whether the recommendation satisfies 42 U.S.C. 6295(o), as applicable. In making this determination, DOE conducted an analysis to evaluate whether the potential energy conservation standards under consideration achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified and result in significant energy conservation. The evaluation is the same comprehensive approach that DOE typically conducts whenever it considers potential energy conservation standards for a given type of product or equipment.

Upon review, the Secretary determined that the Term Sheet comports with the standard-setting criteria set forth under 42 U.S.C. 6295(p)(4)(A). Accordingly, the consensus-recommended efficiency levels were included as the ''recommended TSL'' for CACs/HPs (see section V.A for description of all of the considered TSLs). The details regarding how the consensus-recommended TSLs comply with the standard-setting criteria are discussed and demonstrated in the relevant sections throughout this document.

In sum, as the relevant criteria under 42 U.S.C. 6295(p)(4) have been satisfied, the Secretary has determined that it is appropriate to adopt the consensus-recommended amended energy conservation standards for CACs and HPs through this direct final rule. Also in accordance with the provisions described in section II.A, DOE is simultaneously publishing a NOPR proposing that the identical standard levels contained in this direct final rule be adopted.

III. General Discussion

This section covers subjects that are not explicitly discussed in other sections but provide additional necessary context for understanding this direct final rule.

A. Regulatory Approach

When DOE initiated this rulemaking, DOE had intended to rate and certify split-system central air conditioners based on a blower-coil configuration. This approach was reflected in the August 2015 NODA TSD. However, in the June 2016 test procedure final rule, DOE adopted a different approach based on CAC/HP Working Group recommendations. 81 FR 36992, 37001–03 (June 8, 2016). At its meeting on November 19, 2015, DOE presented two potential regulatory approaches, one based on both coil only and blower-coil configurations (approach 1, similar to the existing regulatory structure) and one based on blower-coil configurations (approach 2), both of which DOE regarded as feasible. During discussion, the CAC/HP Working Group generally supported approach 1 based on concerns with approach 2. Working Group members' primary concern with approach 2 is that the majority of sales are for coil-only installations, so blower-coil only ratings would not be representative of the majority of field installations, which could contribute to consumer confusion. (ASRAC Public Meeting, No. 85 at pp. 6–42)[24] The CAC/HP Working Group ultimately recommended that DOE adopt approach 1 and require rating and certifying split-system central air conditioners based on any configuration (*i.e.,* coil-only or blower-coil). The regulatory approach to split-system central air conditioners is identified as recommendation #7 in the CAC/HP Working Group Term Sheet. (ASRAC Term Sheet, No. 76 at p. 4) The June 2016 test procedure final rule includes a detailed discussion of these recommended changes and DOE's adoption of them. 81 FR 36992, 37001–37003 (June 8, 2016).

For the August 2015 NODA, DOE developed cost-efficiency relationships in the engineering analysis for blower coil systems. Then DOE established a correlation between blower coil system efficiency and coil-only efficiency based on ratings from the AHRI database. DOE used this correlation to calculate the cost-efficiency relationship for coil-only systems. Given the revised regulatory approach for this DFR, DOE analyzed coil-only cost-efficiency directly. Section IV.C describes in detail how DOE determined the cost-efficiency relationship for coil-only systems in this DFR.

B. Compliance Dates

EPCA prescribes a five-year period between the standard's publication date and the compliance date (42 U.S.C. 6295(m)(4)(A)(i)). The compliance date for the 2011 DFR is January 1, 2015. The statute further provides that no manufacturer shall be required to apply new standards to a product to which other new standards have been required during the prior six-year period (42 U.S.C. 6295(m)(4)(B)). Given these statutory provisions, the earliest date that DOE could require compliance with amended standards would be January 1, 2021 (*i.e.,* six years after January 1, 2015, the compliance date of the standards adopted in the June 27, 2011 DFR). Thus, DOE contemplated a compliance date in 2021 in analyzing the impacts of the TSLs other than the Recommended TSL, which represents the recommended standards.

For the Recommended TSL, the CAC/HP Working Group recommended a compliance date of January 1, 2023. While this implies a period between the

[23] These individuals were Deborah E. Miller (NASEO) and David Hungerford (California Energy Commission).

[24] For discussion supporting approach 1, or the approach not based solely on blower coil ratings, see for example, Karen Meyers, pp. 27–28; Rusty Tharp, p. 29; Jim Vershaw, p. 36.

standards final rule's publication date and the compliance date that is longer than five years, DOE understands that EPCA provides some measure of discretion when adopting recommended standards submitted as part of a consensus agreement, provided that DOE determines that the recommended standards are otherwise in accordance with the required provisions. See 42 U.S.C. 6295(p)(4). DOE has made the determination that the rulemaking record in this case supports the adoption of the recommended compliance date.

C. Regional Standards

As described previously, EISA 2007 amended EPCA to allow for the establishment of one or two more-restrictive regional standards in addition to the base national standard for residential central air conditioners and heat pumps. (42 U.S.C. 6295(o)(6)(B)) The regions must include only contiguous States (with the exception of Alaska and Hawaii, which can be included in regions with which they are not contiguous), and each State may be placed in only one region (*i.e.,* a State cannot be divided among or otherwise included in two regions). (42 U.S.C. 6295(o)(6)(C))

Further, EPCA mandates that a regional standard must produce significant energy savings in comparison to a single national standard, and provides that DOE must determine that the additional standards are economically justified and consider the impact of the additional regional standards on consumers, manufacturers, and other market participants, including product distributors, dealers, contractors, and installers. (42 U.S.C. 6295(o)(6)(D)) In the 2011 Direct Final Rule, DOE considered the above-delineated impacts of regional standards in addition to national standards for central air conditioners and heat pumps, and the analyses indicated that regional standards will provide additional positive impacts. See chapter 10 of the 2011 DFR TSD.[25]

Consistent with the consensus agreement[26] submitted to DOE by a number of interested stakeholders on January 15, 2011, the 2011 Direct Final Rule established regional standards on EER for split-system and single-package air conditioners for the southwest region. Pursuant to 42 U.S.C. 6295(o)(1) (*i.e.,* the ''anti-backsliding clause''), DOE may not prescribe any amended standard which increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. As such, DOE intends to maintain the application of a regional standard requirement for the same product classes in the same regions. Accordingly, DOE has addressed the potential impacts from regional standards in the relevant analyses, including the mark-ups to determine product price, the LCC and payback period analysis, the national impact analysis (NIA), and the manufacturer impact analysis (MIA). DOE's approach for addressing regional standards is included in the methodology section corresponding to each individual analysis in section IV of this direct final rule.

D. Alternative Refrigerants

Residential central air conditioners and heat pumps currently on the market primarily utilize R-410A as the refrigerant. R-410A is a mixture of hydrofluorocarbons (HFCs), specifically HFC-32 (R-32) and HFC–125 (R-125) with a 50 percent/50 percent mass ratio. Stakeholders have raised concern that the high global warming potential of HFCs has put pressure on the industry to phase out HFC-containing refrigerants in favor of alternatives with a lower global warming potential (GWP). In response to the November 2014 RFI, ACEEE recommended that DOE consider the potential impact of changes in refrigerants on the standards. (ACEEE, No. 21 at p.3) Lennox suggested that DOE consider equipment redesigns resulting from the transition to alternate refrigerants. (Lennox, No. 10 at p. 4) Southern Co. suggested that DOE also model efficiencies using low-Global Warming Potential (GWP) refrigerants. (Southern Co., No. 11 at p. 2) EIA strongly urged DOE to consider the use of low-GWP refrigerants and alternative refrigerants such as CO2, and indirect evaporative cooling technology. (EIA, No. 12 at p. 1) Rheem suggested that DOE reevaluate the efficacy of design options with respect to the elimination of R410a. (Rheem, No. 17 at p. 3).

In response, DOE is aware that the U.S. Environmental Protection Agency (EPA) has proposed and finalized amendments to its lists of approved refrigerants under its significant new alternatives policy program[27] (SNAP); however, these changes do not address central air conditioners and heat pumps.[28] It would not be appropriate for DOE to speculate on the outcome of a rulemaking in progress or potential proposals that have not yet been issued. Therefore, DOE has not included possible outcomes of a potential EPA SNAP rulemaking affecting central air conditioners and heat pumps in the engineering or LCC analyses. This decision is consistent with past DOE practice, such as in the 2011 direct final rule for room air conditioners. 76 FR 22454 (April 21, 2011). DOE is aware of stakeholder concerns that EPA may broaden the applications for which HFC refrigerants are phased out at some point in the future. DOE is confident that there will be an adequate supply of R-410A for compliance with the standards being adopted in this notice. However, consistent with Executive Order 13563, ''Improving Regulation and Regulatory Review,'' DOE will prioritize its review of the potential effects of any future phase-out of HFCs (should there be one) on the efficiency standards related to this rulemaking. If a manufacturer believes that its design is subjected to undue hardship by regulations, the manufacturer may petition DOE's Office of Hearing and Appeals (OHA) for exception relief or exemption from the standard pursuant to OHA's authority under section 504 of the DOE Organization Act (42 U.S.C. 7194), as implemented at subpart B of 10 CFR part 1003. OHA has the authority to grant such relief on a case-by-case basis if it determines that a manufacturer has demonstrated that meeting the standard would cause hardship, inequity, or unfair distribution of burdens.

As such, DOE did not conduct additional analysis based on alternative

[25] Reference to Technical Support Document for Residential Central Air Conditioners, Heat Pumps, and Furnaces, Chapter 10 National and Regional Impact Analyses (copy and paste into browser): *http://www.regulations.gov/#!documentDetail;D=EERE-2011-BT-STD-0011-0012.*

[26] Reference to Joint Stakeholders Comments on Energy Conservation Standards for Residential Central Air Conditioners, Heat Pumps, and Residential Furnaces (copy and paste into browser): *https://www.regulations.gov/document?D=EERE-2011-BT-STD-0011-0016.*

[27] EPA regulates refrigerants for air conditioning, refrigeration, and other end uses under the stratospheric ozone protection provisions under Section 612(c) the Clean Air Act (CAA). EPA's SNAP Program evaluates and regulates the availability of refrigerants for the U.S. market by identifying and publishing lists of acceptable and unacceptable refrigerant substitutes.

[28] EPA on July 9, 2014 proposed new alternative refrigerants for several applications, but not central air conditioners or heat pumps. 79 FR 38811. On February 27, 2015, EPA issued the final rule for this rulemaking, which was published in the **Federal Register** on April 10, 2015 (see *http://www.epa.gov/ozone/snap/download/SAN_5745-SNAP_Low_GWP_Refrigerants_FRM_Signature_Version-signed-2-27-2015.pdf*). 80 FR 19454. Also, on August 6, 2014, EPA proposed delisting refrigerants for several applications, but not central air conditioners or heat pumps. 79 FR 46126. On July 20, 2015, EPA published the final rule for this rulemaking, which went into effect on August 19, 2015. 80 FR 42870. Refer to the docket (copy and paste into browser): *https://www.regulations.gov/docket?D=EPA-HQ-OAR-2014-0198.*

refrigerants to replace R–410A in this rulemaking.

E. Standby Mode and Off Mode

As noted in section II.A of this document, any final rule for amended or new energy conservation standards for consumer products that is published on or after July 1, 2010 must address standby mode and off mode energy use. (42 U.S.C. 6295(gg))

As set forth in 10 CFR 430.2, *Standby mode* means the condition in which an energy-using product—

(1) Is connected to a main power source; and

(2) Offers one or more of the following user-oriented or protective functions:

(i) To facilitate the activation or deactivation of other functions (including active mode) by remote switch (including remote control), internal sensor, or timer; or

(ii) Continuous functions, including information or status displays (including clocks) or sensor-based functions.

For residential central air conditioners and heat pumps, the standby mode refers to the state when a system is connected to the power supply but the compressor and fans are not running (*i.e.,* the system is not actively cooling or heating but it is primed to be activated by the thermostat). The SEER and HSPF metrics for cooling and heating already account for standby mode energy use. Specifically, the degradation coefficients used to adjust the steady-state efficiency levels to account for cyclic operation of the unit when calculating SEER or HSPF are based on electric energy measurements that include the energy use of the unit during the compressor-off cycles, and they include power input associated with all unit components, including the control system.

As set forth in 10 CFR 430.2, *off mode* means the condition in which an energy using product is connected to a main power source, and is not providing any standby or active mode function. For central air conditioners and heat pumps, off mode generally occurs during all non-cooling seasons for air conditioners, and during the ''shoulder seasons'' (*i.e.,* fall and spring) for heat pumps when consumers neither heat nor cool their homes. Unlike standby mode, off mode energy use is not captured in the SEER and HSPF metrics. As such, the June 2011 Direct Final Rule established off mode energy conservation standards for central air conditioners and heat pumps. In the technology assessment of the June 2011 Direct Final Rule, DOE considered five technologies associated with off mode for central air conditioners and heat pumps: (1) Toroidal transformers; (2) ECM control relays; (3) thermostatically-controlled crankcase heaters; (4) self-regulating crankcase heaters, and (5) compressor insulation covers. DOE continues to screen out the ECM control relay because DOE is not aware of any commercially-available systems that use this technology, and DOE is also not aware of any improvements to the technology that would address the associated reliability issues. DOE did, however, consider the remaining four technologies as design options for establishing the off mode energy conservation standards. The adopted standards were ultimately based upon this list of technologies. 76 FR 37408, 37447–37450 (June 27, 2011).

For the current direct final rule, DOE further researched the four technologies considered as design options in the June 2011 DFR. DOE was able to find thermostatically-controlled and self-regulating crankcase heaters in commercially-available central air conditioners and heat pumps. However, manufacturer specifications do not provide detailed wattage information for DOE to determine if these technologies could lower the off mode energy use for central air conditioners and heat pumps based on the existing off mode standards. Toroidal transformers may have higher efficiencies than conventional laminate transformers, but their savings potential is small compared to the precision of the test procedure as applied to baseline products. Crankcase heater wattage, rather than transformer loss, represents most of the measured off mode power input. DOE also believes that compressor covers can reduce heat loss and, therefore, reduce the off mode energy consumption. However, the existing off mode standards established by the June 2011 Direct Final Rule are already consistent with the energy use achievable using these technologies, and DOE does not have evidence to indicate that further energy savings based on these technologies are achievable.

In addition to the four technologies considered in the June 2011 Direct Final Rule, DOE identified another two technologies that could potentially reduce the off mode energy use for central air conditioners and heat pumps: (1) Hermetic crankcase heaters and (2) integral compressor motor heaters. However, DOE did not find any commercially-available applications of these two technologies in central air conditioners and heat pumps and did not consider these technologies further. More details on these technologies can be found in chapter 3 of the DFR TSD.

As such, DOE concludes that amending the off mode energy conservation standards at this time is not justified. This review satisfies, for off mode energy conservation standards for CAC/HP products, the periodic review of energy conservation standards required by EPCA. (42 U.S.C. 6295(m)(1))

F. Test Procedure

This section provides a brief overview of DOE's requirements with respect to test procedures as well as the history of the most recent central air conditioner and heat pump test procedure rulemakings and an overview of the significant changes adopted.

EPCA sets forth generally applicable criteria and procedures for DOE's adoption and amendment of test procedures. (42 U.S.C. 6293) Manufacturers of covered products must use these test procedures to certify to DOE that their product complies with energy conservation standards and to quantify the efficiency of their product.

DOE notes that Appendix A established procedures, interpretations, and policies to guide DOE in the consideration and promulgation of new or revised appliance efficiency standards under EPCA. (See section 1 of 10 CFR of 430 subpart C, appendix A) These procedures are a general guide to the steps DOE typically follows in promulgating energy conservation standards. The guidance recognizes that DOE can and will, on occasion, deviate from the typical process. (See 10 CFR part 430, subpart C, appendix A, section 14(a)) In this particular instance, DOE deviated from its typical process by conducting a negotiated rulemaking process, per the request of multiple key stakeholders and as chartered by ASRAC. The CAC/HP Working Group met ten times (nine times in-person and once by teleconference) and successfully reached consensus on recommended amended energy conservation standards, as well as test procedure amendments for CACs and HPs. On January 19, 2016, the CAC/HP Working Group submitted the Term Sheet to ASRAC outlining its recommendations, which ASRAC subsequently adopted. As discussed in section II.B.3, the Term Sheet meets the criteria of a consensus recommendation, and DOE has determined that these recommendations are in accordance with the statutory requirements of 42 U.S.C. 6295(p)(4) for the issuance of a direct final rule. DOE ultimately adopted many of the test procedure provisions and recommended standard levels that the CAC/HP Working Group included in the Term Sheet, which

illustrates that DOE's deviations from the typical rulemaking process in this instance did not adversely impact the manufacturers' ability to understand and provide input to DOE's rulemaking process. The process that DOE used, in this case, was a more collaborative negotiated rulemaking effort resulting in an agreement on recommended standard levels, which DOE is fully implementing in this direct final rule.

The most recent test procedure rulemaking included the following key rulemaking documents: The June 2016 test procedure final rule (81 FR 36992), the August 2016 test procedure SNOPR (81 FR 58164), and the November 2016 test procedure final rule (Docket No. EERE–2016–BT–TP–0029). This section does not address specific comments received on these test procedure documents, as those comments are addressed in the three notices listed. Rather, the main purpose of this section is to provide context for understanding the efficiency levels used in analyses for this direct final rule and the translated levels following the walkdown analysis. To reiterate, efficiency levels used throughout the analyses for this DFR are based on the test procedure in effect at the time of the CAC/HP Working Group negotiations, which did not include the changes outlined in this section. Standard levels set in this final rule have a compliance date simultaneous with the date that the test procedure as modified by the November 2016 test procedure final rule must be used to represent product efficiency. The translation of these standard levels based on the November 2016 test procedure final rule—which does include the changes outlined in this section—is presented in section V.C.1.

DOE initiated a test procedure rulemaking for central air conditioners and heat pumps in advance of the June 2011 DFR, publishing a NOPR on June 2, 2010 (June 2010 test procedure NOPR). 75 FR 31224. In this NOPR, DOE proposed adding calculations for the determination of sensible heat ratio, incorporating of a method to evaluate off mode power consumption, and also adding parameters for establishing regional measures of energy efficiency. *Id.*

DOE published a supplemental notice of proposed rulemaking (SNOPR) regarding the test procedure for central air conditioners and heat pumps on April 1, 2011. 76 FR 18105. In this SNOPR, DOE proposed to amend the testing requirements for off mode power consumption in response to the comments DOE received on the June 2010 test procedure NOPR. DOE also discussed issues related to low-voltage transformers used when testing coil-only units, and the use of a regional standard efficiency metric. *Id.*

DOE received further comments regarding the off mode testing requirement for central air conditioners and heat pumps after the publication of the April 2011 test procedure SNOPR. In response to these comments, DOE published a second SNOPR on October 24, 2011. 76 FR 65616. In the October 2011 test procedure SNOPR, DOE addressed comments only related to off mode testing for central air conditioners and heat pumps. *Id.*

DOE received comments on the October 2011 test procedure SNOPR, as well as comments relevant to the test procedure in response to the November 2014 RFI. In response to these comments, DOE published a third SNOPR on November 9, 2015. 80 FR 69278. DOE proposed the following in the November 2015 test procedure SNOPR:

- A new basic model definition as it pertains to central air conditioners and heat pumps and revised rating requirements;
- Revised alternative efficiency determination methods;
- Termination of active waivers and interim waivers;
- Revised procedures to determine off mode power consumption;
- Changes to the test procedure that would improve test repeatability and reduce test burden;
- Clarifications to ambiguous sections of the test procedure intended also to improve test repeatability;
- Inclusion of, amendments to, and withdrawals of test procedure revisions proposed in published test procedure notices in the rulemaking effort leading to this SNOPR; and
- Changes to the test procedure that would improve field representativeness.

Some of these proposals also included incorporation by reference of updated industry standards. *Id.*

On June 8, 2016, DOE published a final rule with amendments to the test procedure that did not change the measured energy efficiency of central air conditioners and heat pumps when compared to the test procedure previously in effect. 81 FR 36992. Broadly, amendments included revisions to:

- Definitions, testing, rating, and compliance of basic models;
- Requirements for Alternative Efficiency Determination Methods (AEDMs);
- Procedures for specific products that had been granted test procedure waivers (*e.g.,* multi-circuit products and triple-capacity northern heat pumps);
- Test methods and calculations for off mode power; and
- Specific procedures concerning test repeatability and test burden, including for example, setting fan speeds, determining the maximum speed for variable-speed compressors, charging refrigerant lines, and determining the coefficient of cyclic degradation (C_D), among others.

In the June 2016 test procedure final rule, DOE did not finalize several proposals of the November 2015 SNOPR that were intended to improve field representativeness, opting instead to revise these proposals and obtain further stakeholder input on them. DOE did this by publishing a SNOPR on August 24, 2016, which proposed amendments to the test procedure established by the June 2016 test procedure final rule. 81 FR 58164 DOE indicated that several of these amendments would change the measured energy efficiency of central air conditioners and heat pumps, while others would provide additional improvements for clarity and consistency. Amendments of the August 2016 SNOPR that would change measured efficiency were proposed for a new appendix M1 that would be required for representations coincident with the compliance date of the new efficiency standards These included proposals to:

- Increase minimum external static pressure requirements for most products, but limit the increase for certain products;
- For coil-only systems, introduce a new default fan power based on the new minimum external static pressure, and a unique, lower default fan power for manufactured home coil-only systems;
- Revise the heating load line slope factor and the heating load line zero-load temperature to better reflect field heating loads; and
- Revise certain aspects of the calculation procedures for calculating HSPF, including modified and clarified requirements regarding compressor speeds used for testing variable-speed heat pumps, and allowing use of a 5 °F test as an option for variable-speed heat pumps.

Other proposed changes to improve clarity and consistency, which DOE proposed as amendments to the current appendix M, as well as in sections of 10 CFR part 429, were to take effect 30 days after publication of the final rule. These included:

- Additional changes to definitions and compliance requirements;
- Extending the requirements for no-match testing to other kinds of outdoor units that are predominantly installed as

replacements where the indoor unit is not replaced;

• Revision to the off-mode test procedure for systems with self-regulating crankcase heaters.

• A revised calculation for variable-speed heat pumps for calculating maximum speed performance below 17 °F;

• A revised method for calculating EER and COP for all variable-speed units, when operating at an intermediate compressor speed;

• Modifications to the outdoor air enthalpy method;

• New restrictions on refrigerant pressure measurement system internal volume;

• A new limit on indoor coil surface area; and

• Clarifying amendments addressing break-in periods, multi-split system part load requirements, and cased coil installation requirements.

On November 30, 2016 DOE issued a test procedure final rule that adopted most of the amendments proposed in the August 2016 SNOPR, many of these with revisions addressing stakeholder comments. Changes in final implementation of the amendments as compared to the proposals of the August 2016 SNOPR included:

• No adoption of restrictions on indoor coil surface area;

• Delay in implementation of certain amendments, moving them to appendix M1, including the change to the off-mode test procedure and some of the provisions for testing of variable-speed heat pumps;

• Revisions to specific requirements for determining whether an outdoor unit must be tested using the no-match test procedure;

• For all secondary test methods (not just for the outdoor air enthalpy method as proposed), requiring a match to confirm primary capacity measurements only for certain tests, rather than for all tests;

• Modifications reducing the restrictions on refrigerant pressure system internal volumes;

• A change in the required external static pressure used for testing for one kind of product; and

• Extending optional use of a 5 °F test to single- and two-speed heat pumps in addition to variable-speed.

Note that, as discussed in section I, the analyses conducted to support this direct final rule were based on the test procedure at the time of the 2015–2016 ASRAC negotiations, per the request of the CAC/HP Working Group. Consequently, the efficiency ratings and levels referenced throughout this document are not impacted by the test procedure amendments described above for the November 2016 test procedure final rule. However, central air conditioners and heat pumps will be required to be certified to the efficiency levels selected in this direct final rule and based on the test procedure established by the November 2016 test procedure final rule. The selected efficiency levels—presented throughout this document in terms of the test procedure at the time of the 2015–2016 ASRAC negotiations—are translated to levels in terms of the November 2016 test procedure final rule following the walk down analysis in section V.C.1.

G. Technological Feasibility

1. General

In each energy conservation standards rulemaking, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of the rulemaking. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, design engineers, and other interested parties. (See chapter 3 of the direct final rule Technical Support Document (''TSD'') for a discussion of the list of technology options that DOE identified.) DOE then determines which of those efficiency-improving options are technologically feasible. DOE considers technologies incorporated in commercially-available products or in working prototypes to be technologically feasible. 10 CFR part 430, subpart C, appendix A, section 4(a)(4)(i).

Once DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) Practicability to manufacture, install, and service; (2) adverse impacts on product utility or availability; and (3) adverse impacts on health or safety. 10 CFR part 430, subpart C, appendix A, section 4(a)(4)(ii)–(iv). Additionally, it is DOE policy not to include in its analysis any proprietary technology that is a unique pathway to achieving a certain efficiency level. Section IV.B of this direct final rule discusses the results of the screening analysis for residential central air conditioners and heat pumps, particularly the designs DOE considered, those it screened out, and those that are the basis for the trial standard levels (TSLs) in this rulemaking. For further details on the screening analysis for this rulemaking, see chapter 4 of this direct final rule's TSD.

DOE notes that these screening criteria do not directly address the proprietary status of design options. As noted previously, DOE only considers efficiency levels achieved with the use of proprietary designs in the engineering analysis if they are not part of a unique path to achieve that efficiency level (*i.e.,* if there are other non-proprietary technologies capable of achieving the same efficiency). DOE believes the amended standards for the products covered in this rulemaking would not mandate the use of any proprietary technologies, and that all manufacturers would be able to achieve the amended levels through the use of non-proprietary designs. The efficiency levels considered in the analysis are all represented by commercially-available technologies that are available to all manufacturers.

2. Maximum Technologically Feasible Levels

When DOE proposes to adopt an amended standard for a type or class of covered product, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such a product. (42 U.S.C. 6295(p)(1)) Accordingly, in the engineering analysis, DOE determined the maximum technologically feasible (''max-tech'') improvements in energy efficiency for central air conditioners and heat pumps, using the design parameters for the most-efficient products available on the market or in working prototypes (see chapter 5 of the direct final rule TSD). The max-tech levels considered for the analysis represent commercially-available products. For most of the product classes, these max-tech products are listed in the AHRI Directory.[29] For the SDHV and space-constrained air conditioner classes, the max-tech levels are as reported in manufacturers' product literature.

The max-tech levels that DOE determined for this rulemaking are presented in Table III–1. Note that these max-tech levels are in terms of the efficiency metrics measured consistent with the test procedure at the time of the 2015–2016 ASRAC negotiations.

[29] AHRI is the trade association representing manufacturers of heating, ventilation, air conditioning and refrigeration (HVACR) and water heating equipment within the global industry. Products of different manufacturers are certified to AHRI and listed in the AHRI Directory at: *https://www.ahridirectory.org/ahridirectory/pages/home.aspx.* directory:*https://www.ahridirectory.org/ahridirectory/pages/home.aspx.*

The max-tech levels themselves are discussed in more detail in section IV.C of this direct final rule and in chapter 5 of the accompanying TSD.

TABLE III–1—MAX-TECH SEER AND CORRESPONDING EER AND HSPF LEVELS CONSIDERED IN THE CENTRAL AIR CONDITIONER AND HEAT PUMP ANALYSES

Product class	Representative cooling capacity (tons)	Max-tech efficiency levels	
		SEER *	HSPF *
Split-Systems			
Air Conditioners **	2	21.0	N/A
	3	21.0	
	5	20.0	
Heat Pumps	2	19.0	9.9
	3	19.0	9.9
	5	17.5	9.4
Single-Package Systems			
Air Conditioners	All	17.5	N/A
Heat Pumps	All	15.0	8.2
Small-Duct High-Velocity Air Conditioners	All	14.0	N/A
Space-Constrained Air Conditioners	All	14.0	N/A

* SEER and HSPF listed in the table are as measured using the test procedure proposed in the November 9, 2015 TP SNOPR. 80 FR 69278 EER is also measured by the test procedure, but as discussed in section IV.C.2, DOE did not analyze EER-based efficiency levels for this direct final rule.

** Max-Tech SEER levels are based on a blower-coil configuration.

H. Energy Savings

1. Determination of Savings

For each TSL, DOE projected energy savings from the application of the TSL to the central air conditioners and heat pumps that are the subject of this rulemaking purchased in the 30-year period that begins in the year of expected compliance with amended standards (2021–2050 or 2023–2052).[30] The savings are measured over the entire lifetime of central air conditioner and heat pump products purchased in the 30-year analysis period. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between each standards case and the no-new-standards case. The latter case represents a projection of energy consumption in the absence of amended energy conservation standards, and it considers market forces and policies that may affect future demand for more-efficient products.

DOE used its national impact analysis (NIA) spreadsheet model to estimate national energy savings (NES) from potential amended standards for central air conditioners and heat pumps. The NIA spreadsheet model (described in section IV.H of this direct final rule and chapter 10 of the TSD) calculates energy savings in terms of site energy, which is the energy directly consumed by products at the locations where they are used. For electricity, DOE calculates national energy savings on an annual basis in terms of primary (source) energy savings, which is the savings in the energy that is used to generate and transmit electricity to the site. To calculate primary energy savings from site electricity savings, DOE derives annual conversion factors from data provided in the Energy Information Administration's (EIA) most recent *Annual Energy Outlook* (*AEO*). For natural gas, the primary energy savings are considered to be equal to the site energy savings.

DOE also calculates NES in terms of full-fuel-cycle (FFC) energy savings. As discussed in DOE's statement of policy, the FCC metric includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and, thus, presents a more complete picture of the impacts of energy conservation standards. 76 FR 51282 (August 18, 2011), as amended at 77 FR 49701 (August 17, 2012). DOE's approach is based on the calculation of an FFC multiplier for each of the energy types used by covered products or equipment. For more information on FFC energy savings, see section IV.H.4.

2. Significance of Savings

To adopt any new or amended standards for a covered product, DOE must determine that such action would result in ''significant'' energy savings. (42 U.S.C. 6295(o)(3)(B)) Although the term ''significant'' is not defined in the Act, the U.S. Court of Appeals for the District of Columbia Circuit, in *Natural Resources Defense Council* v. *Herrington,* 768 F.2d 1355, 1373 (D.C. Cir. 1985), opined that Congress intended ''significant'' energy savings in the context of EPCA to be savings that are not ''genuinely trivial.'' The energy savings for all of the TSLs considered in this rulemaking, including the amended standards (presented in section V.B.3), are nontrivial, and, therefore, DOE considers them ''significant'' within the meaning of section 325 of EPCA.

I. Economic Justification

1. Specific Criteria

As discussed in section II.B., EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII)) The following sections discuss how DOE has addressed each of those seven factors in this rulemaking.

a. Economic Impact on Manufacturers and Consumers

In quantifying the impacts of a potential amended standard on manufacturers, DOE conducts a manufacturer impact analysis (MIA), as discussed in section IV.J, using an annual cash-flow approach to determine the quantitative impacts. This step includes both a short-term assessment—based on the cost and capital requirements during the period between when a regulation is issued and when entities must comply with the regulation—and a long-term assessment over a 30-year period. The industry-wide impacts analyzed include: (1) Industry net present value (INPV), which values the industry on the basis of expected future cash flows; (2) cash flows by year; (3) changes in revenue

[30] DOE also presents a sensitivity analysis that considers impacts for products shipped in a 9-year period.

and income; and (4) other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, including impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of various DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and payback period (PBP) associated with new or amended standards. These measures are discussed further in the following section. For consumers in the aggregate, DOE also calculates the national net present value of the consumer costs and benefits expected to result from particular standards. DOE also evaluates the LCC impacts of potential standards on identifiable subgroups of consumers that may be affected disproportionately by a national standard.

b. Savings in Operating Costs Compared To Increase in Price (LCC and PBP)

EPCA requires DOE to consider the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product that are likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(II)) DOE conducts this comparison in its LCC and PBP analyses.

The LCC is the sum of the purchase price of a product (including its installation) and the operating expense (including energy, maintenance, and repair expenditures) discounted over the lifetime of the product. The LCC analysis requires a variety of inputs, such as product prices, product energy consumption, energy prices, maintenance and repair costs, product lifetime, and consumer discount rates. To account for uncertainty and variability in specific inputs, such as product lifetime and discount rate, DOE uses a distribution of values, with probabilities attached to each value. For its LCC and PBP analysis, DOE assumes that consumers will purchase the covered products in the first year of compliance with amended standards.

The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost due to a more-stringent standard by the change in annual operating cost for the year that standards are assumed to take effect.

For its LCC and PBP analysis, DOE assumes that consumers will purchase the covered products in the first year of compliance with amended standards. The LCC savings for the considered efficiency levels are calculated relative to a case that reflects projected market trends in the absence of amended standards.

DOE's LCC and PBP analyses are discussed in further detail in section IV.F.

c. Energy Savings

Although significant conservation of energy is a separate statutory requirement for adopting an energy conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) As discussed in section IV.H, DOE uses the NIA spreadsheet to project national energy savings.

d. Lessening of Utility or Performance of Products

In establishing product classes and in evaluating design options and the impact of potential standard levels, DOE evaluates potential standards that would not lessen the utility or performance of the considered products. (42 U.S.C. 6295(o)(2)(B)(i)(IV)) Based on data available to DOE, the standards considered in this document would not reduce the utility or performance of the products under consideration in this rulemaking.

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from a proposed standard. (42 U.S.C. 6295(o)(2)(B)(i)(V)) It also directs the Attorney General to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6295(o)(2)(B)(ii)) DOE will transmit a copy of this direct final rule to the Attorney General with a request that the Department of Justice (DOJ) provide its determination on this issue. DOE will consider DOJ's comments on the rule in determining whether to proceed with the direct final rule. DOE will also publish and respond to the DOJ's comments in the **Federal Register** in a separate notice.

f. Need for National Energy Conservation

DOE also considers the need for national energy conservation in determining whether a new or amended standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(VI)) The energy savings from the amended standards are likely to provide improvements to the security and reliability of the nation's energy system. Reductions in the demand for electricity also may result in reduced costs for maintaining the reliability of the nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the Nation's needed power generation capacity, as discussed in section IV.M.

The amended standards also are likely to result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases (GHGs) associated with energy production and use. DOE conducts an emissions analysis to estimate how the amended standards may affect these emissions, as discussed in section IV.K the emissions impacts are reported in section V.5 of this document. DOE also estimates the economic value of emissions reductions resulting from the considered TSLs, as discussed in section IV.L.

g. Other Factors

EPCA allows the Secretary of Energy, in determining whether an energy conservation standard is economically justified, to consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) To the extent interested parties submit any relevant information regarding economic justification that does not fit into the other categories described above, DOE could consider such information under ''other factors.''

In developing the direct final rule, DOE has also considered the submission of the jointly-submitted Term Sheet from the CAC/HP Working Group, as approved by ASRAC. In DOE's view, the Term Sheet sets forth a statement by interested persons that are fairly representative of relevant points of view (including representatives of manufacturers of covered equipment, States, and efficiency advocates) and contains recommendations with respect to energy conservation standards that are in accordance with 42 U.S.C. 6295(o), as required by EPCA's direct

final rule provision. See 42 U.S.C. 6295(p)(4). DOE has encouraged the submission of agreements such as the one developed and submitted by the CAC/HP Working Group as a way to bring diverse stakeholders together, to develop an independent and probative analysis useful in DOE standard setting, and to expedite the rulemaking process. DOE also believes that standard levels recommended in the Term Sheet may increase the likelihood for regulatory compliance, while decreasing the risk of litigation.

2. Rebuttable Presumption

As set forth in 42 U.S.C. 6295(o)(2)(B)(iii), EPCA creates a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of a product that meets the standard is less than three times the value of the first full year's energy savings resulting from the standard, as calculated under the applicable DOE test procedure. DOE's LCC and PBP analyses generate values used to calculate the effects that potential energy conservation standards would have on the payback period for consumers. These analyses include, but are not limited to, the 3-year payback period contemplated under the rebuttable-presumption test. In addition, DOE routinely conducts an economic analysis that considers the full range of impacts to consumers, manufacturers, the Nation, and the environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE's evaluation of the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback calculation is discussed in section IV.F.3 of this document.

IV. Methodology

This section addresses the analyses DOE has performed for this rulemaking with regard to residential central air conditioners and heat pumps. Each subsection will address a component of DOE's analyses.

DOE used several analytical tools to estimate the impact of the amended standards. The first tool is a spreadsheet that calculates the LCC and PBP of amended energy conservation standards. The national impacts analysis (NIA) requires a second spreadsheet set that provides shipments forecasts and calculates national energy savings and net present value resulting from amended energy conservation standards. DOE used the third spreadsheet tool, the Government Regulatory Impact Model (GRIM), to assess manufacturer impacts of amended standards. These three spreadsheet tools are available on the DOE Web site.[31] Additionally, DOE used output from the latest version of EIA's *Annual Energy Outlook (AEO)* for the emissions and utility impact analyses.[32]

A. Market and Technology Assessment

In conducting a market and technology assessment, DOE develops information that provides an overall picture of the market for covered products. This overall picture includes the purpose of the products, the industry structure, manufacturers, market characteristics, and technologies used. DOE uses both quantitative and qualitative assessments, based primarily on publicly-available information. The market and technology assessment for this residential central air conditioning and heat pump rulemaking covers issues that include: (1) A determination of the scope of the rulemaking and product classes; (2) manufacturers and industry structure; (3) quantities and types of products sold and offered for sale; (4) retail market trends; (5) regulatory and non-regulatory programs; and (6) technologies or design options that could improve the energy efficiency of the product(s) under examination. The key findings of DOE's market assessment are summarized below. For additional detail, see chapter 3 of the DFR TSD.

1. Definition and Scope of Coverage

A residential central air conditioner or heat pump is an important component of a home's central heating and cooling system, providing cooled and/or heated air to the conditioned space, often through ductwork. Split-system air conditioners are comprised of an indoor unit, which contains the indoor coil and may contain the indoor fan (blower); and an outdoor unit, which contains the compressor, outdoor coil, and outdoor fan. The indoor unit either includes its own blower (''blower-coil unit'') or uses the furnace fan (''coil-only unit'') to circulate air over the indoor coil, transferring heat between the circulating air and the refrigerant. The cooled (or heated) air is then distributed via ductwork to the conditioned space. The compressor raises the refrigerant pressure, which raises its saturation temperature so that it is warm enough to transfer heat either to the ambient air (for cooling mode) or the indoor air (for heat-pump mode). Single-package systems contain all of these components in a single-package. A residential central heat pump utilizes the same components as a central air conditioner, but also includes a reversing valve and other components that allow it to reverse the functions of the indoor and outdoor coils, thus operating in heat pump mode.

EPCA defines a central air conditioner as a product, other than a packaged terminal air conditioner,[33] which is powered by single phase electric current, air cooled, rated below 65,000 Btu per hour, not contained within the same cabinet as a furnace, the rated capacity of which is above 225,000 Btu per hour, and is a heat pump or a cooling only unit. (42 U.S.C. 6291(21)) DOE has incorporated this definition in its regulations at 10 CFR 430.2.

EPCA defines a ''heat pump'' as a product, other than a packaged terminal heat pump,[34] which consists of one or more assemblies, powered by single phase electric current, rated below 65,000 Btu per hour, utilizing an indoor conditioning coil, compressor, and refrigerant-to-outdoor air heat exchanger to provide air heating, and may also provide air cooling, dehumidifying, humidifying circulating, and air cleaning. (42 U.S.C. 6291(24)) DOE has incorporated this definition into its regulations at 10 CFR 430.2. These products, also known as unitary air conditioners, do not include room air conditioners.[35]

In this DFR, DOE is amending energy conservation standards for the products covered by DOE's current standards for central air conditioners and heat pumps, specified at 10 CFR 430.32(c)(2), which DOE adopted in the June 2011 DFR.

[31] See: *http://www1.eere.energy.gov/buildings/appliance_standards/rulemaking.aspx?ruleid=104.*

[32] All three spreadsheet tools are available online at the rulemaking portion of DOE's Web site: *http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/72.*

[33] ''Packaged terminal air conditioner'' is defined in 10 CFR 430.2 as ''a wall sleeve and a separate unencased combination of heating and cooling assemblies specified by the builder and intended for mounting through the wall. It includes a prime source of refrigeration, separable outdoor louvers, forced ventilation, and heating availability energy.''

[34] ''Packaged terminal heat pump'' is defined in 10 CFR 430.2 as ''a packaged terminal air conditioner that utilizes reverse cycle refrigeration as its prime heat source and should have supplementary heating availability by builder's choice of energy.''

[35] ''Room air conditioner'' is defined in 10 CFR 430.2 as ''a consumer product, other than a 'packaged terminal air conditioner,' which is powered by a single phase electric current which is an encased assembly designed as a unit for mounting in a window or through the wall for the purpose of providing delivery of conditioned air to an enclosed space. It includes a prime source of refrigeration and may include a means for ventilating and heating.''

These products consist of: (1) Split-system air conditioners; (2) split-system heat pumps; (3) single package air conditioners; and (4) single package heat pumps.

DOE's current standards for central air conditioners are expressed as the minimum seasonal energy efficiency ratio (SEER), the minimum heating seasonal performance factor (HSPF) for heat pumps, and the maximum off-mode power ($P_{W, OFF}$). SEER is a seasonal efficiency metric that accounts for electricity consumption in active cooling and standby operating modes during the cooling season, while HSPF is a seasonal efficiency metric that accounts for active heating and standby operating modes for heat pumps during the heating season. For the Southwest region of the United States, (four states including Arizona, California, Nevada, and New Mexico) DOE's current standards also include additional requirements for energy efficiency ratio (EER) for both central air conditioners and heat pumps. 10 CFR 430.32(c).

2. Product Classes

When evaluating and establishing energy conservation standards, DOE divides covered products into product classes by the type of energy used, by capacity, or by another performance-related feature that justifies a different standard. In making a determination whether a performance-related feature justifies a different standard, DOE must consider factors such as the utility to the consumer of the feature. (42 U.S.C. 6295(q)). DOE has divided residential central air conditioners and heat pumps into seven product classes: [36]

- Split-system air conditioners
- Split-system heat pumps
- Single-package air conditioners
- Single-package heat pumps
- Small-duct high-velocity systems
- Space-constrained air conditioners
- Space-constrained heat pumps

In the November 2014 RFI, DOE requested feedback on whether it should consider any changes the existing product classes for central air conditioners and heat pumps. 79 FR 65603, 65605 (Nov. 5, 2014). In response, AHRI and Southern Co. commented that they supported retaining the listed product classes used in the previous rulemaking (*i.e.,* the June 2011 Final Rule). (AHRI, No. 13 at p. 3; Southern Co., No. 11 at p. 2) NEEA and NPCC suggested that DOE consider the possibility of a separate product class for variable capacity systems, given their potential increased cost effectiveness relative to fixed capacity systems. (NEEA & NPCC, No. 19 at p. 3) Rheem recommended that a product class be added for combined appliances which contribute to heat recovery for water heating. (Rheem, No. 17 at p. 2).

For this rulemaking, DOE has retained the product classes associated with the 2011 DFR that were listed in the November 2014 RFI. In response to NEEA & NPCC, DOE sees no need for the suggested change because variable capacity products have no difficulty meeting the current standards—or the standards set in this notice. In response to Rheem's comment, DOE has not found evidence that the capability for heat recovery for water heating reduces a product's ability to meet a given efficiency level, and Rheem's comment did not indicate that this is the case, nor did it explain why such product might have a different efficiency level when tested according to the DOE test procedure for central air conditioners and heat pumps (which does not include transfer of heat to water). Hence, DOE believes that the threshold for setting separate product classes for these products under EPCA is not met. 42 U.S.C. 4295(q)(B)

3. Technology Options

As part of the market and technology assessment performed for the November 2014 RFI and for this DFR, DOE developed a comprehensive list of technologies to improve the energy efficiency of central air conditioners and heat pumps. Chapter 3 of the DFR TSD contains a detailed description of each technology that DOE identified.

DOE received comments on the technology options proposed in the November 2014 RFI. ACEEE requested that DOE consider the addition of multi-stage systems to the list of design options. (ACEEE, No. 21 at p.3) Southern Co. also commented that it supported design options associated with variable speed operation because of humidity control considerations. (Southern Co., No. 19 at p. 2) NEEA and NPCC, as well as PG&E, suggested that DOE add a design options for the reduction of off and standby-mode energy use and for control systems. (NEEA & NPCC, No. 19 at p. 10; PG&E, No. 15 at p. 2) Rheem proposed that DOE add combined appliance technology to the list of design options. (Rheem, No. 17 at p. 3) On the other hand, AHRI commented that DOE should consider only design options that DOE included for central air conditioners in the June 2011 DFR. (AHRI, No. 13 at p. 3). ACEEE also suggested that DOE conduct a systematic evaluation of the energy savings potential of products used in the Southeast and Southwest, particularly the benefits of enhanced latent heat work to condition the air. (ACEEE, No. 21 at p. 3)

In response to the comments made by ACEEE and Southern Co., DOE has included both two-stage and variable speed compressors as design options. Regarding the addition of design options for reducing off and standby-mode energy use, DOE conducted a market and technology assessment (as described in section IV.A.3) and has found that the design options used in the June 2011 DFR are the same ones that are viable today. Additionally, DOE refers to discussions during the CAC/HP CAC/HP Working Group Negotiations, in which no objections were raised by stakeholders to the proposed design option list. (ASRAC Public Meeting, No. 88 at p. 188) Further discussion regarding the viability of the technology options is provided in chapter 4 of the TSD. Regarding the NEEA and NPPC comment regarding controls, there are many ways that controls might be employed to improve rated efficiency, but NEEA and NPPC's comment does not specify, nor could DOE infer from the comment, what type of control design option should be considered. DOE notes that it considered a comprehensive scope of technologies in its market and tech assessment, and is confident that its engineering analysis accounts for these controls. In response to Rheem, EPCA defines ''central air conditioner'' as a product that is air-cooled. (42 U.S.C. 6291(21)(B)) In contrast, combination appliances reject heat to water. Hence, water-heating operation of such appliances is not covered by DOE's regulations for central air conditioners and heat pumps. In response to ACEEE's comment about creating a design option for higher or lower latent capacity, any differential benefit for systems designed for a different latent capacity or different return air humidity would also not be captured in DOE's current or amended test procedures, and hence was not considered as part of the analysis to establish amended efficiency levels. Finally, in response to all of the comments suggesting specific design options, DOE conducted an efficiency-level-based engineering analysis based on existing product designs. While DOE has assembled a specific list of design options that reflect known design differences among these existing products, there are other design differences that affect the rated efficiencies used in the analysis that

[36] These product classes were last examined by the June 2011 DFR. 76 FR 37408, 37446 (June 27, 2011), prior to this current round of rulemaking.

represent design options, the use of which is probable but not certain. Some of these would likely be classified as ''controls'' design options, which would address the NEEA & NPPC comment.

These comments, as well as others, were addressed during the CAC/HP Working Group Negotiations. Based on the RFI comments and the 2015–2016 CAC/HP Working Group discussions, DOE constructed a list of technology options for consideration in the analysis for this direct final rule. Table IV–1 compiles this list.

TABLE IV–1 TECHNOLOGY OPTIONS

Component	Technology
Compressor	Higher-EER compressor.
	Two-stage compressor.
	Variable speed compressor.
Heat exchanger	Larger heat exchanger.
Fan Motor	Constant torque permanent-magnet motor.
	Constant air flow permanent-magnet motor.
Fan	Higher-efficiency fan blades, fan wheels, and fan configurations.
Expansion valve	Thermostatic expansion valve.
	Electronic expansion valve.
Controls	Heat pump defrost controls.

DOE expanded the ''higher efficiency compressor'' technology option to indicate that, in addition to consideration of compressors with higher energy efficiency ratio (EER, the compressor capacity divided by its power input at the compressor rating condition expressed in Btu/h-W), manufacturers can also consider use of two-capacity or variable-speed compressors. DOE limited the specific technology options for heat exchangers to only larger-size heat exchangers because most heat exchanger technology (*e.g.* round-tube/flat fin, microchannel, etc.) can be used either in baseline or higher-efficiency products. The list includes the two general types of higher-efficiency fan motors used in products. For fans, the revised list more generally indicates that efficiency improvements can be associated with the fan blades of outdoor fans, the fan wheels of indoor fans, and the general fan configuration, including all details of design that affect efficiency (*e.g.* overall size, inlet and outlet flow transitions, clearance gaps between rotating and stationary components, etc.) The revised list includes two specific examples of higher-efficiency expansion valves. The list does not separately include inverter technology, which would be captured as part of the variable-speed compressor and/or the constant-air-flow permanent magnet motor technology options.

B. Screening Analysis

After identifying potential technology options for improving the efficiency of residential central air conditioners and heat pumps, DOE performed the screening analysis (see section IV.B of this direct final rule or chapter 4 of the DFR TSD) on these technologies to determine which could be considered further in the analysis and which should be eliminated. DOE uses the following four screening criteria to determine which technology options are suitable for further consideration in an energy conservation standards rulemaking:

1. *Technological feasibility.* Technologies that are neither incorporated in commercial products nor in working prototypes will not be considered further.

2. *Practicability to manufacture, install, and service.* If DOE determines that mass production, reliable installation, and servicing of a technology in commercial products could not be achieved on the scale necessary to serve the relevant market at the time of the compliance date of the standard, then that technology will not be considered further.

3. *Impacts on product utility or product availability.* If DOE determines that a technology would have significant adverse impact on the utility of the product to significant subgroups of consumers or would result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, then that technology will not be considered further.

4. *Adverse impacts on health or safety.* If DOE determines that a technology would have significant adverse impacts on health or safety, then that technology will not be considered further. (10 CFR part 430, subpart C, appendix A, 4(a)(4) and 5(b))

If DOE determines that a technology, or a combination of technologies, fails to meet one or more of the above four criteria, it will be excluded from further consideration in the engineering analysis. DOE found that all of the identified technologies listed in Table IV–1 met all four screening criteria and consequently, are suitable for further examination in DOE's analysis. For off-mode technologies, DOE determined that there is no commercial application for the hermetic crankcase heater and the integral compressor motor heater in central air conditioners and heat pumps. Therefore, DOE screened out these two technologies. For additional details, please see chapter 4 of the direct final rule TSD.

C. Engineering Analysis

The engineering analysis establishes a relationship between energy efficiency and manufacturing production cost (MPC) for units that will be impacted by amended energy conservation standards. This relationship serves as the basis of cost-benefit analyses for individual consumers, manufacturers, and the Nation.

DOE began the engineering analysis by identifying energy efficiency levels to analyze. The current energy conservation standard served as the baseline efficiency level from which DOE analyzed possible energy efficiency improvements. In addition to the baseline, DOE identified higher efficiency levels that correspond to higher-efficiency products available on the market, including the most efficient, or max-tech, products. Using a variety of data sources, DOE estimated market-weighted MPCs at the baseline efficiency level and the market-weighted incremental MPC increases required to achieve each higher efficiency level, for each product class. Following the quantification of MPCs, DOE estimated the additional costs to residential consumers from markups by the manufacturers, distributors, and contractors. This information was then used in the downstream analyses to examine the costs and benefits associated with increased equipment efficiency.

For the August 2015 NODA, DOE used a top-down analysis approach in which an exponential curve-fit was applied to a database of MPC vs. efficiency values to generate a cost-efficiency relationship for each representative capacity in each product class. 80 FR 52206 (Aug. 28, 2015). DOE did not receive comments on the NODA specifically regarding the NODA engineering analysis methodologies and results. During the CAC/HP Working Group meetings, however, DOE's engineering analysis was discussed in detail. ASRAC Working Group members expressed concern that the approach used in the August 2015 NODA did not reflect critical aspects of the relationship between MPC and efficiency. Ingersoll Rand and Southern Company requested to see efficiency levels differentiated by single speed and two-speed products. (ASRAC Public Meeting, No. 40 at p. 232, 248)

Manufacturers generally agreed that certain efficiency levels could only be achieved by switching from single speed to two-stage compressor designs, which represented a considerable increase in MPC. The manufacturers believed this design path would result in a step function in the cost-efficiency relationship from the perspective of a given manufacturer, which was not reflected in the relationships used by DOE in the August 2015 NODA. (ASRAC Public Meeting, No. 40 at p. 248) AHRI presented its own cost-efficiency data to illustrate this step function at the October 14th CAC/HP Working Group meeting. AHRI's cost-efficiency data showed a $280 increase in manufacturing costs at 16 SEER associated with switching from a single speed to two-speed design for a three-ton system. AHRI was unable to share specific details about its methodology or the components included in the $280 cost difference because of confidentiality concerns. (ASRAC Public Meeting, No. 89 at p. 210)

In response, DOE agrees that switching from a single speed to two-speed design could result in a considerable increase in manufacturer production cost. DOE also understands that not all manufacturers choose to make this switch at the same point in the efficiency range. For example, one manufacturer may be able to achieve 15 SEER with a single speed design and need to switch to a two-stage design to achieve above 15 SEER, while other manufacturers may only be able to achieve 14.5 SEER with a single speed design, which would require them to switch to a two-stage design. DOE's NODA cost-efficiency relationships reflect the industry and therefore, represent multiple manufacturers. Step functions in single manufacturer's cost-efficiency relationship occurring at different points in the range of efficiency resulted in the smoother, continuous industry cost-efficiency curves that DOE used in the NODA. For these reasons, DOE does not believe its NODA cost-efficiency relationships are inappropriate, but does recognize that they may not perfectly represent the increase in cost associated with switching from single speed to two-stage designs in the range of efficiency in which manufacturers are making these design changes. In response to the CAC/HP working group discussions, DOE revised its engineering analysis to better reflect the impacts on manufacturer production cost of switching from a single speed to a two-stage design, which is reflected in this direct final rule. DOE's revised direct final rule engineering analysis is described in more detail in the subsequent paragraphs of this section.

Today's direct final rule engineering analysis is different from the August 2015 NODA analysis in five main ways. First, DOE analyzed single speed and two-stage split systems separately (*i.e.,* DOE developed MPC values at each efficiency level analyzed for single speed and two-stage systems independently). Once combined, this approach resulted in single cost-efficiency relationships that reflected the MPC step associated with switching from a single speed to two-stage design. The second key difference was that DOE analyzed individual manufacturer cost-efficiency relationships independently, then used marketshare information to generate a single marketshare-weighted cost-efficiency relationship. This approach better represented the effect of these cost-efficiency relationships on the total market and better accounted for differences between manufacturers in the design paths they use to achieve higher efficiency.

Third, DOE based the manufacturer-specific cost-efficiency relationships used in this direct final rule analysis on the least-cost units offered at each efficiency level, as opposed to all units offered at each efficiency level. DOE believes this approach results in cost-efficiency relationships that better reflect the design decisions manufacturers will make in response to new standards. The fourth key difference was that DOE analyzed coil-only and blower-coil systems separately for this direct final rule. This approach is aligned with the certification requirements finalized in the June 2016 CAC TP final rule, which require compliance for all indoor/outdoor unit combinations and also require certification of at least one coil-only combination for all single speed and two-stage outdoor units. 81 FR 36992 (June 8, 2016).

The final critical difference was that this engineering analysis was conducted based on efficiencies as measured according to the test procedure in place at the time of the CAC/HP Working Group meetings, the October 2007 CAC TP final rule. 72 FR 59906 (Oct. 22, 2007). Following downstream analyses, DOE translated the chosen efficiency levels to minimum standards based on measurement according to the November 2016 test procedure final rule, which is summarized in section III.F. DOE notes that the August 2015 NODA [37] efficiency levels were presented in terms of efficiency per test procedure amendments being proposed at the time of the August 2015 NODA analysis *(i.e.* using the October 2011 test procedure SNOPR (see section III.F)). 76 FR 65616 (October 24, 2011).

For a more detailed description of the methodology used to determine the efficiency levels and manufacturer production costs as well as the key similarities and differences from the August 2015 NODA, please refer to Chapter 5 of the DFR TSD.

1. Segmentation of Covered Products

For the purpose of the engineering analysis, DOE further divided product classes into many segments to capture important differences in the cost-efficiency relationships. As a primary example, DOE recognizes that the cost-efficiency relationship between central air conditioners and heat pumps varies by capacity. For this direct final rule analysis, DOE performed separate analyses for two-ton, three-ton and five-ton split system air conditioners and heat pumps in order to characterize the efficiency levels at different representative capacities. For single-package air conditioner and heat pump product classes, DOE developed a cost-efficiency relationship based on three-ton capacity units. For space-constrained and small-duct high-velocity (SDHV) air conditioners, DOE used systems in the two to two-and-a-half-ton capacity range.

As described in the introduction to this section, DOE further segmented each split-system air conditioner representative capacity into blower coil and coil-only systems. All split-system product classes were further divided into single speed and two-stage outdoor units.

Within each single-package representative capacity, DOE segmented products according to two heat exchanger types—all-aluminum with microchannel or tube-and-fin geometries or copper-tube aluminum fin heat exchangers. This followed the approach DOE had previously taken in the August 2015 NODA. 80 FR 52206. DOE has found that the reduced cost of aluminum per pound results in significantly different cost-efficiency relationships between products employing the two different heat exchanger types.

2. Determination of Efficiency Levels

This section describes the RFI comments received with regard to and the ultimate methodology adopted for

[37] More specifically, refer to Chapter 5 of the NODA Technical Support Document (copy and paste link into browser): *https://www.regulations.gov/document?D=EERE-2014-BT-STD-0048-0029.*

determining energy efficiency levels within each product class. The levels are tabulated along with the MPC results in section IV.C.4.

In response to the November 2014 RFI, ACEEE suggested that DOE consider technologically feasible and economically justifiable efficiency levels based on capacity. (ACEEE, No. 21 at p. 3) DOE has considered variation of efficiency level with capacity in its analysis for split systems, and has adopted some variation of standard levels with capacity, as recommended by the CAC/HP Working Group.

AHRI suggested DOE consider the impacts of the final rule for residential furnace fans on the baseline and max-tech levels for each product class. (AHRI, No. 13 at pp. 3–4) In response, DOE notes that it has developed default fan power levels for testing of coil-only systems, which reflect the improved efficiency of the furnaces likely to be used with the air conditioners considered in the analysis—the November 2016 test procedure final rule discusses this topic in greater detail. (November 2016 Test Procedure Final Rule, pp. 104, 105). These default fan power levels account for higher efficiency fan motors and increased external static pressure, and thus are higher than the previous default fan power used for testing of coil-only systems.

NEEA & NPCC agreed with the proposed baseline and max-tech levels. They did, however, urge DOE to consider ''high-tech'' design options for small duct high velocity (SDHV) systems. (NEEA & NPCC, No. 19 at p. 3) In response, DOE did evaluate ''high-tech'' design options for SDHV systems, but did not find increased efficiency levels for such systems to be cost-effective, based on review of efficiency levels attained by existing products.

Rheem commented that max-tech efficiency levels proposed for all product classes in the November 2014 RFI could not be economically justified within any climate zone in the US. Rheem also questioned the max-tech efficiency differential between split system CAC/HPs, SDHVs, and space constrained AC/HPs. (Rheem, No. 17 at p. 4) In response, DOE notes that its economic analysis is consistent with Rheem's assertion that max-tech efficiency levels are not economically justified, and has not set standard levels at max-tech efficiency. DOE notes that the max-tech efficiency differentials as reported in the RFI have been adjusted in this DFR analysis based on more a thorough review of available products.

PG&E recommended that DOE account for larger evaporator coil areas when evaluating max tech levels for small duct high velocity systems and space-constrained systems due to the special constraints and limited heat transfer associated with lower volumetric flow rates. (PG&E, No. 15 at p. 2). In response, DOE notes that its efficiency-level-based engineering analysis was based on existing product designs. DOE found that for the higher-efficiency products of these classes, evaporator coil areas were larger. However, as discussed, this analysis did not show that increasing the efficiency level of these products was cost-effective.

First, DOE characterized the baseline efficiency levels. Generally, the baseline unit in each product class: (1) Represents the basic characteristics of equipment in that class; (2) just meets the current Federal energy conservation standards, if any; and (3) provides basic consumer utility. For the covered product classes analyzed in this direct final rule, the baseline efficiency levels are represented by the standards that were set in the June 2011 Direct Final Rule and codified at 10 CFR 430.32(c). 76 FR 37408 (June 27, 2011). The baseline efficiency levels are reference points for each product class, against which changes in product cost and energy use resulting from potential amended energy conservation standards are compared.

Next, DOE established intermediate efficiency levels at 0.5 SEER increments increasing from each baseline efficiency level. DOE did not analyze intermediate efficiency levels for which there are few products available on the market. DOE also determined the maximum improvement in energy efficiency that is technologically feasible (max-tech) for central air conditioners and heat pumps, as required under 42 U.S.C. 6295(p)(1). DOE selected max-tech efficiency levels for most of the product classes equal to the highest efficiency levels reported in the AHRI Directory of Certified Product Performance. For space-constrained air conditioners, DOE selected the max-tech efficiency level based on the efficiency reported in product literature. The resulting efficiency levels for all product classes considered are tabulated with MPCs in section IV.C.4IV.C.4.

As discussed in section II.A, DOE also uses EER to characterize CAC/HP efficiency. During the CAC/HP Working Group meetings, some parties suggested dropping EER as a metric all together. These parties argued that the proposed SEER value would be high enough to ensure that the EER level would be at or above the current standard. They also stated that EER requirements are an additional burden and could discourage two-stage and variable speed product designs for which SEER and EER values have a higher divergence than single speed designs. Other parties were firm about keeping EER because it would mitigate peak load issues and improve the health of the utility grid. They added that EER can be a better descriptor than SEER for energy use in certain regions, such as the Southwest. (ASRAC Public Meeting, No. 81 at pp. 10–73; ASRAC Public Meeting, No. 82 at pp. 10–93; ASRAC Public Meeting, No. 83 at pp. 11, 22, 36, 39–42)

Eventually, the CAC/HP Working Group decided to retain the current minimum EER requirements for split-system air conditioners and single-package air conditioners in the Southwest region with a SEER less than 15.2 and a relaxed EER requirement for split-system air conditioners and single-package air conditioners in the Southwest region with a SEER greater than 15.2. (ASRAC Term Sheet, No. 76 at p. 4, Recommendation #8) The CAC/HP Working Group's decision was based on negotiation rather than any analysis to quantify the impacts of increasing EER along with SEER and/or HSPF or the lower EER level for systems with SEER of 16 or higher. Maintaining an EER requirement in the Southwest region aligns with the position of EER advocates, while not increasing the EER requirement and relaxing it for higher SEER products addresses the concerns of the parties that recommended eliminating the EER requirement. DOE did not explicitly analyze the impact of increasing EER on total installed cost, energy consumption, or life-cycle cost for this direct final rule. Consequently, DOE did not define EER-based efficiency levels.

To set the heating mode efficiency levels for residential heat pumps, DOE developed correlations for split-system and single-package heat pumps relating HSPF to SEER based on ratings in the AHRI Directory of Certified Product Performance. Using the correlations, DOE assigned an HSPF value to each SEER-based efficiency level. For split-system products, DOE based the correlations on pairings of outdoor units with indoor units designated in the AHRI Directory as the highest sales volume indoor units. DOE also conducted the split-system analysis for units with two-ton, three-ton and five-ton capacities. The analysis showed that the relationship between SEER and HSPF does not differ significantly across these capacities. Hence, DOE did not differentiate HSPF standards by capacity in this direct final rule. For single-package units, DOE used all the rated two-ton units to develop the

SEER–HSPF correlations. The development of these correlations is described in more detail in Chapter 5 of the TSD.

During the 2015 CAC/HP Negotiations, the CAC/HP Working Group recommended HSPF standards for both split-system and single package heat pumps—8.8 and 8.0 HSPF, respectively. (ASRAC Term Sheet, Docket No. EERE–2014–BT–STD–0048, No. 0076). For split-system heat pumps, the recommendation was higher than the 8.5 HSPF value determined at 15 SEER by DOE's HSPF/SEER correlation. DOE reviewed available data from the BOMs and specification sheets used for its analysis to assess whether this HSPF differential would impact costs. In this review, DOE looked beyond the least-cost units used for its primary analysis, evaluating costs for 15 SEER split-system heat pumps with HSPF between 8.3 and 9.0. The MPCs calculated for 15 SEER systems within this HSPF range show that the cost differential for the HSPF increase from 8.5 to 8.8 is negligible. Hence, DOE did not in its analysis make an adjustment in its MPCs to reflect this HSPF differential. For single-package heat pumps, the selected standard level, 8.0 HSPF, was only slightly higher than the correlated value, 7.9 HSPF. As for split systems, DOE did not make an adjustment in its MPC to reflect this differential. Section IV.E provides details on how DOE used HSPF levels to analyze the energy use of heat pumps.

3. Estimation of Manufacturer Production Costs

For this DFR analysis, DOE determined a marketshare-weighted MPC at each efficiency level for each representative capacity of each product class and, as described previously in section IV.C.1, separately for split-system air conditioner blower coil and coil-only units as well as single speed and two-stage systems.

To calculate MPCs, DOE first compiled a database of split-system air conditioner and heat pump indoor and outdoor units, single-package air-conditioners and heat pumps, space-constrained air conditioners, and SDHV air conditioners from a variety of manufacturers. For each product class and representative capacity, the database included indoor, outdoor and packaged units from multiple manufacturers that represented a majority of the market and that spanned the range of available efficiencies, to the best extent possible. For split systems, DOE analyzed all possible matches of indoor and outdoor units in its database that are listed in the AHRI Directory of Certified Performance. As such, DOE believes the database of units and systems to be representative of the market.

DOE then performed either a physical teardown or a catalog teardown on each unit in the database. A physical teardown involves reverse-engineering the unit in a laboratory. A catalog teardown involves analyzing manufacturer specification sheets and supplementary component data relative to data collected through a similar physical teardown or other catalog teardown to determine the major physical differences between a product that has been physically disassembled and another similar product for which catalog data are available. The objective of both approaches is to build a ''bottom-up'' manufacturing cost assessment based on a detailed bill of materials.

From the teardowns, DOE generated a bill of materials (BOM) for each unit in the database. The BOM lists all required components and manufacturing steps to describe the product manufacturing in detail. DOE then used the BOM data as inputs to develop a cost model that calculates the MPC for each unit based on its detailed BOM. For split-system air conditioners and heat pumps, DOE generated split-system MPCs by adding the MPC of indoor and outdoor units for matches listed in the AHRI Directory.

DOE then used the cost model outputs to generate marketshare-weighted cost-efficiency relationships for each representative capacity of each product class. The resulting cost-efficiency relationships were used in the downstream analyses and are presented in section IV.C.4.

For product classes other than split-systems—single-package, space-constrained, and small-duct high-velocity—the methodology for calculating MPCs at each efficiency level matched the methodology used in the August 2015 NODA analysis with updated material prices and based on efficiency levels defined by the DOE test procedure at the time of the CAC/HP Working Group Meetings. The results are also tabulated in section IV.C.4.

4. Tabulated Results

DOE's market-weighted cost-efficiency relationships for central air conditioners and heat pumps are shown in Table IV.3 through Table IV.15. DOE used these results as inputs for the LCC and payback period analyses.

TABLE IV–2—MANUFACTURER PRODUCTION COSTS FOR TWO-TON SPLIT-SYSTEM AC BLOWER COIL ($2015)

Efficiency level	SEER	MPC
0–Baseline	13.0	$690
1	13.5	695
2	14.0	714
3	14.5	726
4	15.0	744
5	15.5	762
6	16.0	797
7	16.5	863
8	17.0	1,144
9	17.5	1,171
10*	18.0	1,178
11	19.0	1,314
12	20.0	1,362
13	21.0	1,362

* Efficiency level at which designs are assumed to switch from single speed compressors to two-stage compressors for the remaining higher efficiency levels.

TABLE IV–3—MANUFACTURER PRODUCTION COSTS FOR THREE-TON SPLIT-SYSTEM AC BLOWER COIL

[$2015]

Efficiency level	SEER	MPC
0—Baseline	13.0	$788
1	13.5	815
2	14.0	822
3	14.5	855
4	15.0	887
5	15.5	925
6	16.0	927
7	16.5	1,048
8	17.0	1,310
9	17.5	1,356
10*	18.0	1,335
11	19.0	1,360
12	20.0	1,360
13	21.0	1,608

* Efficiency level at which designs are assumed to switch from single speed compressors to two-stage compressors for the remaining higher efficiency levels.

TABLE IV–4—MANUFACTURER PRODUCTION COSTS FOR FIVE-TON SPLIT-SYSTEM AC BLOWER COIL

[$2015]

Efficiency level	SEER	MPC
0—Baseline	13.0	$1,063
1	13.5	1,115
2	14.0	1,119
3	14.5	1,168
4	15.0	1,296
5	15.5	1,296
6	16.0	1,365
7*	16.5	1,459
8	17.0	1,459
9	17.5	1,581
10	18.0	1,631
11	19.0	1,744
12	20.0	1,879

* Efficiency level at which designs are assumed to switch from single speed compressors to two-stage compressors for the remaining higher efficiency levels.

TABLE IV–5—MANUFACTURER PRODUCTION COSTS FOR TWO-TON SPLIT-SYSTEM AC COIL-ONLY

[$2015]

Efficiency level	SEER	MPC
0—Baseline	13.0	$581
1	13.5	598
2	14.0	606
3	14.5	628
4	15.0	676
5	15.5	798
6	16.0	916
7*	16.5	1,149
8	17.0	1,153

* Efficiency level at which designs are assumed to switch from single speed compressors to two-stage compressors for the remaining higher efficiency levels.

TABLE IV–6—MANUFACTURER PRODUCTION COSTS FOR THREE-TON SPLIT-SYSTEM AC COIL-ONLY

[$2015]

Efficiency level	SEER	MPC
0—Baseline	13.0	$665
1	13.5	698
2	14.0	706
3	14.5	749
4	15.0	883
5*	15.5	1,048
6	16.0	1,145

TABLE IV–6—MANUFACTURER PRODUCTION COSTS FOR THREE-TON SPLIT-SYSTEM AC COIL-ONLY—Continued

[$2015]

Efficiency level	SEER	MPC
7	16.5	1,155

* Efficiency level at which designs are assumed to switch from single speed compressors to two-stage compressors for the remaining higher efficiency levels.

TABLE IV–7—MANUFACTURER PRODUCTION COSTS FOR FIVE-TON SPLIT-SYSTEM AC COIL-ONLY

[$2015]

Efficiency level	SEER	MPC
0—Baseline	13.0	$908
1	13.5	943
2	14.0	1,087
3	14.5	1,173
4	15.0	1,234
5	15.5	1,287
6*	16.0	1,352
7	16.5	1,423

* Efficiency level at which designs are assumed to switch from single speed compressors to two-stage compressors for the remaining higher efficiency levels.

TABLE IV–8—MANUFACTURER PRODUCTION COSTS FOR TWO-TON SPLIT-SYSTEM HP

[$2015]

Efficiency level	SEER	MPC
0—Baseline	14.0	$881
1	14.5	900
2	15.0	936
3	15.5	991
4	16.0	1,010
5	16.5	1,152
6	17.0	1,303
7	17.5	1,311
8*	18.0	1,353
9	18.5	1,353
10	19.0	1,418

* Efficiency level at which designs are assumed to switch from single speed compressors to two-stage compressors for the remaining higher efficiency levels.

TABLE IV–9—MANUFACTURER PRODUCTION COSTS FOR THREE-TON SPLIT-SYSTEM HP

[$2015]

Efficiency level	SEER	MPC
0—Baseline	14.0	$973
1	14.5	990
2	15.0	1,031
3	15.5	1,132
4	16.0	1,137
5	16.5	1,379
6*	17.0	1,421
7	17.5	1,438
8	18.0	1,459
9	18.5	1,520
10	19.0	1,541

* Efficiency level at which designs are assumed to switch from single speed compressors to two-stage compressors for the remaining higher efficiency levels.

TABLE IV–10—MANUFACTURER PRODUCTION COSTS FOR FIVE-TON SPLIT-SYSTEM HP

[$2015]

Efficiency level	SEER	MPC
0—Baseline	14.0	$1,256
1	14.5	1,324
2	15.0	1,359

TABLE IV–10—MANUFACTURER PRODUCTION COSTS FOR FIVE-TON SPLIT-SYSTEM HP—Continued

[$2015]

Efficiency level	SEER	MPC
3*	15.5	1,543
4	16.0	1,626
5	16.5	1,743
6	17.0	1,883
7	17.5	2,064

* Efficiency level at which designs are assumed to switch from single speed compressors to two-stage compressors for the remaining higher efficiency levels.

TABLE IV–11—MANUFACTURER PRODUCTION COSTS FOR THREE-TON SINGLE-PACKAGE AC

[$2015]

Efficiency level	SEER	MPC
0—Baseline	14.0	$1,050
1	14.5	1,088
2	15.0	1,128
3	15.5	1,169
4	16.0	1,212
5	17.0	1,302
6	17.5	1,350

TABLE IV–12—MANUFACTURER PRODUCTION COSTS FOR THREE-TON SINGLE-PACKAGE HP

[$2015]

Efficiency level	SEER	MPC
0—Baseline	14.0	$1,188
1	14.5	1,233
2	15.0	1,279

TABLE IV–13—MANUFACTURER PRODUCTION COSTS FOR SPACE-CONSTRAINED

[$2015]

Efficiency level	SEER	MPC
0—Baseline	12.0	$1,240
1	12.5	1,276
2	13.0	1,313
3	13.5	1,351
4	14.0	1,390

TABLE IV–14—MANUFACTURER PRODUCTION COSTS FOR SDHV

[$2015]

Efficiency level	SEER	MPC
0—Baseline	12.0	$1,334
1	12.5	1,442
2	13.0	1,558
3	13.5	1,683
4	14.0	1,819

DOE calculated the manufacturer selling price (MSP) for central air conditioners and heat pumps by multiplying the MPC at each efficiency level (determined from the cost model) by the manufacturer markup (to account for non-production costs and profit) and adding the product shipping costs at the given efficiency level. The MSP is the price at which the manufacturer can recover all production and non-production costs and earn a profit.

DOE estimated the manufacturer markup based on publicly available financial information for manufacturers of residential central air conditioners and heat pumps as well as comments from manufacturer interviews. DOE assumed the average manufacturer markup—which includes SG&A expenses, R&D expenses, interest expenses, and profit—to be 1.34 for split-system air conditioners, 1.35 for split-system heat pumps, and 1.32 for single-package air conditioners and single-package heat pumps. Further details on manufacturer markups can be found in section IV.J and in chapter 12 of the direct final rule TSD.

Manufacturers of HVAC products typically pay for the freight (shipping) to the first step in the distribution chain. Freight is not a manufacturing cost, but because it is a substantial cost incurred by the manufacturer, DOE accounts for shipping costs separately from other non-production costs that comprise the manufacturer markup. DOE calculated shipping costs at each efficiency level based on a typical 53-foot straight-frame trailer with a storage volume of roughly 4,000 cubic feet. See chapter 5 of the direct final rule TSD for more details about the methodology DOE used to determine the shipping costs.

D. Markups Analysis

DOE uses distribution channel markups and sales taxes (where appropriate) to convert the manufacturer selling cost estimates from the engineering analysis to consumer prices, which are then used in the LCC, PBP, and the manufacturer impact analyses. The markups are multipliers that are applied to the purchase cost at each stage in the distribution channel.

DOE characterized two distribution channels to describe how central air conditioners and heat pumps pass from manufacturers to residential consumers: replacement market and new construction. The replacement market channel is characterized as follows:

Manufacturer → Wholesaler → Mechanical contractor → Consumer

The new construction distribution channel is characterized as follows:

Manufacturer → Wholesaler → Mechanical contractor → General contractor → Consumer

To develop markups for the parties involved in the distribution of the product, DOE utilized several sources, including: (1) The Heating, Air-Conditioning & Refrigeration Distributors International (HARDI) 2013 Profit Report [38] (to develop wholesaler markups); (2) the Air Conditioning Contractors of America's (ACCA) 2005 financial analysis on the heating, ventilation, air-conditioning, and refrigeration (HVACR) contracting industry [39] (to develop mechanical contractor markups); and (3) U.S. Census Bureau 2007 Economic Census data [40] on the residential and commercial building construction industry (to develop general contractor markups).

For wholesalers and contractors, DOE developed baseline and incremental markups based on the product markups at each step in the distribution chain. The baseline markup relates the change in the manufacturer selling price of baseline models to the change in the consumer purchase price. The incremental markup relates the change in the manufacturer selling price of higher-efficiency models (the incremental cost increase) to the change in the consumer purchase price.

In addition to the markups, DOE derived state and local taxes from data provided by the Sales Tax Clearinghouse.[41] These data represent weighted average taxes that include county and city rates. DOE derived shipment-weighted average tax values for each region considered in the analysis.

Chapter 6 of the direct final rule TSD provides further detail on the estimation of markups.

E. Energy Use Analysis

The purpose of the energy use analysis is to assess the energy requirements of residential central air conditioners and heat pumps at different efficiencies in representative U.S. single-family homes and multi-family residences, and to assess the energy savings potential of increased product efficiency.

DOE estimated the annual energy consumption of central air conditioners and heat pumps at specified energy efficiency levels across a range of climate zones, building characteristics, and cooling applications. DOE's analysis estimated the energy use of central air conditioners and heat pumps in the field (*i.e.*, as they are actually used by consumers). In contrast to the DOE test procedure, which provides standardized results that can serve as the basis for comparing the performance of different appliances used under the same conditions, the energy use analysis seeks to capture the range of operating conditions for central air conditioners and heat pumps.

In its analysis of the recommended TSL, DOE applied a higher HSPF value to split-system heat pumps than indicated by the SEER and HSPF correlations discussed in section IV.C.2. The higher value, 8.8 HSPF, was recommended by the CAC/HP Working Group. At Efficiency Level 2, the recommended TSL for split-system heat pumps, the HSPF should be 8.5 rather than the recommended value of 8.8. Since increasing the HSPF increases the heating efficiency of the equipment, additional energy savings are realized.

As also noted in section IV.C.2, DOE did not analyze EER-based efficiency levels in the engineering analysis. DOE also did not analyze the impact of EER on energy consumption or on life-cycle cost.

In the November 2014 RFI, DOE requested comment on whether it should analyze the use of central air conditioners and heat pumps in commercial buildings in the residential central air conditioning rulemaking. AHRI and Southern Co. commented that they did not recommend considering commercially-used equipment because central air conditioners are not utilized significantly in commercial buildings. (AHRI, No. 13 at p. 4; Southern Co., No. 11 at p. 2) Rheem stated that commercial applications of residential equipment are less than 5 percent of the market, which would not be a significant enough percentage of the market to warrant special consideration of the application in the analysis for this rulemaking. (Rheem, No. 17 at p. 6)

As presented to the CAC/HP Working Group, DOE did not consider commercial-sector applications of residential central air conditioners and heat pumps because these represent a very small share of the overall market.[42] (ASRAC Public Meeting, No. 89 at pp. 7–14)

1. General Approach

To determine the field energy use of residential central air conditioners and heat pumps used in homes, DOE used a subset of 7,283 households using a central air conditioner or heat pump from the Energy Information Administration's (EIA) 2009 Residential Energy Consumption Survey (RECS 2009).[43] These households represent 60 percent of the weighted households in the U.S. The 153 RECS households that also had a room air conditioner, representing two percent of all weighted households with a central air conditioner, were not included. The RECS data provide information on the age of the home, the number of square

[38] Heating, Air Conditioning & Refrigeration Distributors International 2013 Profit Report, available at *http://www.hardinet.org/Profit-Report* (last accessed Aug. 19, 2014).

[39] Air Conditioning Contractors of America (ACCA), Financial Analysis for the HVACR Contracting Industry (2005), available at *http://www.acca.org/store/* (last accessed Aug. 19, 2014).

[40] U.S. Census Bureau, 2007 Economic Census Data, available at: *http://www.census.gov/econ/* (last accessed April 10, 2014).

[41] Sales Tax Clearinghouse Inc., State Sales Tax Rates Along with Combined Average City and County Rates (2014) available at *http://thestc.com/STrates.stm* (last accessed January, 2014).

[42] EIA's Commercial Building Energy Consumption Surveys from 1992, 1995, 1999, and 2003 indicate that the fraction of commercial buildings with a residential central air conditioner or heat pump unit ranges from 1.2 to 2.1 percent.

[43] U.S. Department of Energy: Energy Information Administration, Residential Energy Consumption Survey: 2009 RECS Survey Data (2013), available at: *http://www.eia.gov/consumption/residential/data/2009/* (last accessed July 6, 2016).

feet that are cooled, the age of its cooling equipment, and the 2009 cooling and heating energy use for each household. DOE used the household samples not only to determine annual central air conditioner or heat pump energy consumption, but also as the basis for conducting the LCC and PBP analysis. DOE projected household weights, building characteristics (such as thermal shell efficiency and square footage), and cooling degree days (CDD) in 2021, the first full year of compliance with any amended energy conservation standards for central air conditioners and heat pumps. To characterize new homes in 2021, DOE used a subset of homes that were built after 1994; these new homes represent 23 percent of the homes with central air conditioners, and 45 percent of the homes with heat pumps.

RECS does not provide information on the type of central air conditioner or heat pump, its capacity, or the number of units installed (in particularly hot or humid locations more than one central air conditioner/heat pump unit may be installed in a home). DOE assigned the number and capacity of central air conditioner/heat pump unit(s) based on the assumption of one ton of cooling capacity installed per 500 square feet of cooled floor space. For homes with more than one story and an estimated cooling capacity of between 3 and 5 tons, DOE assigned a 2-ton and a 3-ton unit, under the assumption that home owners installed a second unit to provide separate thermostatic control for each floor. For households with estimated cooling capacity between 5 and 8 tons, DOE assigned a 3-ton and a 5-ton unit, regardless of the number of stories. These assumptions resulted in a distribution of national central air conditioner/heat pump by capacity very similar to that of AHRI shipment data from 2007 to 2013 (30 percent 2-ton, 39 percent 3-ton, and 32 percent 5-ton). DOE's assignment method resulted in just over one-quarter of households having at least two central air conditioner/heat pump units installed, with one RECS household (representing 33,000 national households) assigned five 5-ton units.

For single-package central air conditioners and heat pumps, DOE only used RECS households with 3-ton and 5-ton units because single-package equipment is concentrated in these sizes. To analyze space-constrained central air conditioners, DOE only used RECS multi-family households with air conditioning because this equipment is targeted for multi-family applications. To analyze small-duct high-velocity air conditioners, DOE only used RECS single-family detached homes sized with cooling requirements of 3-tons because this equipment is targeted for single-family residences with moderate cooling requirements.

To estimate the annual energy consumption of central air conditioners and heat pumps meeting the considered efficiency levels, DOE first estimated the SEER of the existing equipment based on its age and the average SEER of new central air conditioner/heat pump shipments by year from AHRI data. For heat pumps, the HSPF of the existing equipment was based on the SEER–HSPF correlation developed in the Engineering Analysis and described in section IV.C.2.

For each sampled household, DOE adjusted the energy use estimated for 2009 to ''normal'' weather by using ten-year CDD and HDD data for each geographical region.[44] As 2009 was a relatively cool year, these adjustments increased CDD on average by eleven percent and decreased HDD on average by five percent. DOE also accounted for the change in climate based on *Annual Energy Outlook 2015* (*AEO 2015*) projections of CDD.[45] This adjustment results in the national average building cooling load increasing nine percent and the national average building heating decreasing five percent from 2014 to 2021.

DOE accounted for change in building shell characteristics and building size (square footage) between 2009 and 2021 by applying separate building shell indexes for existing and new homes in the National Energy Modeling System (NEMS) associated with *AEO 2015.* The indexes consider projected improvements in building thermal efficiency due to improvement in home insulation and other thermal efficiency practices, as well as projected increases in square footage of new homes. Application of the index results in three percent lower building cooling load for all homes, but one percent higher building cooling load for new homes, between 2009 and 2021.

For each sample housing unit, DOE estimated the cooling load, and heating load for heat pumps, in 2021 by multiplying the estimated cooling and heating energy use in 2021 by the SEER and HSPF of the existing central air conditioner or heat pump. The 2021 cooling and heating loads are then used to estimate the energy use from replacing the existing equipment with new central air conditioner or heat pump units conforming to higher efficiency levels.

Chapter 7 of the direct final rule TSD provides further detail on the general approach to the energy use analysis.

2. Split-System Central Air Conditioner: Blower-Coil to Coil-Only Efficiency Adjustment

As discussed in section III.A, DOE had intended to rate and certify split-system central air conditioners based on a blower-coil configuration. However, the CAC/HP Working Group recommended that DOE adopt an approach, similar to the current one, of rating and certifying split-system central air conditioners based on any configuration (*i.e.,* coil-only or blower-coil). (ASRAC Term Sheet, No. 76 at p. 4) As a result, the energy use analysis no longer had to address the field installation of split-system blower coil central air conditioners as coil-only units. In its analysis, DOE analyzed coil-only and blower coil split-system central air conditioners independently.

3. Split-System Central Air Conditioner: Coil-Only Efficiency Adjustment

Coil-only central air conditioner installations consist of the condensing unit and an evaporative coil. For rating purposes, a default fan power consumption is applied to determine the SEER. In the June 8, 2016 test procedure final rule, DOE designated the default fan power for the rating of coil-only central air conditioner split-systems to be 365 Watts per CFM, which is equivalent to a furnace fan using a permanent split capacitor (PSC) motor. Because the energy use analysis had to account for the actual furnace fan in the existing house to properly represent the rated SEER of the coil-only central air conditioner installation, DOE developed ''factory-to-field'' adjustment factors to convert the coil-only rated SEER to a coil-only ''field SEER''.

To develop such factors, DOE used a furnace fan-motor mix of 77-percent PSC, 9-percent constant torque brushless permanent magnet (CT–BPM), and 15-percent constant speed brushless permanent magnet (CS–BPM). The above furnace fan mix is based on data developed for DOE's furnace fan

[44] National Oceanic and Atmospheric Administration, NNDC Climate Data Online (2014), available at *http://www7.ncdc.noaa.gov/CDO/CDODivisionalSelect.jsp* (last accessed July 29, 2014).

[45] U.S. Department of Energy, Energy Information Administration, *Annual Energy Outlook 2015,* available at *http://www.eia.gov/forecasts/aeo/.* Projections of degree days are informed by a 30-year linear trend of each state's degree days, which are then population-weighted to the Census division level. In this way, the projection accounts for projected population migrations across the nation and continues any realized historical changes in degree days at the state level. The LCC and PBP analysis uses the climate projected for 2021 for all TSLs.

standards rulemaking, and characterizes furnace fan types in the housing stock in 2021 (the expected first full year of compliance with any amended central air conditioner efficiency standards). 79 FR 38129 (July 3, 2014). This furnace fan mix was used in the energy use analysis to specify the furnace fan types in the housing stock that use both a central air conditioner and a furnace to space-condition the home. The furnace fan mix was characterized as a custom probability distribution and each of the furnace fan types was probabilistically assigned to RECS households that utilized a central air conditioner and furnace.

After the assignment of the furnace fan type to the RECS household, the ''factory-to-field'' adjustment factor was applied to convert the rated SEER to a ''field SEER.'' The ''factory-to-field'' adjustment factors were developed as a function of the coil-only rated SEER; the central air conditioner cooling capacity; and the type of furnace fan in the existing household. For example, in the case of a 3-ton coil-only central air conditioner unit with a rated SEER of 15 utilizing a PSC indoor blower-motor, if the unit was installed as a coil-only unit into a household with a CT–BPM furnace fan, then the ''factory-to-field'' adjustment factor accounted for the reduction in fan power associated with utilizing a CT–BPM indoor blower-motor instead of a PSC furnace fan.

Table IV–15 shows the ''factory-to-field'' adjustment factors for converting coil-only rated SEER to a coil-only ''field SEER.'' Appendix 7E of the direct final rule TSD provides details on exactly how the ''factory-to-field'' adjustment factors were determined.

TABLE IV–15—''FACTORY-TO-FIELD'' ADJUSTMENT FACTORS TO CONVERT COIL-ONLY CENTRAL AIR CONDITIONER RATED SEER TO COIL-ONLY ''FIELD SEER''

Coil-only rated SEER	Capacity of central air conditioner and the furnace fan type in the existing household								
	2-ton			3-ton			5-ton		
	PSC (%)	CT–BPM (%)	CS–BPM (%)	PSC (%)	CT–BPM (%)	CS–BPM (%)	PSC (%)	CT–BPM (%)	CS–BPM (%)
13.0	0.0	6.9	7.3	0.0	3.5	4.8	0.0	1.8	5.0
13.5	0.0	7.1	7.5	0.0	3.7	5.0	0.0	1.8	5.2
14.0	0.0	7.3	7.8	0.0	3.8	5.2	0.0	1.9	5.3
14.5	0.0	7.6	8.0	0.0	3.9	5.3	0.0	1.9	5.5
15.0	0.0	7.8	8.3	0.0	4.0	5.5	0.0	2.0	5.7
15.5	0.0	8.0	8.5	0.0	4.1	5.6	0.0	2.1	5.8
16.0	0.0	8.3	8.8	0.0	4.2	5.8	0.0	2.1	6.0
16.5	0.0	8.7	9.3	0.0	4.5	6.1	0.0	2.2	6.3
17.0	0.0	9.0	9.5	0.0	4.6	6.3	0.0	2.3	6.5
18.0	0.0	9.2	9.8	0.0	4.7	6.4	0.0	2.3	6.7

4. Split-System Central Air Conditioner: Coil-Only Installations

In the August 2015 NODA, the analysis assumed that coil-only installations would consist of a new condensing unit and a new evaporative coil utilizing the blower of the furnace. Data presented to the CAC/HP Working Group by AHRI showed that there are far more shipments of condensing units than evaporative coils, indicating that new condensing units are not always paired with a new evaporative coil, and instead some installations use the existing evaporative coil. The AHRI data suggested that approximately 25 percent of installations use the existing evaporative coil. (ASRAC Public Meeting, No. 88 at pp. 175–214)

In the analysis for this DFR, DOE assumed that 25 percent of coil-only installations use the existing evaporative coil. Based on a characterization of the stock of evaporative coils, DOE assumed that 25 percent of the existing evaporative coils are from a system rated at 10 SEER (the efficiency standard effective in 1992) and 75 percent are from a system rated at 13 SEER (the efficiency standard effective in 2006). The analysis paired a new condensing unit at each considered efficiency level with an evaporative coil at either 10 or 13 SEER, so the system efficiency is less than would be the case with a new evaporative coil. DOE used an equipment simulation model, the DOE/Oak Ridge National Laboratory (ORNL) Heat Pump Design Model, Mark VI version,[46] along with a manufacturer's central air conditioner system specifications, to estimate the resulting system efficiency. Appendix 7G of the DFR TSD provides details of the analysis, which were also presented to the CAC/HP Working Group. (ASRAC Public Meeting, No. 84 at pp. 59–61) Because 25 percent of coil-only installations use the existing (lower-efficiency) evaporative coil, the overall average energy use of split-system central air conditioners is higher in the DFR analysis than in the August 2015 NODA. (ASRAC Public Meeting, No. 88 at pp. 175–214)

5. Fan Energy Use During Continuous Operation

The SEER and HSPF efficiency metrics account for fan energy use to provide space cooling and space heating, respectively. These metrics do not account for fan energy use in continuous operation.[47] As noted above in section IV.E.3, DOE published a final rule that established energy conservation standards for residential furnace fans. Products addressed in the final rule include furnace fans used in weatherized and non-weatherized gas furnaces, oil furnaces, electric furnaces, and modular blowers, which included capturing the energy use of these products in continuous operation. The rule does not cover furnace fans used in blower-coil indoor units of split-system central air conditioners and heat pumps of any type.[48] As noted above in section IV.E.3, coil-only split-system air conditioners are coupled with non-weatherized furnaces and, as a result, the continuous operation of the fan was already accounted for in the furnace fan final rule. The continuous operation of the fan for single-package air

[46] DOE/ORNL Heat Pump Design Model, Mark VI Version. *http://web.ornl.gov/~wlj/hpdm/MarkVI.shtml.*

[47] Continuous operation is used in homes that require mechanical ventilation because are infiltration is very low.

[48] Reference to Technical Support Document for Residential Furnace Fans Energy Conservation Standard, Chapter 3 Market and Technology Assessment: *http://www.regulations.gov/#!documentDetail;D=EERE-2010-BT-STD-0011-0111.*

conditioners was also already accounted for in the furnace fan final rule as these products are sold within a single package that includes a weatherized furnace. Therefore, DOE needed to account for fan energy use in continuous operation for the following product classes: Split-system central air conditioner product class in a blower coil configuration, split-system heat pumps, single-package heat pumps, and small duct high velocity air conditioners.

To accomplish the accounting of continuous fan operation, DOE relied on inputs from the rulemaking for furnace fans. Specifically, DOE used the wattage reduction from certain fan technologies, the hours of operation in continuous mode for households that use that mode, and the fraction of households that require such continuous operation.[49] The engineering analysis specifies the fan technologies that are associated with specific SEER and HSPF efficiency levels, allowing for calculation of the fan energy savings in continuous operation at each level for split-system and package heat pumps and split-system central air conditioners in a blower coil configuration. Further details are given in chapter 7 of the DFR TSD.

6. Other Issues

Higher-efficiency central air conditioners and heat pumps can reduce the operating costs for a consumer, which DOE understands could lead to greater use of the product. A direct rebound effect occurs when a piece of equipment that is made more efficient is used more intensively, such that the expected energy savings from the efficiency improvement may not fully materialize. In this DFR analysis, DOE examined a 2009 review of empirical estimates of the rebound effect for various energy-using products.[50] However, the review contained relatively few estimates of the direct rebound effect for household cooling. The two studies discussed in the review were old studies (from 1978 and 1981), conducted during a period of rising energy prices and using small sample sizes. One shows a short-run rebound effect of 4 percent,[51] while the other reported a wide range of 1–26 percent.[52] In the NOPR for residential furnaces, DOE chose to use a rebound effect of 15 percent, which is roughly in the center of the range reported for household cooling. 80 FR 13120, 13148 (May 12, 2015). For consistency, DOE used a rebound effect of 15 percent for central air conditioner and heat pump when counting energy savings in the NIA.

In its comments on the November 2014 RFI, NEEA and NPCC stated that DOE's proposed test procedure change for variable-speed units may have a significant impact on energy savings. (NEEA & NPCC, No. 19 at p. 10) As discussed in section III.F, DOE is amending the testing requirement for systems with a variable speed compressor. As noted in section III.F, however, the analyses conducted to support this direct final rule were based on the test procedure at the time of the CAC/HP Working Group negotiations, per the request of the CAC/HP Working Group.

Commenting on the RFI, AHRI urged DOE to evaluate the impact of changes in SEER and EER on cooling energy savings once the 2011 DFR standards are effective (in 2015). AHRI stated that DOE cannot determine whether additional improvements will save energy without evaluating whether the standards that have been adopted have actually resulted in the energy savings predicted in the 2011 DFR analysis. According to AHRI, if those savings are not in fact realized, DOE cannot have a basis for concluding that further changes will result in additional significant energy savings. (AHRI, No. 13 at p. 4)

In response, DOE expects that manufacturers will comply with the 2011 DFR standards and that the units sold at the rated SEER and EER levels will generally perform as expected. DOE's estimation of the energy use of standards-compliant units in representative use in U.S. homes was extensively reviewed in the 2011 DFR rulemaking, and it is reasonable to expect that the efficiency improvements required by the 2011 DFR will yield energy savings roughly in accord with DOE's projections.

F. Life-Cycle Cost and Payback Period Analysis

In determining whether an energy efficiency standard is economically justified, DOE considers the economic impact of potential standards on consumers. The effect of new or amended standards on individual consumers usually includes a reduction in operating cost and an increase in purchase cost. DOE used the following two metrics to measure consumer impacts:

- LCC (life-cycle cost) is the total consumer cost of an appliance or product, generally over the life of the appliance or product, including purchase and operating costs. The latter costs consist of maintenance, repair, and energy costs. Future operating costs are discounted to the time of purchase and summed over the lifetime of the appliance or product.
- PBP (payback period) measures the amount of time it takes consumers to recover the assumed higher purchase price of a more energy-efficient product through reduced operating costs.

For any given efficiency level, DOE measures the change in LCC relative to the efficiency levels estimated for the no-standards case, which reflects the market in the absence of amended energy conservation standards, including market trends for equipment that exceeds the current energy conservation standards.

DOE analyzed the net effect of potential amended central air conditioner and heat pump standards on consumers by calculating the LCC savings and PBP for each household by efficiency level. Inputs to the LCC calculation include the installed cost to the consumer (purchase price, including sales tax where appropriate, plus installation cost), operating costs (energy expenses, repair costs, and maintenance costs), the lifetime of the product, and a discount rate. Inputs to the payback period calculation include the installed cost to the consumer and first-year operating costs.

DOE performed the LCC and PBP analyses using a spreadsheet model combined with Crystal Ball[53] to account for uncertainty and variability among the input variables. Each Monte Carlo simulation consists of 10,000 LCC and PBP calculations using input values that are either sampled from probability

[49] Technical Support Document: Energy Efficiency Program for Consumer Products and Commercial and Industrial Equipment: Residential Furnace Fans. U.S. Department of Energy. Washington DC. June 2014. Chapter 7. *https://www.regulations.gov/#!documentDetail;D=EERE–2010–BT–STD–0011–0111.*

[50] S. Sorrell, J. Dimitropoulos, and M. Sommerville, 2009. Empirical Estimates of the Direct Rebound Effect: A Review. 37 *Energy Policy* 1356–71.

[51] Hausman, J.A., 1979. Individual discount rates and the purchase and utilization of energy-using durables. *Bell Journal of Economics* 10(1), 33–54.

[52] Dubin, J.A., Miedema, A.K., Chandran, R.V., 1986. Price effects of energy-efficient technologies—a study of residential demand for heating and cooling. *Rand Journal of Economics* 17(3), 310–25.

[53] Crystal Ball is a commercial software program developed by Oracle and used to conduct stochastic analysis using Monte Carlo simulation. A Monte Carlo simulation uses random sampling over many iterations of the simulation to obtain a probability distribution of results. Certain key inputs to the analysis are defined as probability distributions rather than single-point values.

distributions and household samples or characterized with single point values. The analytical results include a distribution of 10,000 data points showing the range of LCC savings for a given efficiency level relative to the no-standards case efficiency distribution. In performing an iteration of the Monte Carlo simulation for a given consumer, product efficiency is chosen based on its probability. If the chosen product efficiency is greater than or equal to the efficiency of the standard level under consideration, the LCC and PBP calculation reveals that a consumer is not impacted by the standard level. By accounting for consumers who already purchase more-efficient products, DOE avoids overstating the potential benefits from increasing product efficiency.

EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy (and, as applicable, water) savings during the first year that the consumer will receive as a result of the standard, as calculated under the test procedure in place for that standard. (42 U.S.C. 6295(o)(B)(ii)) For each considered efficiency level, DOE determines the value of the first year's energy savings by calculating the quantity of those savings in accordance with the applicable DOE test procedure, and multiplying that amount by the average energy price forecast for the year in which compliance with the amended standards would be required.

As discussed in section IV.E, DOE developed nationally-representative household samples from 2009 RECS. For each sampled building, DOE determined the energy consumption of the central air conditioner or heat pump and the appropriate energy prices in the area where the building is located.

DOE calculated the LCC and PBP for all central air conditioner or heat pump consumers as if the consumers were to purchase the product in the year that compliance with amended standards is required. Because the analysis was conducted when 2021 was the expected first year of compliance, it used that year for all the considered TSLs, including the Recommended TSL.

At the October 14, 2015 CAC/HP Working Group meeting, AHRI presented an LCC sensitivity analysis demonstrating the impact of several inputs, including manufacturer production costs, distribution channel markups, consumer discount rates, and expected time of ownership, on the LCC savings of more-efficient split system CACs and HPs. AHRI's analysis demonstrated that the LCC savings are highly sensitive to the above inputs. (ASRAC Public Meeting, No. 89 at pp. 225–239). Although AHRI did question the above inputs that DOE used in the LCC analysis, the purpose of their analysis was to demonstrate that the LCC savings were highly sensitive to changes in the inputs. As a result of AHRI's analysis, DOE requested feedback and made revisions to the above inputs based on member recommendations during subsequent CAC/HP Working Group meetings. The inputs to the LCC analysis which were the focus of AHRI's sensitivity analysis are described in sections above (manufacturer production costs and markups) or below (discount rates and product lifetime). In the case of the manufacturer production costs, DOE details how stakeholder recommendations were considered in the development of the costs. As a result of the Working Group's efforts to provide meaningful input and insights for all of the input into the LCC analysis, DOE believes the LCC results presented in section V.B.1 accurately represent the consumer impacts of the amended standards for CACs and HPs.

1. Inputs to Installed Cost

The primary inputs for establishing the total installed cost are the baseline consumer product price, standard-level consumer price increases, and installation costs (labor and material cost). Baseline consumer prices and standard-level consumer price increases were determined by applying markups to manufacturer selling price estimates, including sales tax where appropriate. The installation cost is added to the consumer price to produce a total installed cost.

a. Equipment Cost

The manufacturer selling price estimated in the engineering analysis refers to the current price. Economic literature and historical data suggest that the real prices of many products may trend downward over time according to ''learning'' or ''experience'' curves. Experience curve analysis focuses on entire industries and aggregates over many causal factors that may not be well characterized.[54] For example, experience curve analysis implicitly includes factors such as efficiencies in labor, capital investment, automation, materials prices, distribution, and economies of scale at an industry-wide level. An experience curve relates the product price to the cumulative production of the product. Using a given set of historical data, DOE derived an experience rate that expresses the percentage reduction in price for each doubling of cumulative production.

For the default price trend for residential central air conditioner and heat pump, DOE derived an experience rate based on an analysis of long-term historical data. As a proxy for manufacturer price, DOE used Producer Price Index (PPI) data for unitary air conditioners from the Bureau of Labor Statistics for 1978 through 2013.[55] An inflation-adjusted PPI was calculated using the GDP chained price deflators for the same years. To calculate an experience rate, DOE performed a least-squares power-law fit on the inflation-adjusted PPI versus cumulative shipments of residential central air conditioners and heat pumps, based on a corresponding series for historic shipments of these products (see section IV.G of this direct final rule for discussion of shipments data). A detailed discussion of DOE's derivation of the experience rate is provided in appendix 8–C of the direct final rule TSD.

DOE then derived a price factor index, with the price in 2013 equal to 1, to forecast prices in the compliance year for the LCC and PBP analysis, and, for the NIA, for each subsequent year in the 30-year shipments period. The index value in each year is a function of the experience rate and the cumulative production through that year. To derive the latter, DOE combined the historical shipments data with projected shipments from the NIA (see section IV.H of this notice).

As discussed, DOE determined the type, capacity and number of central air conditioner/heat pump units for each RECS household in order to assign the correct equipment price. For packaged systems, DOE only developed manufacturer costs for 3-ton systems, so it used these costs for all packaged systems to arrive at equipment prices.

As discussed, the energy use analysis had to address the field installation of coil-only installations use the existing evaporative coil. For these installations, the equipment price was based solely on the condensing unit.

[54] Margaret Taylor & K. Sydny Fujita, Accounting for Technological Change in Regulatory Impact Analyses: The Learning Curve Technique. (Lawrence Berkeley Nat'l Lab., 2013) available at: *http://eetd.lbl.gov/publications/accounting-for-technological-change-0.*

[55] U.S. Department of Labor, Bureau of Labor Statistics, Produce Price Indices Series ID PCU333415333415E, available at *http://www.bls.gov/ppi/* (last accessed July 28, 2014).

b. Installation Cost

Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the equipment.

DOE developed installation labor costs for different central air conditioner and heat pump capacities from *RSMeans Facilities Maintenance & Repair Cost Data 2015.* Based on input from the CAC/HP Working Group, two further actions were taken: The hourly wages were updated and overhead and profit were included using the information from RS Means. (ASRAC Public Meeting, No. 84 at pp. 76–80)

Commenting on the November 2014 RFI, AHRI stated that installation costs are generally scalable with equipment size and weight. (AHRI, No. 13 at p. 4) Southern Co. stated that installation cost scales with weight. (Southern Co., No. 11 at p. 2) In contrast, Rheem does not believe that installation costs scale with equipment weight. According to Rheem, DOE should analyze the installation costs as increasing with efficiency due to duct modifications that are required for larger indoor coils. (Rheem, No. 17 at p. 6)

DOE initially determined that the change in weight from the minimum efficiency unit to maximum efficiency unit is not large enough to require an increase in the number of people in the crew to move and position the unit—two people are sufficient.[56] The labor hours also do not change with the physical size of the unit. Regarding the need for duct modification, air flow volume does not change with efficiency, so duct size does not need to change for the same tonnage unit even if the indoor coil size is bigger. Based on the foregoing, the installation cost was initially estimated to remain the same across the considered efficiency levels. Based on input from the CAC/HP Working Group, however, DOE revised the installation cost for replacement installations to account for the installation of/thermostat wire as well as the increased thermostat costs for 2-speed compressors and indoor fan ECMs. (ASRAC Public Meeting, No. 84 at pp. 76–80) These cost adders were generally applied to units with energy efficiencies at about 16 SEER.

The CAC/HP Working Group requested that ACCA conduct a survey of its members to provide insight regarding the degree to which installation costs are higher for more-efficient equipment. ACAA conducted a survey and presented it to the CAC/HP Working Group. Based on the survey, ACCA concluded that DOE was not fully covering installation costs, including the costs of changing wiring and thermostats, checking ducting, and start-up costs to commission a higher efficiency product. (ASRAC Public Meeting, No. 85 at pp. 43–79) In response, DOE notes that the number of survey respondents was small (44 out of approximately 4,000 member contractors). Therefore, DOE chose to retain its estimates of installation costs.

Commenting on the November 2014 RFI, AHRI suggested that DOE include costs incurred by contractors and consumers associated with installation limitations such as local fire code access restrictions and indoor space constraints. (AHRI, No. 13 at p. 4) In response, DOE notes that it currently has space-constrained central air conditioner and space-constrained heat pump product classes specifically for products that may have installation limitations due to space constraints. Therefore, contractor and consumer costs due to space constraints were not considered for the other non-space-constrained product classes.

2. Inputs to Operating Costs

a. Energy Consumption

For each sample household, DOE determined the energy consumption for a central air conditioner or heat pump at different efficiency levels using the approach described above in section IV.E.

As discussed in section IV.E, DOE is taking into account the rebound effect associated with more-efficient residential central air conditioner and heat pump. The take-back in energy consumption associated with the rebound effect provides consumers with increased value (*e.g.,* enhanced comfort associated with a cooler or warmer indoor environment). The increased comfort has a cost that is equal to the monetary value of the higher energy use. DOE could reduce the energy cost savings to account for the rebound effect, but then it would have to add the value of increased comfort in order to conduct a proper economic analysis. The approach that DOE uses—not reducing the energy cost savings to account for the rebound effect and not adding the value of increased comfort—assumes that the value of increased comfort is equal to the monetary value of the higher energy use. Although DOE cannot measure the actual value of increased comfort to the consumers, the monetary value of the higher energy use represents a lower bound for this quantity.

b. Energy Prices

DOE used marginal and average prices which vary by season, region and household consumption level. DOE estimated these prices using data published with the Edison Electric Institute (EEI) Typical Bills and Average Rates reports for summer and winter 2014.[57] Each report provides, for most of the major investor-owned utilities (IOUs) in the country, the total bill assuming household consumption levels of 500, 750 and 1,000 kWh for the billing period. DOE defined an average price as the ratio of the total bill to the electricity consumption, and a marginal price as the ratio of the change in the bill to the change in energy consumption.

Regional weighted-average values for each type of price were calculated for the nine census divisions and four large States (CA, FL, NY and TX). Each EEI utility in a region was assigned a weight based on the number of residential consumers it serves. Consumer counts were taken from the most recent EIA Form 861 data.[58] DOE adjusted these regional weighted-average prices to account for systematic differences between IOUs and publicly-owned utilities (POUs), as the latter are not included in the EEI data set. For each region, DOE estimated a correction factor based on the ratio of the average electricity price for IOUs to the average price charged by POUs (calculated using EIA Form 861 data), and the percentage of consumers served by POUs.

DOE assigned seasonal average and marginal prices to each household in the LCC sample based on its location and its baseline monthly electricity consumption for an average summer or winter month. For a detailed discussion of the development of seasonal average and marginal energy prices, see appendix 8–F of the direct final rule TSD.

To estimate future prices, DOE used the projected annual changes in average residential electricity prices in the Reference case projection in *AEO 2015.*[59] The AEO price trends do not distinguish between marginal and average prices. DOE reviewed the EEI data for the years 2007 to 2014 and

[56] For example, a 5 ton air conditioner outdoor unit weight changes from 190 lb to 290 lb when efficiency changes from 13 SEER to 18 SEER (data from manufacturer published data).

[57] Edison Electric Institute. Typical Bills and Average Rates Report. Winter 2014 published April 2014, Summer 2014 published October 2014. See *http://www.eei.org/resourcesandmedia/products/Pages/Products.aspx.*

[58] See *http://www.eia.gov/electricity/data/eia861/*.

[59] U.S. Department of Energy, Energy Information Administration, *op.cit.*

determined that there is no systematic difference in the trends for marginal vs. average prices in the data, so DOE used the same *AEO 2015* trend for both.

c. Maintenance and Repair Costs

Maintenance costs are associated with maintaining the proper operation of the equipment, whereas repair costs are associated with repairing or replacing components that have failed.

The maintenance cost for an air conditioner or heat pump unit includes a preventative annual check done by HVAC professionals, and preventative maintenance performed by home owners such as filter changes.

Commenting on the November 2014 RFI, Rheem stated that more efficient products do not require additional maintenance. (Rheem, No. 17 at p. 7) Southern Co. stated that time and cost of routine maintenance should be higher for variable speed units. (Southern Co., No. 11 at p. 3)

DOE reviewed *RSMeans Facilities Maintenance & Repair Cost Data 2015* and determined that the maintenance cost does not change with equipment size and equipment efficiency, even for variable-speed products. Most variable-speed products have intelligent controls, which have certain diagnostic capabilities that would likely reduce the maintained cost of the unit. However, DOE decided not to estimate lower maintenance costs for variable-speed units to be more conservative. Therefore, DOE did not include maintenance costs in the LCC analysis as it would have no impact on the results.

DOE calculated the cost of repair by totaling the cost of replacing the major components in central air conditioner or heat pump that are expected to fail during the life of the equipment. Higher efficiency units have more expensive components, and the estimated repair costs are higher. The major components included in the analysis are the indoor coil, outdoor coil, indoor blower (except for coil-only unit), outdoor fan, indoor TXV, outdoor TXV (heat pump only), reversing valve (heat pump only), and controls. Compressor failures were not considered in the LCC and PBP analysis but, rather, were included in the shipments and national impact analyses. DOE assumed that compressor failure is the principal driver for a consumer to either replace or repair the unit (see section IV.G). For investors, which are often used in variable-speed compressors, manufacturers offer the same warranty term for inverters and compressors together, so DOE assumed inverters have approximately the same reliability as compressors.

DOE developed component failure rates from proprietary industry data. The associated material cost and labor costs were initially developed from *RSMeans Facilities Maintenance & Repair Cost Data 2015,* the 2014 furnace fan final rule TSD,[60] and component vendors. The development of repair costs considered a warranty period, as almost all manufacturers provide warranty coverage for their products. As a result, the costs associated with component repairs occurring during the warranty period were deducted from the total consumer repair cost. Because equipment of different capacities and efficiencies contain different components, repair costs were calculated as a function of efficiency and capacity. Because component failure rates are a function of equipment age, DOE determined failure rates and the associated repair costs during different periods of equipment age.

Commenting on the November 2014 RFI, AHRI stated that higher efficiency products have more complex and expensive components necessitating longer repair times by more experienced technicians, and repair costs are generally directly proportional with equipment price. (AHRI, No. 13 at p. 4–5) Rheem stated that with the exception of evaporator and condenser coils, repair costs vary with replacement component prices and not product price. Rheem noted that with more complex technologies to achieve higher efficiency, the number of components increases and the number of repairs per system is likely to increase. (Rheem, No. 17 at p. 7) Southern Co. stated that inverters tend to have shorter lives than compressors and evaporators, and costs for inverter replacements should be separately modeled. (Southern Co., No. 11 at p. 3)

The cost of replacing the major components in a central air conditioner or heat pump that are expected to fail during the life of the equipment and the component failure rates were presented to the CAC/HP Working Group. Based on input from the CAC/HP Working Group, DOE revised its estimates. (ASRAC Public Meeting, No. 84 at pp. 83–100) Failure rates and material costs were revised based on further discussion with industry experts. All components besides fan motors were marked up with a mechanical contractor markup. Fan motor costs were taken from Grainger.[61] The labor hours for the repair remained the same as what was initially developed but the hourly wages were updated to include overhead and profit based on RS Means. Refer to chapter 7 of the direct final rule TSD for more details on the development of the costs, labor hours, and failure rates.

d. Product Lifetime

Product lifetime is the age at which an appliance is retired from service. DOE estimated the lifetime of central air conditioners and heat pumps as part of the shipments analysis. The method that DOE used to develop lifetime estimates is described in section IV.G. DOE developed separate lifetime distributions for the three considered regions. Table IV–16 shows the average lifetimes.

TABLE IV–16—AVERAGE LIFETIME BY REGION

Product class group	National	North	Hot-humid	Hot-dry
Central Air Conditioners	21.2	24.1	18.0	24.9
Heat Pumps	15.3	16.4	15.1	15.4

e. Discount Rates

In the calculation of LCC, DOE applies discount rates to estimate the present value of future operating costs. The discount rate used in the LCC analysis represents the individual consumer's perspective.

To establish discount rates for residential consumers, DOE identified all relevant household debt or asset classes in order to approximate a consumer's opportunity cost of funds related to appliance operating cost savings. DOE's primary data source was the Federal Reserve Board's *Survey of*

[60] Available at: *http://www.regulations.gov/#!documentDetail;D=EERE-2010-BT-STD-0011-0111.*

[61] W.W. Grainger, Inc. See: *https://www.grainger.com/category/motors/ecatalog/N-bii?analytics=nav.*

Consumer Finances (SCF) for 1995, 1998, 2001, 2004, 2007, and 2010. DOE estimated separate discount rate distributions for six income groups, divided based on income percentile as reported in the SCF. DOE calculated a weighted average discount rate for each household in the SCF using the shares of each type of debt and equity of a household's total combined debt-plus-equity. The household-level discount rates were then aggregated to form discount rate distributions for each of the six income groups, representing the discount rates that may apply in the year in which amended standards would take effect. DOE assigned each sample household a specific discount rate drawn from the appropriate distribution. The average residential discount rate across all types of household debt and equity and income groups, weighted by the shares of each class, is 4.5 percent.

See chapter 8 in the direct final rule TSD for further details on the development of discount rates for the LCC analysis.

f. Product Efficiency in the No-New-Standards Case

To accurately estimate the share of consumers that would be affected by a standard at a particular efficiency level, DOE estimates the distribution of product efficiencies that consumers would purchase in the case without new or amended energy efficiency standards (referred to as the no-new-standards case) in the year compliance with the standard is required. DOE develops such an efficiency distribution for each of the considered product classes.

For the June 2011 DFR, AHRI provided historical shipment-weighted efficiency data by product class through 2009.[62] Absent any recent data, DOE had to make its own estimates of how the efficiency distributions determined for the June 2011 DFR were impacted by the amended standards that became effective in January, 2015 and, in turn, how the distributions would change further from 2015 to 2021, the assumed first full compliance year for any amended central air conditioner and heat pump standards. The estimated efficiency distributions were presented to the CAC/HP Working Group, which recommended that they be revised based on recent data from AHRI. (ASRAC Public Meeting, No. 89 at pp. 163–170)

AHRI submitted data on market share for 2015 by SEER for the three regions for split-systems.[63] DOE then projected the shipment-weighed SEER for 2021 using an efficiency growth rate equal to half of the rate in the 1993–2002 period. The years 1993 to 2002 were a time period when no new central air conditioner and heat pump standards became effective, and, therefore, the efficiency trend represented gains caused solely by non-regulatory market conditions. DOE chose to use half the growth rate observed during the historic period due to potential technological limits on further improving efficiency with single-speed design measures. DOE then allocated market shares to the efficiency levels being analyzed for this rule so that the resultant shipment-weighted SEER matched the value determined from the application of the estimated growth rate from 2015 to 2021.

For package systems, AHRI did not provide recent data on market share by SEER, so DOE retained the approach developed for the August 2015 NODA. First, DOE altered the efficiency distributions it developed for the June 2011 DFR by rolling-up the market shares for products between 13 and 13.99 SEER to 14 SEER, the new standard level effective in 2015. To estimate the efficiency distributions in 2021, DOE applied an efficiency growth rate that was half that observed from 1993 to 2002 to the shipment-weighted SEER estimated in 2015. After determining the shipment-weighed SEER in 2015, DOE then allocated market shares to the efficiency levels being analyzed for this rule so that the resultant shipment-weighted SEER matched the value determined from the application of the estimated growth rate from 2015 to 2021.

3. Inputs to Payback Period Analysis

The payback period is the amount of time it takes the consumer to recover the additional installed cost of more efficient products, compared to baseline products, through energy cost savings. The simple payback period does not account for changes in operating expense over time or the time value of money. Payback periods that exceed the life of the product mean that the increase in total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation are the total installed cost of the equipment to the customer for each efficiency level and the average annual operating expenditures for each efficiency level. The PBP calculation uses the same inputs as the LCC analysis, except that discount rates are not needed. The results of DOE's PBP analysis are presented in section V.B.1.

For the rebuttable presumption PBP, for each considered efficiency level, DOE determined the value of the first year's energy savings by calculating the quantity of those savings in accordance with the applicable DOE test procedure, and multiplying that amount by the average energy price forecast for the year in which compliance with the amended standard would be required.

G. Shipments Analysis

Shipments of covered equipment are a key input to estimates of the national energy savings under a proposed standard. The goal of the shipments model is to provide projections of the total number of units of shipped during the analysis period, and to estimate how those shipments may be affected by the equipment price and operating cost changes induced by a standard.

The shipments model is factored into two segments: Estimation of the total number of shipments of a given product type across all efficiencies available in the market, and distribution of these shipments over efficiency bins. Consumer decisions with respect to repairs and equipment switching only affect the total number of units shipped.

1. Model Structure

The shipments model produces separate projections for each of four equipment classes: Split and packaged central air conditioners (central air conditioners), and split and packaged heat pumps (heat pumps). To capture potential effects of regional standards, a separate shipments projection is calculated for each of the three regions considered in the analysis: North (N), hot-humid (HH) and hot-dry (HD). For each equipment class and each region the total shipments are divided into three market segments: (1) New shipments to new buildings, (2) new shipments to existing buildings, and (3) replacement shipments to existing buildings. Buildings are defined as single-family residences. More detail on the input data to the shipments model is provided in the next section.

[62] These data, along with model data from the Air- Conditioning, Heating, and Refrigeration (ACHR) News, were used to develop base-case efficiency distributions for 2008. DOE projected the central air conditioner and heat pump efficiency distributions to 2011 based on the average growth in shipment-weighted efficiency observed in the AHRI data from 2006 to 2009. DOE then took into account Federal tax credit programs designed to encourage purchase of higher-efficiency products to further adjust the distributions for the year 2016, the assumed compliance date of new standards that was used for the DFR analysis.

[63] AHRI also provided data indicating the market shares of split-system air conditioners in coil-only and blower coil configurations. These fractions (61% and 39%, respectively) were used to establish the shares of projected shipments in the shipments model.

The model is initialized in 1983 using historic shipments from 1953 to 1982 to define the initial distribution of stock by vintage. The model is run from 1983 to 2009, and compared with historical shipments, to calibrate the lifetime distribution parameters. The calibrated model is run from 1983 to 2021 to provide, for each region and product class, an estimate of the distribution of equipment stock by vintage in the start year of the analysis period. DOE's analysis of market saturation data shows slowly increasing heat pump saturations and slowly decreasing central air conditioner saturations, which lead to slight change in the market share of central air conditioners vs. heat pumps in the projections beyond 2021.

New shipments to new buildings are calculated as the product of new housing starts times the new construction market saturation. Shipments to new buildings comprise approximately 20 percent of total central air conditioner shipments and 29 percent of total heat pump shipments in 2021.

New shipments to existing buildings represent new purchases of the equipment by households that did not previously own it. The data show that the market for central air conditioners is essentially saturated, but market penetration is still growing for heat pumps. Shipments to this market segment (*i.e.,* homes that did not previously have a heat pump) comprise approximately 15 percent of total heat pump shipments.

Replacement shipments constitute the largest segment of total shipments. Replacements are determined by using a survival function to calculate the number of units in the stock that fail in each year. The survival function defines the probability that a unit will fail as a function of the unit's age. This analysis uses a Weibull survival function, adjusted to account for the difference in operating hours in the three analysis regions, as described below in section IV.G.2.

Shipments for each product class and market segment are calculated for the no-new-standards case and for each of the considered standard levels. The calculations proceed in three steps.

First, the total shipments across all regions and product classes are calculated for the no-new-standards case, which assumes that the future shipments are driven entirely by new construction, growth in market saturations, and replacements of failed units. This shipments projection is then used to estimate an product price trend using a price-learning approach.

In the second step, within each region and product class, the product distribution model is used to estimate the distribution of shipments across efficiency bins for each TSL. Relative market share is determined using a logit model, which defines the product utility as the sum of total installed cost plus discounted operating costs. The implicit discount rate and product price sensitivity are estimated from historic data as described in the next section. This estimation step uses the average total installed cost, efficiency and annual operating cost calculated for each efficiency level in the LCC. The operating cost depends on the annual operating hours and electricity price, both of which vary by region. The product price trend is applied to the product price, and the electricity price trend (taken from *AEO 2015*) is applied to the operating cost, to obtain time-dependent estimates of the relative market share for each equipment class and for each region.

In the third step, the total shipments are recalculated for each product class, region and TSL to determine the deviation from no-new-standards case shipments. This deviation is caused by the fact that, when the price of new products increases, some consumers will opt to repair rather than replace failed units. These ''excess repairs'' are numerically equal to the drop in shipments. The inputs to the estimation are the market-share weighted product price and annual operating cost for each product class and region, at each TSL. These are used to calculate a market-weighted average utility. The utility is defined as the purchase price plus the discounted operating cost over the lifetime of the product. The consumer discount rate for future operating costs was taken from the decision model used in the residential demand module of NEMS. This utility function is used to estimate the change in shipments, assuming that the percent change in shipments is equal to the percent change in utility times a price elasticity. DOE used a price elasticity equal to -0.34, which is an average value estimated from an analysis of available data for consumer purchases of household appliances (see appendix 9A). The change in shipments is only estimated for replacement shipments, as it is unlikely that shipments to new construction would be affected by the adopted standards. Repaired units are estimated to survive an additional number of years (extended lifetime), which is on average about half of the original lifetime, and then trigger a new replacement shipment.

Commenting on the November 2014 RFI, AHRI stated that there is evidence that the past rulemaking on residential central air conditioners and heat pumps (the 2006 standards) had a negative impact on shipments. It noted that the significant price increase of 13 SEER units (compared to 10 SEER) pushed consumers to find cheaper alternatives including repairing old equipment or switching to room air conditioners. (AHRI, No. 13 at p. 5) Rheem made a similar comment, and stated that currently homeowners are deciding to repair old inefficient air conditioners, and are also replacing central air conditioners with less efficient window air conditioners. (Rheem, No. 17 at pp. 1, 8) During the October 26, 2015 CAC/HP Working Group meeting, several parties expressed concern on how repairs were accounted for in the shipments model (ASRAC Public Meeting, No. 68 at pp. 82–103) One stakeholder mentioned that if DOE made the SEER requirements too high, the market for repairing would grow substantially and DOE needed to account for it. (ASRAC Public Meeting, No. 68 at p. 102)

DOE is aware that some consumers may respond to higher prices for central air conditioners and heat pumps by repairing the unit (compressor replacement) or, in the case of central air conditioners, by purchasing room air conditioners.[64] DOE did not have sufficient data to specifically estimate these practices, however, so it used a price elasticity approach to estimate the consumer responses to higher product prices. DOE assumes that demand in the new construction market is inelastic because the decision to install central air conditioner equipment is made by the builder rather than the consumer.

In response to the August 2015 NODA, the Edison Electric Institute (EEI) commissioned a nationwide builder survey, performed by the NAHB Home Innovation Research Labs, on the fuel and technology impacts of higher residential heat pump energy conservation standards. The survey asked installers to identify the price increase for a heat pump that would lead to switching to a other types of heating systems, including gas and oil furnaces and boilers, and identified the fractions of installations that would switch at different levels of price increase. (EEI, No. 33, NAHB Heat Pump Survey Final Tabulations July 2015) For the price increases associated with heat pumps that comply with the

[64] Purchase of room air conditioners would not be an effective substitute to a new heat pump since they would not provide heating.

adopted standards, the survey suggests that there would be some switching.

In response, DOE notes that since a heat pump provides space cooling and space heating, switching away from a heat pump would require a consumer to purchase and install a central air conditioner as well as another type of heating product. Therefore, a decision to switch would be influenced by the price differential between a heat pump and a combination of a central air conditioner and alternative heating system, not simply the price increase for a heat pump. Because DOE is adopting standards for central air conditioners that have a greater estimated price increase than the increase estimated for heat pumps, DOE reasons that consumers would not switch from heat pumps to a combination of a furnace and a central air conditioner.

2. Inputs and Method

The principal inputs to the shipments model are the projections of housing stock and housing starts, market saturations, price-learning parameters, equipment lifetime (survival function), and logit model parameters.

The American Housing Survey (AHS), conducted every two years, was used to determine the total housing stock and the saturation of central air conditioners and heat pumps, in both new and existing buildings, from 1983 to 2011.[65] The U.S. Census Bureau's Characteristics of New Housing (CNH) report, issued annually, provided the total households built and the amount of central air conditioners or heat pumps installed in newly constructed homes from 1983 to 2013.[66] Both AHS and CNH provide household and equipment saturation data by census region (north, midwest, south, west). DOE used the U.S. Housing Census, which provides the number of households by state, to determine the proportion of homes from each census region that should be allocated to the three regions considered in this analysis (N, HH, HD). Future household projections from *AEO 2015* were available by census division. DOE used average population growth data, by state and census division, from the U.S. Census Bureau to allocate the AEO data into the N, HH, HD regions. The price-learning parameter that DOE applied to future product costs was derived as described in section IV.F.1.

The calibration of the no-new-standards case shipments projection provides an estimate of the Weibull lifetime distribution parameters *s* (shape) and *T* (scale). These represent national average values. Within each region, the scale parameter is adjusted to reflect the differences in average annual operating hours. In general, for mechanical devices the equipment life is defined as the total lifetime operating hours. This can be converted to a service lifetime in years by dividing by the average annual operating hours. Equipment that is operated for fewer hours can therefore be expected to have a longer service lifetime. To account for this effect, DOE estimated the ratio of the average operating hours within each analysis region to the national average value. The estimate was based on a database of simulations of RECS 2009 households[67] that was calibrated to reproduce the same distribution of annual end-use energy consumption as the RECS. Population-weighted average annual operating hours for central air conditioners and heat pumps were calculated for each region, and for the nation as a whole. If equipment failure was perfectly correlated with lifetime operating hours, then the service lifetime would be adjusted proportionally to the operating hours; for example, if the operating hours in the north were half the national average, then the service lifetime in the north would be twice the national average. However, it is likely that some aspects of product failure depend on the actual equipment age. Hence, DOE assumed that half the time the product failure would be related to lifetime operating hours, and half the time it would be related to product age. This approach results in parameter adjustments that lead to average product service lifetime by region shown in Table IV–16.

The product service lifetimes for central air conditioners and heat pumps were presented to the CAC Working Group and were discussed in detail. Members expressed general concern about the long-tailed distribution for central air conditioner and heat pump lifetimes, given that the long lifetimes have a very low probability of occurrence. (ASRAC Public Meeting, No. 68 at pp. 85–103) In response, DOE notes that the Weibull lifetime parameters were estimated to produce a match to historical shipments from 1983 to 2009, which were the most recent data DOE could access. DOE could not find, nor did it receive any other shipments data, and thus DOE used the same Weibull parameters and product service lifetimes presented to the CAC/HP Working Group in the analysis for this DFR.

DOE used the total installed costs and annual operating cost of the products with different efficiency levels, combined with their respective market shares in the no-new-standards case in 2021, to calibrate the logit model parameters (alpha for total installed costs and beta for annual operating cost). These two parameters describe consumers' sensitivities to first costs and operating costs. These costs were then used to project consumer choices among efficiency levels in the analysis period.

DOE presented the results of its latest shipments analysis to the CAC/HP Working Group for discussion. (ASRAC Public Meeting, No. 68 at pp. 77–127) During the meetings, certain members of the CAC Working Group noted that DOE's projected shipments for split-system heat pumps were markedly higher than in the June 2011 DFR. (ASRAC Public Meeting, No. 84 at pp. 103–117) DOE reviewed the two sets of projections and determined that the primary driver for higher forecasted heat pump shipments in the most recent analysis versus the 2011 DFR analysis was the higher saturation of heat pumps in new construction shown in more recent data from the Census' Characteristics of New Housing. The latest data also show a corresponding drop in new construction saturation for central air conditioners. DOE found that, in addition, heat pump shipments were also higher due to the relatively shorter product lifetime in the hot-humid region, where much of the increase in new housing occurs.

For details on DOE's shipments analysis, see chapter 9 of the direct final rule TSD.

H. National Impact Analysis

The national impact analysis (NIA) assesses the national energy savings (NES) and the net present value (NPV) from a national perspective of total consumer costs and savings expected to result from new or amended energy conservation standards at specific efficiency levels. To make the analysis more accessible and transparent to all interested parties, DOE used a spreadsheet model to calculate the energy savings and the national consumer costs and savings from each TSL.[68] The NIA calculations were based

[65] *http://www.census.gov/programs-surveys/ahs.html.*

[66] *https://www.census.gov/construction/chars/.*

[67] Hopkins, A.S., Lekov, A., Lutz, J., Rosenquist, G. and Gu, L. (2011). Simulating a Nationally Representative Housing Sample Using EnergyPlus. LBNL–4420E. Berkeley, CA (US): Ernest Orlando Lawrence Berkeley National Laboratory.

[68] DOE's use of spreadsheet models provides interested parties with access to the models within a familiar context. In addition, the TSD and other documentation that DOE provides during the

on the annual energy consumption and total installed cost data from the energy use analysis and the LCC analysis. In the NIA, DOE forecasted the energy savings, energy cost savings and installed product costs for each product class over the lifetime of products sold from 2021 through 2050 or, for the Recommended TSL, from 2023 through 2052.

1. Efficiency Trends

A key component of the NIA is the trend in energy efficiency forecasted for the no-new-standards case and each of the standards cases. Section IV.F.2.f of this direct final rule describes how DOE developed an energy efficiency distribution for the no-new-standards case for each of the considered product classes for the expected first full year of compliance. To project the efficiency distribution over the 30-year shipments period, DOE used the product distribution model described in section IV.G. This model was calibrated based on product cost information and the efficiency distribution for 2021. The projected efficiency trends vary by product class and region, as illustrated in chapter 10 of the direct final rule TSD.

In the standards cases, the market share of products with efficiencies in the no-new-standards case that do not meet a potential amended standard level is allocated to the particular standard level, and the market shares of products at efficiencies above the standard level under consideration are projected using the consumer choice model. This approach provides a reasonable estimate of the potential energy savings in the standards cases by including consumers' sensitivities to total installed costs and annual operating costs, and accounting for equipment price trend and electricity price trend during the 30-year analysis period.

Details on how the consumer choice model was developed are in chapter 10 of the direct final rule TSD.

2. Product Cost Trend

As discussed in section IV.F.1, DOE used an experience curve method to project future product price trends. Application of the price index results in a decline of 22 percent in central air conditioner and heat pump prices (in real terms) from 2021 to 2050. In addition to the default trend described in section IV.F.1, which shows a modest rate of decline, DOE performed price trend sensitivity calculations in the NIA to examine the dependence of the analysis results on different analytical assumptions. The price trend sensitivity analysis considered a trend with a greater rate of decline than the default trend and a trend with constant prices. The derivation of these trends is described in appendix 10C of the direct final rule TSD.

3. Accounting for Repaired Units

As discussed in section IV.G.1, DOE introduced ''excess repairs'' in the standards cases, assuming that when the price of new equipment increases, some consumers will opt to repair rather than replace broken units. The repair is assumed to consist of replacement of the compressor. The repaired units are assumed to live an additional number of years (extended lifetime), which is on average about half of the original lifetime. For these ''excess repair'' units, the cost of the repair is a one-time replacement cost for the compressor that varies depending on the capacity of the unit. The annual energy use of the repaired units is calculated as the average energy use for all of the units that were installed in the same year as the repaired unit. More details on accounting for repaired units are described in chapter 10 of the direct final rule TSD.

4. National Energy Savings

To develop the NES, DOE calculated annual energy consumption for the no-new-standards case and the standards cases. DOE calculated the annual energy consumption for each case using the appropriate per-unit annual energy use data multiplied by the projected central air conditioner and heat pump shipments for each year. The per-unit annual energy use is adjusted with the building shell improvement index, which results in a decline of 12 percent in the cooling load from 2021 to 2050, and the climate index, which results in an increase of 6.6 percent in the cooling load. In the standards cases, there are fewer shipments of central air conditioners or heat pumps compared to the no-new-standards case because of repair rather than replacement.

As explained in section IV.E, DOE incorporated a rebound effect for central air conditioners and heat pumps by reducing the site energy savings in each year by 15 percent.

To estimate the national primary energy savings from amended central air conditioner and heat pump standards, DOE used a multiplicative factor to convert site electricity consumption (at the home) into primary energy consumption (the energy required to convert and deliver the site electricity). These conversion factors account for the energy used at power plants to generate electricity and energy losses during transmission and distribution. The factors vary over time due to changes in generation sources (*i.e.,* the power plant types projected to provide electricity to the country) projected in *AEO 2015.*[69] The factors that DOE developed are marginal values, which represent the response of the electricity sector to an incremental decrease in consumption associated with potential appliance standards.

In response to the recommendations of a committee on ''Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards'' appointed by the National Academy of Science, in 2011 DOE announced its intention to use full-fuel-cycle (FFC) measures of energy use and greenhouse gas and other emissions in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings. 76 FR 51281 (August 18, 2011). After evaluating the approaches discussed in the August 18, 2011 notice, DOE published a statement of amended policy in the **Federal Register** in which DOE explained that NEMS is the most appropriate tool for its FFC analysis and DOE intended to use NEMS for that purpose. 77 FR 49701 (August 17, 2012). The FFC factors incorporates losses in production and delivery in the case of natural gas (including fugitive emissions) and additional energy used to produce and deliver the various fuels used by power plants. The approach used is described in more detail in appendix 10A of the direct final rule TSD.

5. Net Present Value of Consumer Benefit

To develop the national NPV of consumer benefits from potential energy conservation standards, DOE calculated projected annual operating costs (energy costs and repair and maintenance costs) and annual installation costs for the no-new-standards case and the standards cases. DOE calculated annual product expenditures by multiplying the price per unit times the projected shipments in each year.

DOE calculated annual energy expenditures from annual energy consumption using forecasted energy prices in each year. In this direct final rule, DOE used the projected annual changes in national-average residential

rulemaking help explain the models and how to use them, and interested parties can review DOE's analyses by changing various input quantities within the spreadsheet.

[69] U.S. Department of Energy, Energy Information Administration, *op. cit.*

electricity prices in the Reference case projection in *AEO 2015*.[70]

The aggregate difference each year between operating cost savings and increased installation costs is the net savings or net costs. DOE multiplies the net savings in future years by a discount factor to determine their present value. DOE estimates the NPV of consumer benefits using both a 3-percent and a 7-percent real discount rate, in accordance with guidance provided by the Office of Management and Budget (OMB) to Federal agencies on the development of regulatory analysis.[71] The 7-percent real value is an estimate of the average before-tax rate of return to private capital in the U.S. economy. The 3-percent real value represents the ''societal rate of time preference,'' which is the rate at which society discounts future consumption flows to their present value. The discount rates for the determination of NPV differ from the discount rates used in the LCC analysis, which are designed to reflect a consumer's perspective.

As noted, in determining national energy savings, DOE is accounting for the rebound effect estimated for more-efficient central air conditioners and heat pumps.[72] Because consumers have foregone a monetary savings in energy expenses, it is reasonable to conclude that the value of the increased utility is equivalent to the monetary value of the energy savings that would have occurred without the rebound effect. Therefore, the economic impacts on consumers with or without the rebound effect, as measured in the NPV, are the same.

I. Consumer Subgroup Analysis

In analyzing the potential impacts of new or amended standards on consumers, DOE evaluated the impacts on two identifiable subgroups of consumers, low-income consumers and senior citizens, that may be disproportionately affected by amended standards. DOE analyzed the LCC impacts and PBP for those particular consumers from alternative standard levels using subsets of the RECS 2009 sample comprised of households that meet the criteria for the two subgroups for both central air conditioners and heat pumps, along with the appropriate inputs for these groups.

Chapter 11 of the direct final rule TSD describes the consumer subgroup analysis and its results.

J. Manufacturer Impact Analysis

1. Overview

DOE performed a Manufacturer Impact Analysis (MIA) to estimate the impacts of an energy conservation standard on manufacturers. The MIA has both quantitative and qualitative aspects. The quantitative part of the MIA primarily relies on the Government Regulatory Impact Model (GRIM), an industry cash-flow model with inputs specific to this rulemaking. The key GRIM inputs are data on the industry cost structure, manufacturer productions costs, shipments, and assumptions about markups and conversion expenditures. The key output is the industry net present value (INPV). DOE uses the GRIM to calculate cash flows using standard accounting principles and to compare changes in INPV between a scenario in which there is no new standard (the no-new-standards case) and each TSL (the standards case). The difference in INPV between the no-new-standards case and a standards case represents the financial impact of energy conservation standards on central air conditioner and heat pump manufacturers. DOE uses different sets of assumptions (markup scenarios) to represent the uncertainty surrounding potential impacts on prices and manufacturer profitability as a result of standards. Different sets of assumptions produce a range of INPV results. The qualitative part of the MIA addresses the amended standard's potential impacts on manufacturing capacity and industry competition, as well as factors such as product characteristics, impacts on particular subgroups of firms, and important market and product trends.

The MIA for central air conditioners and heat pumps in this direct final rule focuses on split-system air conditioners, split-system heat pumps, single-package air conditioners, and single-package heat pumps. Since this rule does not propose to amend standards for space-constrained air conditioners, space-constrained heat pumps, or small-duct high-velocity systems, these products were not evaluated. The complete MIA is outlined in chapter 12 of the direct final rule TSD.

DOE conducted the MIA for this rulemaking in three phases. In Phase 1 of the MIA, DOE prepared a profile of the residential central air conditioner and heat pump industry. This industry characterization was developed using publicly available information, such as Securities and Exchange Commission (SEC) 10–K reports,[73] market research tools (*e.g.,* Hoovers [74]), corporate annual reports, the U.S. Census Bureau's 2014 Annual Survey of Manufacturers (ASM),[75] and industry trade association membership directories (*e.g.,* AHRI), as well as information obtained through DOE's engineering analysis, life-cycle cost analysis, and market and technology assessment prepared for this rulemaking.

In Phase 2 of the MIA, DOE prepared an industry cash-flow analysis to quantify the potential impacts of amended energy conservation standards on manufacturers. In general, energy conservation standards can affect manufacturer cash flow in three distinct ways: (1) Create a need for increased investment; (2) raise production costs per unit; and (3) alter revenue due to higher per-unit prices and/or possible changes in sales volumes. To quantify these impacts, DOE used the GRIM to perform a cash-flow analysis for the industry using financial values derived during Phase 1 and the shipment scenario used in the NIA.

DOE also conducted interviews with manufacturers. During these interviews, DOE discussed engineering, manufacturing, procurement, and financial topics to validate assumptions used in the GRIM and to identify key issues or concerns. These topics were discussed again during the course of CAC/HP Working Group meetings, which enabled DOE to further refine inputs to the MIA, including MPCs and shipments forecasts.

In Phase 3, DOE evaluated subgroups of manufacturers that may be disproportionately impacted by energy conservation standards or that may not be represented accurately by the average cost assumptions used to develop the industry cash-flow analysis. For example, small manufacturers, niche players, or manufacturers exhibiting a cost structure that largely differs from the industry average could be more negatively affected. DOE identified one subgroup for a separate impact analysis: Small business manufacturers. The small business subgroup is discussed in section VI.B, ''Review under the Regulatory Flexibility Act,'' and in chapter 12 of the direct final rule TSD.

[70] U.S. Department of Energy, Energy Information Administration, *op.cit.*

[71] Office of Management and Budget, OMB Circular A–4, section E, Identifying and Measuring Benefits and Costs (2003), *available at http://www.whitehouse.gov/omb/memoranda/m03-21.html.*

[72] As discussed in section IV.F, the rebound effect provides consumers with increased utility (*e.g.,* a more comfortable indoor environment).

[73] U.S. Securities and Exchange Commission, Annual 10–K Reports (Various Years) (Available at: *www.sec.gov*).

[74] Hoovers Inc., Company Profiles, Various Companies (Available at: *www.hoovers.com/*).

[75] U.S. Census Bureau, Annual Survey of Manufacturers: General Statistics: Statistics for Industry Groups and Industries (2014) (Available at: *http://www.census.gov/manufacturing/asm/index.html*).

2. Government Regulatory Impact Model

DOE uses the GRIM in its standards rulemakings to quantify the changes in cash flow due to amended standards that result in a higher or lower industry value. The GRIM uses a standard, annual discounted cash-flow analysis that incorporates manufacturer costs, markups, shipments, and industry financial information as inputs. The GRIM models changes in costs, distribution of shipments, investments, and manufacturer margins that could result from an amended energy conservation standard. The GRIM spreadsheet uses the inputs to arrive at a series of annual cash flows, beginning in 2016 (the base year of the analysis) and continuing to 2050.[76] DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. For manufacturers of residential central air conditioners and heat pumps, DOE used a real discount rate of 11.0 percent,[77] which was derived from industry financials and then modified according to feedback received during manufacturer interviews.

The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between the no-new-standards case and each standards case. The difference in INPV between the no-new-standards case and a standards case represents the financial impact of the amended energy conservation standard on manufacturers. As discussed previously, DOE developed critical GRIM inputs using a number of sources, including publicly available data, results of the engineering analysis, and information gathered from industry stakeholders during the course of manufacturer interviews and subsequent CAC/HP Working Group meetings. The GRIM results are presented in section V.B.2. Additional details about the GRIM, the discount rate, and other financial parameters can be found in chapter 12 of the direct final rule TSD.

a. Government Regulatory Impact Model Key Inputs

Manufacturer Production Costs

Manufacturing more efficient equipment is typically more expensive than manufacturing baseline equipment due to the use of more complex components, which are typically more costly than baseline components. The changes in the manufacturer production costs (MPCs) of covered products can affect the revenues, gross margins, and cash flow of the industry.

In the MIA, DOE used the MPCs for each considered efficiency level calculated in the engineering analysis, as described in section IV.C and further detailed in chapter 5 of the direct final rule TSD. The engineering analysis developed multiple MPCs for split-system air conditioners based on representative capacities (*i.e.,* 2-ton, 3-ton, and 5-ton) and configurations (*i.e.,* blower-coil versus coil only). Similarly, MPCs for split-system heat pumps were broken out by representative capacities. In addition, DOE used information from the engineering teardown analysis to disaggregate MPCs into material, labor, overhead, and depreciation costs. Both MPCs and cost breakdowns were validated and revised with manufacturers during manufacturer interviews. The MPCs used in the GRIM are presented in chapter 12 of the direct final rule TSD along with the methodology used to develop weighted average MPCs for split-system air conditioners using blower-coil and coil only shipment weights.

Shipments Forecasts

The GRIM estimates manufacturer revenues based on total unit shipment forecasts and the distribution of those shipments by efficiency level. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer finances. For this analysis, the GRIM uses the NIA's annual shipment forecasts derived from the shipments analysis from 2016 (the base year) to 2050 (the end year of the analysis period). See chapter 9 of the direct final rule TSD for additional details.

Product and Capital Conversion Costs

An amended energy conservation standard would cause manufacturers to incur conversion costs to bring their production facilities and equipment designs into compliance. DOE evaluated the level of conversion-related expenditures that would be needed to comply with each considered efficiency level in each product class. For the MIA, DOE classified these conversion costs into two major groups: (1) Product conversion costs; and (2) capital conversion costs. Product conversion costs are investments in research, development, testing, marketing, and other non-capitalized costs necessary to make product designs comply with amended energy conservation standards. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new compliant product designs can be fabricated and assembled.

To evaluate the level of capital conversion expenditures manufacturers would likely incur to comply with amended energy conservation standards, DOE used manufacturer interviews to request feedback on the anticipated level of capital investment that would be required at each efficiency level. However, DOE received very limited feedback on likely capital investments from manufacturers. As a result, DOE developed conversion cost estimates based on estimates of capital expenditure requirements derived from the product teardown analysis and engineering analysis described in chapter 5 of the DFR TSD.

To evaluate the level of product conversion costs manufacturers would likely incur to comply with amended energy conservation standards, DOE integrated data from quantitative and qualitative sources. As with capital conversion costs, DOE requested feedback from manufacturers regarding potential product conversion costs. Based on feedback received, DOE applied a scaling factor to estimate product conversion costs based on the magnitude of capital conversion costs. DOE estimated that product conversion costs account for 40 percent of total conversion costs.

In general, DOE assumes that all conversion-related investments occur between the year of publication of the final rule and the year by which manufacturers must comply with the new standard. The conversion cost figures used in the GRIM can be found in section V.B.2 of this notice. For additional information on the estimated capital and product conversion costs, see chapter 12 of the direct final rule TSD.

b. Government Regulatory Impact Model Scenarios

Markup Scenarios

MSPs include direct manufacturing production costs (*i.e.,* labor, materials, and overhead estimated in DOE's MPCs)

[76] In contrast to the NIA, which uses an end date of 2050 for TSLs 1, 3, and 4, and an end date of 2052 for TSL 2, the MIA maintains the same end date (2050) for all TSLs. This is done to enable clear comparison of INPV impacts across TSLs. See chapter 12 of the direct final rule TSD for a more detailed discussion of this assumption.

[77] DOE estimated preliminary financial metrics, including the industry discount rate, based on publicly available financial information, including Securities and Exchange Commission (''SEC'') filings and S&P bond ratings. DOE presented the preliminary financial metrics to manufacturers in MIA interviews. DOE adjusted those values based on feedback from manufacturers. The complete set of financial metrics and more detail about the methodology can be found in chapter 12 of the final rule TSD. Additionally, DOE provides a sensitivity analysis based on an alternative discount rate in chapter 12 of the TSD.

and all non-production costs (*i.e.,* SG&A, R&D, and interest), along with profit. To calculate the MSPs in the GRIM, DOE applied non-production cost markups to the MPCs estimated in the engineering analysis for each product class and efficiency level. Modifying these markups in the standards case yields different sets of impacts on manufacturers. For the MIA, DOE modeled two standards-case markup scenarios to represent uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of amended energy conservation standards: (1) A preservation of gross margin percentage markup scenario; and (2) a tiered markup scenario. These scenarios lead to different markup values that, when applied to the MPCs, result in varying revenue and cash flow impacts.

Under the preservation of gross margin percentage scenario, DOE applied a single uniform ''gross margin percentage'' markup across all efficiency levels, which assumes that manufacturers would be able to maintain the same amount of profit as a percentage of revenues at all efficiency levels within a product class. As production costs increase with efficiency, this scenario implies that the absolute dollar markup will increase as well. Based on publicly available financial information for manufacturers of residential central air conditioners and heat pumps as well as comments from manufacturer interviews, DOE assumed the average non-production cost baseline markup—which includes SG&A expenses, R&D expenses, interest, and profit—to be 1.34 for split-system air conditioners, 1.35 for split-system heat pumps, and 1.32 for single-package air conditioners and single-package heat pumps. Because the preservation of gross margin percentage markup scenario assumes manufacturers would be able to maintain their gross margin percentage markups as production costs increase in response to amended energy conservation standards, it represents a high bound to industry profitability.

Under the tiered markup scenario, DOE modeled a situation in which manufacturers set markups based on three tiers of products. These tiers can be described as ''good, better, best'' or ''value, standard, premium.'' Under this tiered structure, high-volume ''value'' product lines typically offer fewer features, lower efficiency, and lower markups, while ''premium'' product lines offer more features, higher efficiency, and higher markups. The tiered markup scenario evaluates impacts on manufacturers when the breadth of their product portfolios shrinks as higher energy conservation standards ''demote'' higher-tier products to lower tiers. In this scenario, higher-efficiency products that previously commanded ''standard'' and ''premium'' markups are reassigned ''value'' and ''standard'' markups respectively. This markup scenario represents the low bound to industry profitability under an amended energy conservation standard.

A comparison of industry financial impacts under the two markup scenarios is presented in section V.B.2.a of this notice.

3. Discussion of Comments

Cumulative Regulatory Burden

During the RFI stage, Lennox commented that manufacturers of central air conditioners and heat pumps face a significant cumulative regulatory burden and urged DOE both to consider the impact on manufacturers of multiple regulations and to take action to minimize the associate economic burden. (Lennox, No.10 at p. 4) In response, DOE has performed an analysis of cumulative regulatory burden (CRB) in section V.B.2.e of this notice. The CRB analysis is intended to identify rulemakings that could be aligned or combined to minimize total burden. As such, the CRB section focuses on regulations that take effect within three years of the effective date of this rulemaking. Rulemakings addressed in the CRB include those for: Commercial Packaged Air Conditioners and Heat Pumps (Air-Cooled) (81 FR 2420), Residential Boilers (81 FR 2320), Commercial and Industrial Pumps (80 FR 17826), Portable Room Air Conditioners (81 FR 38398), Residential Furnace Fans (80 FR 13120), and Commercial Warm Air Furnaces (81 FR 2420).

Additionally, Lennox commented that given the complexities associated with regional standards and regulating central air conditioners and heat pumps, DOE should utilize a negotiated rulemaking approach. Lennox requested that DOE consider the pace and timing of rulemakings to ensure stakeholders can provide meaningful comments and analysis. (Lennox, No.10 at p. 3) As discussed throughout this document, DOE established a CAC/HP Working Group to negotiate amended standards for central air conditioners and heat pumps. The recommendations made by the CAC/HP Working Group are presented in this direct final rule.

K. Emissions Analysis

The emissions analysis consists of two components. The first component estimates the effect of potential energy conservation standards on power sector and site (where applicable) combustion emissions of CO_2, NO_X, SO_2, and Hg. The second component estimates the impacts of potential standards on emissions of two additional greenhouse gases, CH_4 and N_2O, as well as the reductions to emissions of all species due to ''upstream'' activities in the fuel production chain. These upstream activities comprise extraction, processing, and transporting fuels to the site of combustion. The associated emissions are referred to as upstream emissions.

The analysis of power sector emissions uses marginal emissions factors calculated using a methodology based on results published for the *AEO 2015* reference case and a set of side cases that implement a variety of efficiency-related policies. The methodology is described in chapter 15 of the direct final rule TSD.

Combustion emissions of CH_4 and N_2O are estimated using emissions intensity factors published by the EPA, GHG Emissions Factors Hub.[78] The FFC upstream emissions are estimated based on the methodology described in chapter 15. The upstream emissions include both emissions from fuel combustion during extraction, processing and transportation of fuel, and ''fugitive'' emissions (direct leakage to the atmosphere) of CH_4 and CO_2.

The emissions intensity factors are expressed in terms of physical units per MWh or MMBtu of site energy savings. Total emissions reductions are estimated using the energy savings calculated in the national impact analysis.

For CH_4 and N_2O, DOE calculated emissions reduction in tons and also in terms of units of carbon dioxide equivalent (CO_2eq). Gases are converted to CO_2eq by multiplying each ton of the greenhouse gas by the gas's global warming potential (GWP) over a 100-year time horizon. Based on the Fifth Assessment Report of the Intergovernmental Panel on Climate Change,[79] DOE used GWP values of 28 for CH_4 and 265 for N_2O.

The *AEO* incorporates the projected impacts of existing air quality regulations on emissions. *AEO 2015* generally represents current legislation and environmental regulations,

[78] Available at *http://www2.epa.gov/climateleadership/center-corporate-climate-leadership-ghg-emission-factors-hub.*

[79] IPCC, Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, 2013).

including recent government actions, for which implementing regulations were available as of October 31, 2014. DOE's estimation of impacts accounts for the presence of the emissions control programs discussed in the following paragraphs.

SO_2 emissions from affected electric generating units (EGUs) are subject to nationwide and regional emissions cap-and-trade programs. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for affected EGUs in the 48 contiguous States and the District of Columbia (DC). (42 U.S.C. 7651 *et seq.*) SO_2 emissions from 28 eastern States and DC were also limited under the Clean Air Interstate Rule (CAIR; 70 FR 25162 (May 12, 2005)), which created an allowance-based trading program that operates along with the Title IV program. CAIR was remanded to the U.S. Environmental Protection Agency (EPA) by the U.S. Court of Appeals for the District of Columbia Circuit, but it remained in effect.[80] In 2011, EPA issued a replacement for CAIR, the Cross-State Air Pollution Rule (CSAPR). 76 FR 48208 (August 8, 2011). On August 21, 2012, the D.C. Circuit issued a decision to vacate CSAPR.[81] The court ordered EPA to continue administering CAIR. On April 29, 2014, the U.S. Supreme Court reversed the judgment of the D.C. Circuit and remanded the case for further proceedings consistent with the Supreme Court's opinion.[82] On October 23, 2014, the D.C. Circuit lifted the stay of CSAPR.[83] Pursuant to this action, CSAPR went into effect (and CAIR ceased to be in effect) as of January 1, 2015.[84]

EIA was not able to incorporate CSAPR into *AEO 2015,* so it assumes implementation of CAIR. Although DOE's analysis used emissions factors that assume that CAIR, not CSAPR, is the regulation in force, the difference between CAIR and CSAPR is not significant for the purpose of DOE's analysis of emissions impacts from energy conservation standards.

The attainment of emissions caps is typically flexible among EGUs and is enforced through the use of emissions allowances and tradable permits. Under existing EPA regulations, any excess SO_2 emissions allowances resulting from the lower electricity demand caused by the adoption of an efficiency standard could be used to permit offsetting increases in SO_2 emissions by any regulated EGU. In past rulemakings, DOE recognized that there was uncertainty about the effects of efficiency standards on SO_2 emissions covered by the existing cap-and-trade system, but it concluded that negligible reductions in power sector SO_2 emissions would occur as a result of standards.

Beginning in 2016, however, SO_2 emissions will decline as a result of the Mercury and Air Toxics Standards (MATS) for power plants. 77 FR 9304 (February 16, 2012). In the final MATS rule, EPA established a standard for hydrogen chloride as a surrogate for acid gas hazardous air pollutants (HAP), and also established a standard for SO_2 (a non-HAP acid gas) as an alternative equivalent surrogate standard for acid gas HAP. The same controls are used to reduce HAP and non-HAP acid gas; thus, SO_2 emissions will be reduced as a result of the control technologies installed on coal-fired power plants to comply with the MATS requirements for acid gas. *AEO 2015* assumes that, in order to continue operating, coal plants must have either flue gas desulfurization or dry sorbent injection systems installed by 2016. Both technologies, which are used to reduce acid gas emissions, also reduce SO_2 emissions. Under the MATS, emissions will be far below the cap established by CAIR, so it is unlikely that excess SO_2 emissions allowances resulting from the lower electricity demand would be needed or used to permit offsetting increases in SO_2 emissions by any regulated EGU.[85] Therefore, DOE believes that energy conservation standards will generally reduce SO_2 emissions in 2016 and beyond.

CAIR established a cap on NO_X emissions in 28 eastern States and the District of Columbia.[86] Energy conservation standards are expected to have little effect on NO_X emissions in those States covered by CAIR because excess NO_X emissions allowances resulting from the lower electricity demand could be used to permit offsetting increases in NO_X emissions from other facilities. However, standards would be expected to reduce NO_X emissions in the States not affected by the caps, so DOE estimated NO_X emissions increases for these States.

The MATS limit mercury emissions from power plants, but they do not include emissions caps and, as such, the increase in electricity demand associated with the residential furnace efficiency levels would be expected to increase mercury emissions. DOE estimated mercury emissions using emissions factors based on *AEO 2015,* which incorporates the MATS.

L. Monetizing Carbon Dioxide and Other Emissions Impacts

As part of the development of this proposed rule, DOE considered the estimated monetary benefits from the reduced emissions of CO_2 and NO_X that are expected to result from each of the TSLs considered. In order to make this calculation similar to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of equipment shipped in the forecast period for each TSL. This section summarizes the basis for the monetary values used for each of these emissions and presents the values considered in this direct final rule.

1. Social Cost of Carbon

The social cost of carbon (SCC) is an estimate of the monetized damages associated with an incremental increase

[80] See *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008), modified on rehearing, 550 F.3d 1176 (D.C. Cir. 2008).

[81] See *EME Homer City Generation, L.P.* v. *EPA,* 696 F.3d 7 (D.C. Cir. 2012).

[82] *See EPA* v. *EME Homer City Generation,* L.P., 134 S.Ct. 1584 (U.S. 2014). The Supreme Court held in part that EPA's methodology for quantifying emissions that must be eliminated in certain States due to their impacts in other downwind States was based on a permissible, workable, and equitable interpretation of the Clean Air Act provision that provides statutory authority for CSAPR.

[83] *See EME Homer City Generation, L.P.* v. *EPA,* Order *(D.C. Cir. filed October 23, 2014)* (*No. 11–1302).*

[84] On July 28, 2015, the D.C. Circuit issued its opinion regarding the remaining issues raised with respect to CSAPR that were remand by the Supreme Court. The D.C. Circuit largely upheld CSAPR, but remanded to EPA without *vacatur* certain States' emission budgets for reconsideration. *EME Homer City Generation, LP* v. *EPA,* 795 F.3d 118 (D.C. Cir. 2015).

[85] DOE notes that on June 29, 2015, the U.S. Supreme Court ruled that the EPA erred when the agency concluded that cost did not need to be considered in the finding that regulation of hazardous air pollutants from coal- and oil-fired electric utility steam generating units (EGUs) is appropriate and necessary under section 112 of the Clean Air Act (CAA). *Michigan* v. *EPA,* 135 S. Ct. 2699 (2015). The Supreme Court did not vacate the MATS rule, and DOE has tentatively determined that the Court's decision on the MATS rule does not change the assumptions regarding the impact of energy conservation standards on SO_2 emissions. Further, the Court's decision does not change the impact of the energy conservation standards on mercury emissions. The EPA, in response to the U.S. Supreme Court's direction, has now considered cost in evaluating whether it is appropriate and necessary to regulate coal- and oil-fired EGUs under the CAA. EPA concluded in its final supplemental finding that a consideration of cost does not alter the EPA's previous determination that regulation of hazardous air pollutants, including mercury, from coal- and oil-fired EGUs is appropriate and necessary. 79 FR 24420 (April 25, 2016). The MATS rule remains in effect, but litigation is pending in the D.C. Circuit Court of Appeals over EPA's final supplemental finding MATS rule.

[86] CSAPR also applies to NO_X, and it would supersede the regulation of NO_X under CAIR. As stated previously, the current analysis assumes that CAIR, not CSAPR, is the regulation in force. The difference between CAIR and CSAPR with regard to DOE's analysis of NO_X is slight.

in carbon emissions in a given year. It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services. Estimates of the SCC are provided in dollars per metric ton of carbon dioxide. A domestic SCC value is meant to reflect the value of damages in the United States resulting from a unit change in carbon dioxide emissions, while a global SCC value is meant to reflect the value of damages worldwide.

Under section 1(b)(6) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993), agencies must, to the extent permitted by law, ''assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.'' The purpose of the SCC estimates presented here is to allow agencies to incorporate the monetized social benefits of reducing CO2 emissions into cost-benefit analyses of regulatory actions. The estimates are presented with an acknowledgement of DOE acknowledges that there are many uncertainties involved in the estimates and with a clear understanding that they should be updated over time to reflect increasing knowledge of the science and economics of climate impacts.

As part of the interagency process that developed the SCC estimates, technical experts from numerous agencies met on a regular basis to consider public comments, explore the technical literature in relevant fields, and discuss key model inputs and assumptions. The main objective of this process was to develop a range of SCC values using a defensible set of input assumptions grounded in the existing scientific and economic literatures. In this way, key uncertainties and model differences transparently and consistently inform the range of SCC estimates used in the rulemaking process.

a. Monetizing Carbon Dioxide Emissions

When attempting to assess the incremental economic impacts of carbon dioxide emissions, the analyst faces a number of challenges. A recent report from the National Research Council [87] points out that any assessment will suffer from uncertainty, speculation, and lack of information about: (1) Future emissions of greenhouse gases; (2) the effects of past and future emissions on the climate system; (3) the impact of changes in climate on the physical and biological environment; and (4) the translation of these environmental impacts into economic damages. As a result, any effort to quantify and monetize the harms associated with climate change will raise questions of science, economics, and ethics, and should be viewed as provisional.

Despite the limits of both quantification and monetization, SCC estimates can be useful in estimating the social benefits of reducing carbon dioxide emissions. The agency can estimate the benefits from reduced (or costs from increased) emissions in any future year by multiplying the change in emissions in that year by the SCC value appropriate for that year. The net present value of the benefits can then be calculated by multiplying each of these future benefits by an appropriate discount factor and summing across all affected years.

It is important to emphasize that the interagency process is committed to updating these estimates as the science and economic understanding of climate change and its impacts on society improves over time. In the meantime, the interagency group will continue to explore the issues raised by this analysis and consider public comments as part of the ongoing interagency process.

b. Development of Social Cost of Carbon Values

In 2009, an interagency process was initiated to offer a preliminary assessment of how best to quantify the benefits of reducing carbon dioxide emissions. To ensure consistency in how benefits were evaluated across agencies, the Administration sought to develop a transparent and defensible method, specifically designed for the rulemaking process, to quantify avoided climate change damages from reduced CO_2 emissions. The interagency group did not undertake any original analysis. Instead, it combined SCC estimates from the existing literature to use as interim values until a more comprehensive analysis could be conducted. The outcome of the preliminary assessment by the interagency group was a set of five interim global SCC estimates for 2007 (in 2006 dollars) of $55, $33, $19, $10, and $5 per metric ton of CO_2. These interim values represented the first sustained interagency effort within the U.S. government to develop an SCC for use in regulatory analysis. The results of this preliminary effort were presented in several proposed and final rules.

c. Current Approach and Key Assumptions

After the release of the interim values, the interagency group reconvened on a regular basis to calculate improved SCC estimates. Specifically, the group considered public comments and further explored the technical literature in relevant fields. The interagency group relied on three integrated assessment models commonly used to estimate the SCC: The FUND, DICE, and PAGE models. These models are frequently cited in the peer-reviewed literature and were used in the last assessment of the Intergovernmental Panel on Climate Change (IPCC). Each model was given equal weight in the SCC values that were developed.

Each model takes a slightly different approach to model how changes in emissions result in changes in economic damages. A key objective of the interagency process was to enable a consistent exploration of the three models, while respecting the different approaches to quantifying damages taken by the key modelers in the field. An extensive review of the literature was conducted to select three sets of input parameters for these models: Climate sensitivity, socio-economic and emissions trajectories, and discount rates. A probability distribution for climate sensitivity was specified as an input into all three models. In addition, the interagency group used a range of scenarios for the socio-economic parameters and a range of values for the discount rate. All other model features were left unchanged, relying on the model developers' best estimates and judgments.

In 2010, the interagency group selected four sets of SCC values for use in regulatory analyses. Three sets of values are based on the average SCC from three integrated assessment models, at discount rates of 2.5 percent, 3 percent, and 5 percent. The fourth set, which represents the 95th-percentile SCC estimate across all three models at a 3-percent discount rate, is included to represent higher-than-expected impacts from climate change further out in the tails of the SCC distribution. The values grow in real terms over time. Additionally, the interagency group determined that a range of values from 7 percent to 23 percent should be used to adjust the global SCC to calculate domestic effects, although preference is given to consideration of the global benefits of reducing CO_2 emissions.[88]

[87] National Research Council. *Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use* (2009).

[88] It is recognized that this calculation for domestic values is approximate, provisional, and highly speculative. There is no *a priori* reason why

Table IV–17 presents the values in the 2010 interagency group report,[89] which is reproduced in appendix 14–A of the NOPR TSD.

TABLE IV–17—ANNUAL SCC VALUES FROM 2010 INTERAGENCY REPORT, 2010–2050

[In 2007 dollars per metric ton CO_2]

Year	Discount rate			
	5%	3%	2.5%	3%
	Average	Average	Average	95th Percentile
2010	4.7	21.4	35.1	64.9
2015	5.7	23.8	38.4	72.8
2020	6.8	26.3	41.7	80.7
2025	8.2	29.6	45.9	90.4
2030	9.7	32.8	50.0	100.0
2035	11.2	36.0	54.2	109.7
2040	12.7	39.2	58.4	119.3
2045	14.2	42.1	61.7	127.8
2050	15.7	44.9	65.0	136.2

The SCC values used for this document were calculated using the most recent versions of the three integrated assessment models that have been published in the peer-reviewed literature, as described in the 2013 update from the interagency working group (revised July 2015).[90]

Table IV–18 shows the updated sets of SCC estimates from the latest interagency update in five-year increments from 2010 to 2050. Appendix 14–B of the direct final rule TSD provides the full set of values. The central value that emerges is the average SCC across models at a 3-percent discount rate. However, for purposes of capturing the uncertainties involved in regulatory impact analysis, the interagency group emphasizes the importance of including all four sets of SCC values.

TABLE IV–18—ANNUAL SCC VALUES FROM 2013 INTERAGENCY UPDATE (REVISED JULY 2015), 2010–2050

[In 2007 dollars per metric ton CO_2]

Year	Discount rate			
	5%	3%	2.5%	3%
	Average	Average	Average	95th Percentile
2010	10	31	50	86
2015	11	36	56	105
2020	12	42	62	123
2025	14	46	68	138
2030	16	50	73	152
2035	18	55	78	168
2040	21	60	84	183
2045	23	64	89	197
2050	26	69	95	212

It is important to recognize that a number of key uncertainties remain, and that current SCC estimates should be treated as provisional and revisable since they will evolve with improved scientific and economic understanding. The interagency group also recognizes that the existing models are imperfect and incomplete. The National Research Council report describes tension between the goal of producing quantified estimates of the economic damages from an incremental ton of carbon and the limits of existing efforts to model these effects. There are a number of analytical challenges that are being addressed by the research community, including research programs housed in many of the Federal agencies participating in the interagency process to estimate the SCC. The interagency group intends to periodically review and reconsider those estimates to reflect increasing knowledge of the science and economics of climate impacts, as well as improvements in modeling.[91]

In summary, in considering the potential global benefits resulting from reduced CO_2 emissions, DOE used the

domestic benefits should be a constant fraction of net global damages over time.

[89] Interagency Working Group on Social Cost of Carbon, *Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866* (2010), *available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf.*

[90] United States Government-Interagency Working Group on Social Cost of Carbon. *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866.* May 2013. Revised July 2015. *https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-tsd-final-july-2015.pdf.*

[91] In November 2013, OMB announced a new opportunity for public comment on the interagency technical support document underlying the revised SCC estimates. 78 FR 70586 (Nov. 26, 2013). In July 2015 OMB published a detailed summary and formal response to the many comments that were received. *https://www.whitehouse.gov/blog/2015/07/02/estimating-benefits-carbon-dioxide-emissions-reductions.* It also stated its intention to seek independent expert advice on opportunities to improve the estimates, including many of the approaches suggested by commenters.

values from the 2013 interagency report, adjusted to 2015$ using the Gross Domestic Product price deflator. For each of the four SCC cases specified, the values used for emissions in 2015 were $12.4, $40.6, $63.2, and $118 per metric ton avoided (values expressed in 2015$). DOE derived values after 2050 based on the trend in 2010–2050 in each of the four cases.

DOE multiplied the CO_2 emissions reduction estimated for each year by the SCC value for that year in each of the four cases. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SCC values in each case.

2. Social Cost of Other Air Pollutants

As noted previously, DOE has estimated how the considered energy conservation standards would reduce power sector NO_X emissions in those 22 States not affected by the CAIR.

DOE estimated the monetized value of NO_X emissions reductions using benefit per ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule,* published in August 2015 by EPA's Office of Air Quality Planning and Standards.[92] The report includes high and low values for NO_X (as $PM_{2.5}$) for 2020, 2025, and 2030 discounted at 3 percent and 7 percent; these values are presented in appendix 14C of the direct final rule TSD. DOE primarily relied on the low estimates to be conservative.[93] The national average low values for 2020 (in 2015$) are $3,187/ton at 3-percent discount rate and $2,869/ton at 7-percent discount rate. DOE assigned values after 2030 using the value for 2030. DOE developed values specific to the end-use category for residential air conditioners and heat pumps using a method described in appendix 14C. For this analysis DOE used linear interpolation to define values for the years between 2020 and 2025 and between 2025 and 2030; for years beyond 2030 the value is held constant.

DOE multiplied the emissions reduction (in tons) in each year by the associated $/ton values, and then discounted each series using discount rates of 3 percent and 7 percent as appropriate. DOE will continue to evaluate the monetization of avoided NO_X emissions and will make any appropriate updates in energy conservation standards rulemakings.

DOE is evaluating appropriate monetization of avoided SO_2 and Hg emissions in energy conservation standards rulemakings. DOE has not included monetization of those emissions in the current analysis.

M. Utility Impact Analysis

The utility impact analysis estimates several effects on the electric power generation industry that would result from the adoption of new or amended energy conservation standards. The utility impact analysis estimates the changes in installed electrical capacity and generation that would result for each TSL. The analysis is based on published output from the NEMS associated with *AEO 2015.* NEMS produces the *AEO* Reference case, as well as a number of side cases that estimate the economy-wide impacts of changes to energy supply and demand. DOE uses published side cases to estimate the marginal impacts of reduced energy demand on the utility sector. These marginal factors are estimated based on the changes to electricity sector generation, installed capacity, fuel consumption and emissions in the *AEO* Reference case and various side cases. Details of the methodology are provided in the appendices to chapters 13 and 15 of the DFR TSD.

The output of this analysis is a set of time-dependent coefficients that capture the change in electricity generation, primary fuel consumption, installed capacity and power sector emissions due to a unit reduction in demand for a given end use. These coefficients are multiplied by the stream of electricity savings calculated in the NIA to provide estimates of selected utility impacts of new or amended energy conservation standards.

N. Employment Impact Analysis

Employment impacts from new or amended energy conservation standards include direct and indirect impacts. Direct employment impacts are any changes in the number of employees of manufacturers of the products subject to standards; the MIA addresses those impacts. Indirect employment impacts are changes in national employment that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more-efficient appliances. Indirect employment impacts from standards consist of the jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, due to: (1) Reduced spending by end users on energy; (2) reduced spending on new energy supply by the utility industry; (3) increased consumer spending on the purchase of new products; and (4) the effects of those three factors throughout the economy.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sector employment statistics developed by the Labor Department's Bureau of Labor Statistics (BLS). BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy.[94] There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than other sectors. Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and service sectors). Thus, the BLS data suggest that net national employment may increase because of shifts in economic activity resulting from amended standards for central air conditioners and heat pumps.

DOE estimated indirect national employment impacts for the standard levels considered in this direct final rule using an input/output model of the U.S. economy called Impact of Sector Energy

[92] Available at: *http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis.* See Tables 4A–3, 4A–4, and 4A–5 in the report. The U.S. Supreme Court has stayed the rule implementing the Clean Power Plan until the current litigation against it concludes. *Chamber of Commerce, et al.* v. *EPA, et al.,* Order in Pending Case, 577 U.S. ___(2016). However, the benefit-per-ton estimates established in the Regulatory Impact Analysis for the Clean Power Plan are based on scientific studies that remain valid irrespective of the legal status of the Clean Power Plan.

[93] For the monetized NO_X benefits associated with $PM_{2.5}$, the related benefits are primarily based on an estimate of premature mortality derived from the ACS study (Krewski et al. 2009), which is the lower of the two EPA central tendencies. Using the lower value is more conservative when making the policy decision concerning whether a particular standard level is economically justified. If the benefit-per-ton estimates were based on the Six Cities study (Lepuele et al. 2012), the values would be nearly two-and-a-half times larger. (See chapter 14 of the direct final rule TSD for further description of the studies mentioned above.)

[94] *See* Bureau of Economic Analysis, ''Regional Multipliers: A Handbook for the Regional Input-Output Modeling System (RIMS II),'' U.S. Department of Commerce (1992).

Technologies, Version 3.1.1 (ImSET).[95] ImSET is a special-purpose version of the ''U.S. Benchmark National Input-Output'' (I–O) model, which was designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model having structural coefficients that characterize economic flows among the 187 sectors. ImSET's national economic I–O structure is based on a 2002 U.S. benchmark table, specially aggregated to the 187 sectors most relevant to industrial, commercial, and residential building energy use. DOE notes that ImSET is not a general equilibrium forecasting model, and understands the uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Because ImSET does not incorporate price changes, the employment effects predicted by ImSET may over-estimate actual job impacts over the long run. For this DFR, DOE used ImSET only to estimate short-term (through 2023) employment impacts, where these uncertainties are reduced.

For more details on the employment impact analysis, see chapter 16 of the DFR TSD.

V. Analytical Results and Conclusions

This section addresses the results from DOE's analyses with respect to amended energy conservation standards for central air conditioners and heat pumps. It addresses the trial standard levels examined by DOE, the projected impacts of each of these levels if adopted as energy conservation standards for central air conditioners and heat pumps, and the standards levels that DOE is adopting in this direct final rule.

A. Trial Standard Levels

For this DFR, DOE analyzed the benefits and burdens of seven TSLs for central air conditioners and heat pumps. These TSLs were developed using combinations of efficiency levels for each of the product classes analyzed by DOE. DOE presents the results for those TSLs in this document. The results for all efficiency levels that DOE analyzed are in the direct final rule TSD.

Table V–1 presents the TSLs and the corresponding efficiency levels for the central air conditioner and heat pump product classes. TSL 4 represents the maximum technologically feasible (''max-tech'') for all product classes. TSL 3 represents the maximum energy savings, considering a national standard. TSL 2, the Recommended TSL, represents the maximum national NPV, considering regional standards. TSL 1 represents a minimal increase in SEER for split-system product classes only, considering regional standards.

TABLE V–1—TRIAL STANDARD LEVELS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS

TSL	Region	Efficiency metric	Product class					
			Split-system AC	Split-system heat pumps	Single-package AC	Single-package heat pumps	Small-duct high-velocity	Space-constrain. AC
1	National	SEER	14.0	14.5	14.0	14.0	12.0	12.0
		HSPF	n/a	8.4	n/a	8.0	n/a	n/a
	Hot-Humid **	SEER	14.5	n/a	n/a	n/a	n/a	n/a
	Hot-Dry ***	SEER	14.5	n/a	n/a	n/a	n/a	n/a
Recommend *	National	SEER	14.0	15.0	14.0	14.0	12.0	12.0
		HSPF	n/a	8.8	8.0	8.0	n/a	n/a
	Hot-Humid **	SEER	† 15.0/14.5	n/a	n/a	n/a	n/a	n/a
	Hot-Dry ***	SEER	† 15.0/14.5	n/a	n/a	n/a	n/a	n/a
3	National	SEER	16.0	16.0	15.0	15.0	12.0	12.0
		HSPF	n/a	8.9	n/a	8.2	n/a	n/a
4	National	SEER	# 17.0/16.5	## 19.0/17.5	17.5	15.0	14.0	14.0
		HSPF	n/a	## 9.9/9.4	n/a	8.2	n/a	n/a

* The Recommended TSL includes energy conservation standards based on EER in addition to SEER for split-system and single-package air conditioners in the Hot-Dry region. For split-system air conditioners the EER standards are: 12.2 EER for cooling capacities less than 45,000 Btu/hr; 11.7 EER for cooling capacities equal to or greater than 45,000 Btu/hr; and 10.2 EER for split-system air conditioners with a seasonal energy efficiency ratio greater than or equal to 16.0. For single-package air conditioners, the EER standard is 11.0.

** Hot-Humid includes: The states of Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virginia, the District of Columbia, and the U.S. territories.

*** Hot-Dry includes the states of Arizona, California, Nevada, and New Mexico.

† The 15.0 SEER energy conservation standard applies to cooling capacities less than 45,000 Btu/hr; the 14.5 SEER energy conservation standard applies to cooling capacities equal to or greater than 45,000 Btu/hr.

The 17.0 SEER energy conservation standard applies to cooling capacities less than 30,000 Btu/hr; the 16.5 SEER energy conservation standards applies to cooling capacities equal to or greater than 30,000 Btu/hr.

The 19.0 SEER and 9.9 HSPF energy conservation standards apply to cooling capacities less than 45,000 Btu/hr; the 17.5 SEER and 9.4 HSPF energy conservation standards apply to cooling capacities equal to or greater than 45,000 Btu/hr.

n/a—Not applicable.

B. Economic Justification and Energy Savings

1. Economic Impacts on Individual Consumers

DOE analyzed the economic impacts on central air conditioner and heat pump consumers by looking at the effects potential amended standards at each TSL would have on the LCC and PBP. DOE also examined the impacts of potential standards on selected consumer subgroups. These analyses are discussed below.

a. Life-Cycle Cost and Payback Period

In general, higher-efficiency products affect consumers in two ways: (1) Purchase price increases, and (2) annual operating costs decrease. Inputs used for calculating the LCC and PBP include total installed costs (*i.e.,* product price plus installation costs), and operating

[95] M.J. Scott, *et. al., ImSET 3.1: Impact of Sector Energy Technologies,* PNNL–18412, (2009), *available at www.pnl.gov/main/publications/external/technical_reports/PNNL-18412.pdf.*

costs (*i.e.,* annual energy use, energy prices, energy price trends, repair costs, and maintenance costs). The LCC calculation also uses product lifetime and a discount rate. Chapter 8 of the direct final rule TSD provides detailed information on the LCC and PBP analyses.

Table V–2 through show the LCC and PBP results for the TSLs considered for each product class. In the first of each pair of tables, the simple payback is measured relative to consumer use of the baseline product. In the second table, the LCC impacts are measured relative to the consumer LCCs projected for the no-new-standards case in the compliance year (see section IV.F.2.f). Because some consumers purchase products with higher efficiency in the no-new-standards case, the average savings are less than the difference between the average LCC of EL 0 and the average LCC at each TSL. The savings refer only to consumers who are affected by a standard at a given TSL. Those who already purchase a product with an efficiency at or above a given TSL are not affected. Consumers for whom the LCC increases at a given TSL experience a net cost.

TABLE V–2—AVERAGE LCC AND PBP RESULTS FOR SPLIT-SYSTEM CENTRAL AIR CONDITIONERS

TSL	Region	SEER	Average costs (2015$)				Simple payback (years)	Average lifetime (years)
			Installed cost	First year's operating cost	Lifetime operating cost	LCC		
Baseline	North	13	$3,966	$172	$3,875	$7,841	N/A	24.1
	Hot-Dry	14	4,392	279	5,639	10,031	5.0	24.9
	Hot-Humid	14	4,011	320	5,044	9,054	5.0	18.0
1	North	14	4,092	161	3,696	7,787	10.5	24.1
	Hot-Dry	14.5	4,475	263	5,387	9,862	5.4	24.9
	Hot-Humid	14.5	4,086	308	4,884	8,969	5.5	18.0
Recommended	North	14	4,092	161	3,696	7,787	10.5	24.1
	Hot-Dry *	15/14.5	4,584	256	5,269	9,853	7.6	24.9
	Hot-Humid *	15/14.5	4,183	302	4,812	8,995	7.7	18.0
3	National	16	4,638	224	4,216	8,854	15.2	21.2
4	National **	17/16.5/16.5	4,906	217	4,130	9,036	19.2	21.2

Note: The results for each TSL are calculated assuming that all consumers use products with that efficiency level. The PBP is measured relative to use of the baseline product.

* 15 SEER for 2 and 3 ton units, 14.5 SEER for 5 ton units.

** Max-Tech SEER is different for 2, 3, and 5 ton units.

TABLE V–3—LCC IMPACTS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR SPLIT-SYSTEM CENTRAL AIR CONDITIONERS

TSL	Region	SEER	Average LCC savings	% of net cost
Baseline	North	13	N/A	N/A
	Hot-Dry	14	N/A	N/A
	Hot-Humid	14	N/A	N/A
1	North	14	$43	25
	Hot-Dry	14.5	169	14
	Hot-Humid	14.5	82	15
Recommended	North	14	43	25
	Hot-Dry *	15/14.5	150	42
	Hot-Humid *	15/14.5	39	45
3	National	16	(122)	63
4	National **	17/16.5/16.5	(304)	75

* 15 SEER for 2 and 3 ton units, 14.5 SEER for 5 ton units.

** Max-Tech SEER is different for 2, 3, and 5 ton units.

TABLE V–4—AVERAGE LCC AND PBP RESULTS FOR SPLIT-SYSTEM CENTRAL HEAT PUMPS

TSL	Region	SEER	HSPF	Average costs (2015$)				Simple payback (years)	Average lifetime (years)
				Installed cost	First year's operating cost	Lifetime operating cost	LCC		
Baseline	National	14	8.2	$5,246	$468	$6,396	$11,642	N/A	15.3
1	National	14.5	8.4	5,318	455	6,253	11,570	5.2	15.3
Recommended	National	15	8.5	5,391	439	6,081	11,472	4.9	15.3
3	National	16	8.9	5,720	420	5,906	11,627	9.4	15.3
4	National *	19/19/17.5	9.9/9.3	6,572	378	5,476	12,047	14.9	15.3

Note: The results for each TSL are calculated assuming that all consumers use products with that efficiency level. The PBP is measured relative to the baseline product.

* Max-Tech SEER is different for 2, 3, and 5 ton unit.

TABLE V–5—LCC IMPACTS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR SPLIT-SYSTEM CENTRAL HEAT PUMPS

TSL	Region	SEER	HSPF	Average LCC savings	% of net cost
Baseline	National	14	8.2	N/A	N/A
1	National	14.5	8.4	$72	9
Recommended	National	15	8.5	131	20
3	National	16	8.9	(25)	54
4	National *	19/19/17.5	9.9/9.3	(425)	79

* Max-Tech SEER is different for 2, 3, and 5 ton units.

TABLE V–6—AVERAGE LCC AND PBP RESULTS FOR PACKAGED CENTRAL AIR CONDITIONERS

TSL	Region	SEER	Average costs (2015$)				Simple payback (years)	Average lifetime (years)
			Installed cost	First year's operating cost	Lifetime operating cost	LCC		
Baseline	National	14	$4,779	$294	$5,452	$10,231	N/A	21.2
1	National	14	4,779	294	5,452	10,231	N/A	21.2
Recommended	National	14	4,779	294	5,452	10,231	N/A	21.2
3	National	15	4,935	275	5,225	10,160	8.9	21.2
4	National	17.5	5,427	237	4,855	10,281	12.3	21.2

Note: The results for each TSL are calculated assuming that all consumers use products with that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–7—LCC IMPACTS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR PACKAGED CENTRAL AIR CONDITIONERS

TSL	Region	SEER	Average LCC savings	% of net cost
Baseline	National	14	N/A	N/A
1	National	14	N/A	N/A
Recommended	National	14	N/A	N/A
3	National	15	$43	53
4	National	17.5	(80)	69

TABLE V–8—AVERAGE LCC AND PBP RESULTS FOR PACKAGED CENTRAL HEAT PUMPS

TSL	Region	SEER	HSPF	Average costs (2015$)				Simple payback (years)	Average lifetime (years)
				Installed cost	First year's operating cost	Lifetime operating cost	LCC		
Baseline	National	14	8.0	$5,361	$517	$6,998	$12,359	N/A	15.3
1	National	14	8.0	5,361	517	6,998	12,359	N/A	15.3
Recommended	National	14	8.0	5,361	517	6,998	12,359	N/A	15.3
3	National	15	8.2	5,545	479	6,584	12,129	5.2	15.3
4	National	15	8.2	5,545	479	6,584	12,129	5.2	15.3

Note: The results for each TSL are calculated assuming that all consumers use products with that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–9—LCC IMPACTS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR PACKAGED CENTRAL HEAT PUMPS

TSL	Region	SEER	HSPF	Average LCC savings	% of net cost
Baseline	National	14	8.0	N/A	N/A
1	National	14	8.0	N/A	N/A
Recommended	National	14	8.0	N/A	N/A
3	National	15	8.2	$115	39
4	National	15	8.2	115	39

TABLE V–10—AVERAGE LCC AND PBP RESULTS FOR SPACE-CONSTRAINED AIR CONDITIONERS

TSL	Region	SEER	Average costs (2015$)				Simple payback (years)	Average lifetime (years)
			Installed cost	First year's operating cost	Lifetime operating cost	LCC		
Baseline	National	12	$4,736	$190	$3,779	$8,515	N/A	21.2
1	National	12	4,736	190	3,779	8,515	N/A	21.2
Recommended	National	12	4,736	190	3,779	8,515	N/A	21.2
3	National	12	4,736	190	3,779	8,515	N/A	21.2
4	National	14	5,040	164	3,417	8,458	11.6	21.2

Note: The results for each TSL are calculated assuming that all consumers use products with that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–11—LCC IMPACTS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR SPACE-CONSTRAINED AIR CONDITIONERS

TSL	Region	SEER	Average LCC savings	% of net cost
Baseline	National	12	N/A	N/A
1	National	12	N/A	N/A
Recommended	National	12	N/A	N/A
3	National	12	N/A	N/A
4	National	14	$58	60

TABLE V.12—AVERAGE LCC AND PBP RESULTS FOR SMALL-DUCT HIGH-VELOCITY AIR CONDITIONERS

TSL	Region	SEER	Average costs (2015$)				Simple payback (years)	Average lifetime (years)
			Installed cost	First year's operating cost	Lifetime operating cost	LCC		
Baseline	National	12	$5,544	$197	$4,035	$9,579	N/A	21.2
1	National	12	5,544	197	4,035	9,579	N/A	21.2
Recommended	National	12	5,544	197	4,035	9,579	N/A	21.2
3	National	12	5,544	197	4,035	9,579	N/A	21.2
4	National	14	6,478	170	3,648	10,126	34.3	21.2

Note: The results for each TSL are calculated assuming that all consumers use products with that efficiency level. The PBP is measured relative to the baseline product.

TABLE V.13—LCC IMPACTS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR SMALL-DUCT HIGH-VELOCITY AIR CONDITIONERS

TSL	Region	SEER	Average LCC savings	% of net cost
Baseline	National	12	N/A	N/A
1	National	12	N/A	N/A
Recommended	National	12	N/A	N/A
3	National	12	N/A	N/A
4	National	14	($540)	90

b. Consumer Subgroup Analysis

In the consumer subgroup analysis, DOE estimated the impacts of the considered TSLs on low-income households and senior-only households. The average LCC savings and simple payback periods for low-income and senior-only households are compared to the results for all consumers of split air conditioners and split heat pumps in Table V–12 and Table V–13. In most cases, the average LCC savings and PBP for low-income households and senior-only households at the considered efficiency levels are not substantially different from the average for all households. Chapter 11 of the direct final rule TSD presents detailed results of the consumer subgroup analysis.

TABLE V–12—SPLIT-SYSTEM CENTRAL AIR CONDITIONERS: IMPACTS FOR SENIOR-ONLY AND LOW-INCOME CONSUMER SUBGROUPS COMPARED TO ALL HOUSEHOLDS

TSL	Region	SEER	Average LCC savings			Simple payback period		
			Senior	Low-income	All consumers	Senior	Low-income	All consumers
Baseline	North	13	N/A	N/A	N/A	N/A	N/A	N/A
	Hot-Dry	14	N/A	N/A	N/A	4.9	6.8	5.0
	Hot-Humid	14	N/A	N/A	N/A	5.0	5.0	5.0
1	North	14	$32	$28	$43	11.3	11.7	10.5
	Hot-Dry	14.5	171	105	169	5.5	7.3	5.4
	Hot-Humid	14.5	74	62	82	5.8	6.1	5.5
Recommended	North	14	32	28	43	11.3	11.7	10.5
	Hot-Dry	15/14.5	149	71	150	7.9	10.0	7.6
	Hot-Humid	15/14.5	30	16	39	8.1	8.4	7.7
3	National	16	(122)	(179)	(122)	16.1	15.3	15.2
4	National	17/16.5/16.5	(306)	(368)	(304)	20.4	19.3	19.2

* 15 SEER for 2 and 3 ton units, 14.5 SEER for 5 ton units.
** Max-Tech SEER is different for 2, 3, and 5 ton units.

TABLE V–13—SPLIT-SYSTEM HEAT PUMPS: IMPACTS FOR SENIOR-ONLY AND LOW-INCOME CONSUMER SUBGROUPS COMPARED TO ALL HOUSEHOLDS

TSL	Region	SEER	HSPF	Average LCC savings			Simple payback period		
				Senior	Low-income	All consumers	Senior	Low-income	All consumers
Baseline	National	14	8.2	N/A	N/A	N/A	N/A	N/A	N/A
1	National	14.5	8.4	$76	$70	$72	5.0	5.1	5.2
Recommended	National	15	8.5	140	125	131	4.8	5.0	4.9
3	National	16	8.9	(6)	(33)	(25)	9.1	9.5	9.4
4	National	19\19\17.5	9.9/9.3	(398)	(450)	(425)	14.7	15.1	14.9

* Max-Tech SEER is different for 2, 3, and 5 ton units.

c. Rebuttable Presumption Payback Period

As discussed in section III.J.2, EPCA establishes a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. In calculating a rebuttable presumption payback period for each of the considered TSLs, DOE used discrete values rather than distributions for input values, and, as required by EPCA, based the energy use calculation on the DOE test procedures for central air conditioners and heat pumps. In contrast, the PBPs presented in section V.B.1.a were calculated using distributions that reflect the range of energy use in the field.

Table V–14 presents the rebuttable-presumption payback periods for the considered TSLs. While DOE examined the rebuttable-presumption criterion, it considered whether the standard levels considered for this rule are economically justified through a more detailed analysis of the economic impacts of those levels, pursuant to 42 U.S.C. 6295(o)(2)(B)(i), that considers the full range of impacts to the consumer, manufacturer, Nation, and environment. The results of that analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level, thereby supporting or rebutting the results of any preliminary determination of economic justification.

TABLE V–14 REBUTTABLE PRESUMPTION PAYBACK PERIOD FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS

Product class	Trial standard level			
	1	Recommended	3	4
Split Air Conditioners *	N/A	N/A	6.2	12.5
Split Heat Pumps	2.2	1.8	4.2	6.5
Package Air Conditioners **	N/A	N/A	5.5	7.7
Package Heat Pumps **	N/A	N/A	3.9	3.9
Space-Constrained Air Conditioners **	N/A	N/A	N/A	6.2
Small-Duct High-Velocity Air Conditioners **	N/A	N/A	N/A	16.1

* The rebuttable presumption payback period uses a national calculation so there are no results for TSL 1 and the Recommended TSL because split-system central air conditioners have regional standards.
** The TSL is set at the baseline level so payback period is not relevant.

2. Economic Impacts on Manufacturers

DOE performed a manufacturer impact analysis (MIA) to estimate the impact of amended energy conservation standards on central air conditioner and heat pump manufacturers. The following section describes the expected impacts on manufacturers at each considered TSL. Chapter 12 of the direct final rule TSD explains the analysis in further detail.

a. Industry Cash Flow Analysis Results

Table V–15 and Table V–16 depict the estimated financial impacts (represented by changes in industry net present value, or INPV) of amended energy conservation standards on manufacturers of central air conditioners and heat pumps, as well as the conversion costs that DOE expects manufacturers would incur at each TSL.

As discussed in section 2.b, DOE modeled two different markup scenarios to evaluate the range of cash flow impacts on the central air conditioner and heat pump industry: (1) The preservation of gross margin percentage markup scenario; and (2) the tiered markup scenario.

To assess the less severe end of the range of potential impacts on industry profitability, DOE modeled a preservation of gross margin percentage markup scenario, in which a uniform ''gross margin percentage'' markup is applied across all potential efficiency levels. In this scenario, DOE assumed that a manufacturer's absolute dollar markup would increase as production costs increase in the standards case.

To assess the more severe end of the range of potential impacts on industry profitability, DOE modeled a tiered markup scenario. In this scenario, the breadth of manufacturers' product portfolios shrinks as higher energy conservation standards increase the efficiency of baseline products. In this scenario, products in more efficient tiers that previously commanded higher markups are ''demoted'' to lower efficiency tiers that command lower markups. The contraction in markups in this scenario reduces manufacturers' per-unit revenues.

Each of the markup scenarios results in a unique set of cash flows and corresponding industry values at each TSL. In the following discussion, the INPV results refer to the difference in industry value between the no-new-standards case and each standards case that result from the sum of discounted cash flows from the base year (2016) through the end of the analysis period (2050). To provide perspective on the short-run cash flow impact, DOE includes in the discussion of results a comparison of free cash flow between the no-new-standards case and the standards case at each TSL in the year before amended standards would take effect. This figure provides an understanding of the magnitude of required conversion costs relative to cash flows calculated by the industry in the no-new-standards case.

TABLE V–15—MANUFACTURER IMPACT ANALYSIS RESULTS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS: PRESERVATION OF GROSS MARGIN PERCENTAGE MARKUP SCENARIO

	Units	No-new-standard case	Trial standard level *			
			1	2 **	3	4
INPV	2015$M	4,496.1	4,466.2	4,381.9	4,512.2	4,889.6
Change in INPV	2015$M		(29.9)	(114.2)	16.1	393.5
	%		(0.7)	(2.5)	(0.4)	8.8
Product Conversion Costs	2015$M		40.7	137.0	225.2	248.7
Capital Conversion Costs	2015$M		61.0	205.6	337.9	373.0
Total Conversion Costs	2015$M		101.7	342.6	563.1	621.6
Free Cash Flow	2015$M	416.0 (429.6 for TSL 2)	376.2	278.8	195.7	172.8
	%		(9.6)	(35.1)	(53.0)	(58.5)

* Parentheses indicate negative values. All values have been rounded to the nearest tenth. M = millions.
** TSL recommended by the CAC/HP Working Group with 2023 compliance date. All other TSLs have a modeled compliance date of 2021, which is six years after the compliance date of the standards adopted in the June 27, 2011 DFR.

TABLE V–16—MANUFACTURER IMPACT ANALYSIS RESULTS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS: TIERED MARKUP SCENARIO

	Units	No-new-standard case	Trial standard level *			
			1	2 **	3	4
INPV	2015$M	4,496.1	3,852.0	3,803.9	3,382.0	3,360.6
Change in INPV	2015$M		(644.1)	(692.3)	(1,114.2)	(1,135.6)
	%		(14.3)	(15.4)	(24.8)	(25.3)
Product Conversion Costs	2015$M		40.7	137.0	225.2	248.7
Capital Conversion Costs	2015$M		61.0	205.6	337.9	373.0
Total Conversion Costs	2015$M		101.7	342.6	563.1	621.6
Free Cash Flow	2015$M	411.9 (426.8 for TSL 2).	372.1	276.1	191.6	168.7
	%		(9.7)	(35.3)	(53.5)	(59.0)

* Parentheses indicate negative values. All values have been rounded to the nearest tenth. M = millions.
** TSL recommended by the CAC/HP Working Group with 2023 compliance date. All other TSLs have a modeled compliance date of 2021, which is six years after the compliance date of the standards adopted in the June 27, 2011 DFR.

At TSL 1, DOE estimates impacts on INPV to range from −$644.1 million to −$29.9 million, or a change of −14.3 percent to −0.7 percent. DOE projects that in the absence of new standards, 57 percent of central air conditioner and heat pump shipments would already meet or exceed the efficiency levels prescribed by TSL 1 in the compliance

year (2021). DOE estimates total industry conversion costs of $101.7 million would be required to bring the balance of shipments into compliance with a new standard. These conversion costs drive an estimated decrease in industry free cash flow in the year before the compliance date (2020). In the more severe tiered markup scenario, DOE estimates a decrease in industry free cash flow in the year prior to compliance of $39.8 million, or a change of −9.7 percent relative to the no-new-standards case value of $411.9 million. At TSL 1, DOE also projects higher unit prices will result in a slight decrease in total shipments over the period beginning with the compliance year (2021) and ending in 2050. DOE estimates a change in shipments of −0.04 percent relative to the no-new-standards case.

At TSL 1, under the preservation of gross margin percentage scenario, the shipment-weighted average price per unit increases by 1.8 percent relative to the no-new-standards-case price per unit in the year of compliance (2021). This slight price increase would mitigate a portion of the $101.7 million in conversion costs estimated at TSL 1, resulting in slightly negative INPV impacts under this scenario. Under the tiered markup scenario, the industry markup structure is compressed as the least efficient products are eliminated from the market. Under amended standards, products in higher efficiency tiers that previously commanded higher markups are demoted to lower efficiency tiers that command lower markups. At TSL 1, this markup scenario results in a weighted average price increase of 0.3 percent. This relatively modest price increase is outweighed by the expected conversion costs and slight decrease in total shipments, resulting in more severe INPV impacts at TSL 1.

At TSL 2, the TSL recommended by the ASRAC CAC/HP Working Group, DOE estimates impacts on INPV to range from −$692.3 million to −$114.2 million, or a change in INPV of −15.4 percent to −2.5 percent. DOE projects that in the absence of new standards, 32 percent of central air conditioner and heat pump shipments would already meet or exceed the efficiency levels prescribed by TSL 2 in the compliance year (2023). DOE estimates total industry conversion costs of $342.6 million would be required to bring the balance of shipments into compliance with a new standard. These conversion costs drive an estimated decrease in industry free cash flow in the year before the compliance date (2022). In the more severe tiered markup scenario, DOE estimates a decrease in industry free cash flow of up to $150.8 million, or a change of −35.3 percent relative to the no-new-standards case value of $426.8 million in the year before compliance (2022). At TSL 2, DOE also projects higher unit prices will result in a slight decrease in total shipments over the period beginning with the compliance year (2023) and ending in 2050. DOE estimates a change in shipments of −0.03 percent relative to the no-new-standards case.

At TSL 2, under the preservation of gross margin percentage scenario, the shipment-weighted average price per unit increases by 4.4 percent relative to the no-new-standards-case price per unit in the year of compliance (2023). In this scenario, manufacturers are able to fully pass on the increase in MPC to consumers. However, this price increase is outweighed by the $342.6 million in conversion costs estimated at TSL 2, resulting in slightly negative INPV impacts under this scenario. Under the tiered markup scenario, the weighted average price per unit increases by 2.9 percent. This price increase is offset by the expected conversion costs and slight decrease in total shipments, resulting in more severe INPV impacts at TSL 2.

At TSL 3, DOE estimates impacts on INPV to range from −$1,114.2 million to $16.1 million, or a change in INPV of −24.8 percent to 0.4 percent. DOE projects that in the absence of new standards, 8 percent of central air conditioner and heat pump shipments would meet or exceed the efficiency levels prescribed by TSL 3 in the compliance year (2021). DOE estimates total industry conversion costs of $563.1 million would be required to bring the balance of shipments into compliance with a new standard. These conversion costs drive an estimated decrease in industry free cash flow in the year before the compliance date (2020). In the more severe tiered markup scenario, DOE estimates a decrease in industry free cash flow in the year prior to compliance of $220.3 million, or a change of −53.5 percent relative to the no-new-standards case. At TSL 3, DOE also projects higher unit prices will result in a slight decrease in total shipments over the period beginning with the compliance year (2021) and ending in 2050. DOE estimates a change in shipments of −0.24 percent relative to the no-new-standards case.

At TSL 3, under the preservation of gross margin percentage scenario, the shipment-weighted average price per unit increases by 20.9 percent relative to the no-new-standards-case price per unit in the year of compliance (2021). Under this scenario, the higher unit price offsets conversion costs and the slight decrease in shipments to produce slightly positive INPV impacts. Under the tiered markup scenario, the weighted average price increases by 17.9 percent. This price increase is not sufficient to offset the expected conversion costs and slight decrease in total shipments, resulting in negative INPV impacts at this level.

At TSL 4, DOE estimates impacts on INPV to range from −$1,135.6 million to $393.5 million, or a change in INPV of −25.3 percent to 8.8 percent. DOE projects that in the absence of new standards, 3 percent of central air conditioner and heat pump shipments would meet or exceed the efficiency levels prescribed by TSL 4 in the compliance year (2021). DOE estimates total industry conversion costs of $621.6 million would be required to bring the balance of shipments into compliance with a new standard. These conversion costs drive an estimated decrease in industry free cash flow in the year before the compliance date (2020). In the more severe tiered markup scenario, DOE estimates a decrease in industry free cash flow in the year prior to compliance of approximately $243.2 million, or a change of −59.0 percent relative to the no-new-standards case. At this level, DOE also projects higher prices will result in a slight decrease in total shipments over the period beginning with the compliance year (2021) and ending in 2050. DOE estimates a change in shipments of −0.29 percent relative to the no-new-standards case.

At TSL 4, under the preservation of gross margin percentage scenario, the shipment-weighted average price per unit increases by 43.2 percent relative to the no-new-standards-case price per unit in the year of compliance (2021). Under this scenario, the higher unit price offsets conversion costs and the slight decrease in shipments to produce positive INPV impacts. Under the tiered markup scenario, the weighted average price per unit increases by 39.2 percent. This increase is outweighed by the expected conversion costs and a decrease in total shipments, resulting in negative INPV impacts at TSL 4.

b. Direct Impacts on Employment

To quantitatively assess the potential impacts of amended energy conservation standards on direct employment, DOE used the GRIM to estimate the domestic labor expenditures and number of direct employees in the no-new-standards case and at each TSL from the base year of the analysis (2016) through the end of the analysis (2050). DOE used statistical

data from the U.S. Census Bureau's 2014 Annual Survey of Manufacturers, the results of the engineering analysis, and interviews with manufacturers to determine the inputs necessary to calculate industry-wide labor expenditures and domestic direct employment levels. Labor expenditures related to producing the equipment are a function of the labor intensity of producing the equipment, the sales volume, and an assumption that wages remain fixed in real terms over time. The total labor expenditures in each year are calculated by multiplying the MPCs by the labor percentage of MPCs. DOE estimates that 50 percent of residential central air conditioner and heat pump units are produced domestically.

The total labor expenditures in the GRIM were then converted to domestic production employment levels by dividing production labor expenditures by the annual payment per production worker (production worker hours times the labor rate found in the U.S. Census Bureau's 2014 Annual Survey of Manufacturers). The production worker estimates in this section only cover workers up to the line-supervisor level who are directly involved in fabricating and assembling a product within an OEM facility. Workers performing services that are closely associated with production operations, such as materials handling tasks using forklifts, are also included as production labor. DOE's estimates only account for production workers who manufacture the specific products covered by this rulemaking.

To estimate an upper bound to employment change, DOE assumes all domestic manufacturers would choose to continue producing products in the U.S. and would not move production to foreign countries. To estimate a lower bound to employment, DOE considers the case where all manufacturers choose to relocate production overseas rather than make the necessary conversions at domestic production facilities. A complete description of the assumptions used to calculate these upper and lower bounds can be found in chapter 12 of the direct final rule TSD.

In the absence of amended energy conservation standards, DOE estimates that the residential central air conditioner and heat pump industry would employ 10,379 and 10,708 domestic production workers in 2021 and 2023, respectively. Table V–17 shows the range of impacts of potential amended energy conservation standards on U.S. production workers of central air conditioners and heat pumps.

TABLE V–17—POTENTIAL CHANGES IN THE TOTAL NUMBER OF CENTRAL AIR CONDITIONER AND HEAT PUMP PRODUCTION WORKERS IN IN COMPLIANCE YEAR *

	No-new-standard †	Trial standard level **			
		1	2	3	4
Potential Changes in Domestic Production Workers in Compliance Year.	.....	(10,379) to 139	(10,708) to 642	(10,379) to 886	(10,379) to 1,878.

* The compliance year for TSL 2 is 2023, as recommended by the CAC/HP Working Group; all other TSLs have a compliance year of 2021.
** Parentheses indicate negative values.
† The no-new-standard case assumes 10,379 domestic production workers in 2021 and 10,708 in 2023.

The upper end of the range estimates the maximum increase and/or minimum decrease in the estimated number of domestic production workers in the residential central air conditioner and heat pump industry after implementation of amended energy conservation standards. It assumes manufacturers would continue to produce the same scope of covered products within the United States.

The lower end of the range represents the maximum decrease in the total number of U.S. production workers that could result from an amended energy conservation standard. In interviews, manufacturers stated that the residential HVAC industry has seen increasing migration to foreign production facilities, often located in Mexico. Many manufacturers of central air conditioners and heat pumps already have foreign production facilities. Some manufacturers indicated a change in standard would lead to a re-evaluation of production in other countries, where it may be possible to mitigate capital investments and/or to reduce the cost of labor inputs. As a result, the lower bound of direct employment impacts assumes domestic production of covered products ceases as manufacturers shift production abroad in search of reduced manufacturing costs.

This conclusion is independent of any conclusions regarding indirect employment impacts in the broader United States economy, which are documented in chapter 15 of the direct final rule TSD.

c. Impacts on Manufacturing Capacity

In interviews and in discussions during the CAC/HP Working Group meetings, manufacturers of residential central air conditioners and heat pumps did not indicate that amended energy conservation standards would significantly constrain manufacturing production capacity.

d. Impacts on Subgroups of Manufacturers

As discussed above, using average cost assumptions to develop an industry cash flow estimate is not adequate for assessing differential impacts among subgroups of manufacturers. Small manufacturers, niche players, or manufacturers exhibiting a cost structure that differs largely from the industry average could be affected differently. DOE used the results of the industry characterization to group manufacturers exhibiting similar characteristics. Specifically, DOE identified small business manufacturers as a subgroup for a separate impact analysis.

For the small business subgroup analysis, DOE applied the small business size standards published by the Small Business Administration (SBA) to determine whether a company is considered a small business. The size standards are codified at 13 CFR part 121. To be categorized as a small business under North American Industry Classification System (NAICS) code 333415, ''Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing,'' a residential central air conditioner and heat pump manufacturer and its affiliates may employ a maximum of 1,250 employees. The 1,250-employee threshold includes all employees in a business's parent company and any other subsidiaries. The small business subgroup analysis is discussed in

section VI.B of this notice and in chapter 12 of the direct final rule TSD.

e. Cumulative Regulatory Burden

While any one regulation may not impose a significant burden on manufacturers, the combined effects of several impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Assessing the impact of a single regulation may overlook this cumulative regulatory burden. Multiple regulations affecting the same manufacturer can strain profits and can lead companies to abandon product lines or markets with lower expected future returns than competing products. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency.

For the cumulative regulatory burden analysis, DOE looks at other regulations that could affect manufacturers of central air conditioners and heat pumps during the compliance period, from 2017 to 2023, or those that will take effect approximately three years after the 2023 compliance date of amended energy conservation standards for central air conditioners and heat pumps. In interviews, manufacturers cited federal regulations on equipment other than central air conditioners and heat pumps that contribute to their cumulative regulatory burden. The compliance years and expected industry conversion costs of relevant amended energy conservation standards are indicated in Table V–18.

TABLE V–18—COMPLIANCE DATES AND EXPECTED CONVERSION EXPENSES OF FEDERAL ENERGY CONSERVATION STANDARDS AFFECTING RESIDENTIAL CENTRAL AIR CONDITIONER AND HEAT PUMP MANUFACTURERS

Federal energy conservation standard	Number of manufacturers *	Number of manufacturers affected from today's rule **	Approximate compliance date	Estimated total industry conversion expenses (millions $)	Industry conversion costs/revenue †
Commercial Packaged Air Conditioners and Heat Pumps (Air-Cooled) 81 FR 2420 (January 15, 2016).	13	11	2018 and 2023	520.8 (2014$)	4.4%.
Residential Boilers *** 81 FR 2320 (January 15, 2016).	36	5	2020	2.5 (2014$)	Less than 1%.
Commercial and Industrial Pumps 80 FR 17826 (January 26, 2016).	86	1	2020	81.2 (2014$)	5.6%.
Portable Room Air Conditioners *** 81 FR 38398 (June 13, 2016).	29	5	2021	302.8 (2014$)	10.8%.
Residential Furnaces *** 80 FR 13120 (March 12, 2015).	12	12	2021	55.0 (2013$)	1%.
Commercial Packaged Boilers *** 81 FR 158836 (March 24, 2016).	45	4	2022	27.5 (2014$)	2.3%.
Commercial Warm Air Furnaces 81 FR 2420 (January 15, 2016).	14	10	2023	7.5 to 22.2 (2014$) ††	1.7% to 5.2% ††.

* The number of manufacturers listed in the final rule or notice of proposed rulemaking for the energy conservation standard that is contributing to cumulative regulatory burden.

** The number of manufacturers producing central air conditioners and heat pumps that are affected by the listed energy conservation standards.

*** The final rule for this energy conservation standard has not been published. The compliance date and analysis of conversion costs have not been finalized at this time. (If a value is provided for total industry conversion expense, this value represents an estimate from the NOPR.)

† This column presents conversion costs as a percentage of cumulative revenue for the industry during the conversion period. The conversion period is the timeframe over which manufacturers must make conversion cost investments and lasts from the announcement year of the final rule to the standards year of the rule. This period typically ranges from 3 to 5 years, depending on the energy conservation standard.

†† Low and high conversion cost scenarios were analyzed as part of this Direct Final Rule. The range of estimated conversion expenses presented here reflects those two scenarios.

DOE also identified federal energy conservation standards for residential water heaters, residential room air conditioners, and commercial packaged air conditioners and heat pumps (water and evaporative cooled) as sources of cumulative regulatory burden for manufacturers of central air conditioners and heat pumps. However, NOPRs have not yet been published for those standards so information on manufacturer impacts is not yet available.

In addition to the energy conservation standards listed, manufacturers cited increasing ENERGY STAR [96] standards as a source of regulatory burden. In response, DOE does not consider ENERGY STAR in its presentation of cumulative regulatory burden, because ENERGY STAR is a voluntary program and is not federally mandated.

Manufacturers also cited the U.S. EPA Significant New Alternatives Policy (SNAP) Program as a source of regulatory burden. The SNAP Program evaluates and regulates substitutes for ozone-depleting chemicals (such as air conditioning refrigerants) that are being phased out under the stratospheric ozone protection provisions of the Clean Air Act. On April 10, 2015, the EPA issued a final rule allowing the use of three flammable refrigerants (HFC-32 (R-32), Propane (R-290), and R-441A) as new acceptable substitutes, subject to use conditions, for refrigerant in the Household and Light Commercial Air Conditioning class of equipment. 80 FR 19454 (April 10, 2015). However, DOE notes that the use of alternate refrigerants by manufacturers of residential central air conditioners and heat pumps would not be required as a direct result of this rule. Hence, alternate refrigerants were not considered in this analysis.

More information on the cumulative regulatory burden can be found in chapter 12 of the direct final rule TSD.

3. National Impact Analysis

a. Significance of Energy Savings

To estimate the energy savings attributable to potential standards for central air conditioners and heat pumps, DOE compared the energy consumption of those products under the base case to

[96] ENERGY STAR is a U.S. EPA voluntary program designed to identify and promote energy-efficient products to reduce greenhouse gas emissions. For more information on the ENERGY STAR program, please visit *www.energystar.gov.*

their anticipated energy consumption under each TSL. The savings are measured over the entire lifetime of products purchased in the 30-year period that begins in the first full year of anticipated compliance with amended standards (2021–2050 or, for the recommended TSL, 2023–2052). Table V–19 presents the estimated national energy savings for each considered TSL disaggregated by product class. Because TSL 1 and the Recommended TSL are comprised of regional standards for split system central air conditioners, the national energy savings results for this product class are disaggregated by region. The approach for estimating national energy savings is described in section IV.H.

TABLE V–19—CENTRAL AIR CONDITIONERS AND HEAT PUMPS: CUMULATIVE NATIONAL ENERGY SAVINGS FOR POTENTIAL STANDARDS

[Units sold in 30-year period]

Product class	TSL 1 *			Recommended TSL *			TSL 3	TSL 4
	North	Hot-humid	Hot-dry	North	Hot-humid	Hot-dry	National	National
Primary Energy Use								
Split AC	0.3	0.4	0.1	0.4	0.8	0.2	4.6	5.7
Split HP	0.4			1.7			3.2	7.0
Packaged AC	0.0			0.0			0.2	0.7
Packaged HP	0.0			0.0			0.3	0.3
Total	1.2			3.1			8.2	13.6
Full Fuel Cycle Energy Use								
Split AC	0.4	0.4	0.1	0.4	0.8	0.2	4.8	5.9
Split HP	0.5			1.8			3.4	7.3
Packaged AC	0.0			0.0			0.2	0.7
Packaged HP	0.0			0.0			0.3	0.3
Total	1.3			3.2			8.6	14.2

* National results for all product classes with exception of split system central air conditioners.

OMB Circular A–4 [97] requires agencies to present analytical results, including separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs. Circular A–4 also directs agencies to consider the variability of key elements underlying the estimates of benefits and costs. For this rulemaking, DOE undertook a sensitivity analysis using nine, rather than 30, years of product shipments. The choice of a nine-year period is a proxy for the timeline in EPCA for the review of certain energy conservation standards and potential revision of and compliance with such revised standards.[98] The review timeframe established in EPCA is generally not synchronized with the product lifetime, product manufacturing cycles, or other factors specific to central air conditioners and heat pumps. Thus, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology. The NES sensitivity analysis results based on a nine-year period of shipments are presented in Table V–20.

TABLE V–20—CUMULATIVE NATIONAL ENERGY SAVINGS FOR POTENTIAL STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS

[Units sold in 9-year period]

Product class	TSL 1 *			Recommended TSL *			TSL 3	TSL 4
	North	Hot-humid	Hot-dry	North	Hot-humid	Hot-dry	National	National
Primary Energy Use								
Split AC	0.1	0.1	0.0	0.1	0.2	0.0	1.2	1.5
Split HP	0.1			0.4			0.8	1.7
Packaged AC	0.0			0.0			0.0	0.2
Packaged HP	0.0			0.0			0.1	0.1

[97] U.S. Office of Management and Budget, ''Circular A–4: Regulatory Analysis'' (Sept. 17, 2003) (Available at: *http://www.whitehouse.gov/omb/circulars_a004_a-4/*).

[98] Section 325(m) of EPCA requires DOE to review its standards at least once every 6 years, and requires, for certain products, a 3-year period after any new standard is promulgated before compliance is required, except that in no case may any new standards be required within 6 years of the compliance date of the previous standards. While adding a 6-year review to the 3-year compliance period adds up to 9 years, DOE notes that it may undertake reviews at any time within the 6 year period and that the 3-year compliance date may yield to the 6-year backstop. A 9-year analysis period may not be appropriate given the variability that occurs in the timing of standards reviews and the fact that for some consumer products, the compliance period is 5 years rather than 3 years.

TABLE V–20—CUMULATIVE NATIONAL ENERGY SAVINGS FOR POTENTIAL STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS—Continued

[Units sold in 9-year period]

Product class	TSL 1 *			Recommended TSL *			TSL 3	TSL 4
	North	Hot-humid	Hot-dry	North	Hot-humid	Hot-dry	National	National
Total	0.3			0.8			2.1	3.5
Full Fuel Cycle Energy Use								
Split AC	0.1	0.1	0.0	0.1	0.2	0.1	1.3	1.6
Split HP	0.1			0.5			0.8	1.8
Packaged AC	0.0			0.0			0.0	0.2
Packaged HP	0.0			0.0			0.1	0.1
Total	0.4			0.9			2.2	3.6

* National results for all product classes with exception of split system central air conditioners.

b. Net Present Value of Consumer Costs and Benefits

Table V–21 shows the consumer NPV of the total costs and savings for consumers that would result from each TSL considered for central air conditioners and heat pumps disaggregated by product class. As noted above in the presentation of national energy savings results, because TSL 1 and the Recommended TSL are comprised of regional standards for split system central air conditioners, the national energy savings results for this product class are disaggregated by region. The impacts cover the lifetime of products purchased in 2021–2050. In accordance with OMB's guidelines on regulatory analysis,[99] DOE calculated NPV using both a 7-percent and a 3-percent real discount rate.

TABLE V–21—CENTRAL AIR CONDITIONERS AND HEAT PUMPS: CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR POTENTIAL STANDARDS

[Units sold in 30-year period]

Product class	TSL 1 *			Recommended TSL *			TSL 3	TSL 4
	North	Hot-humid	Hot-dry	North	Hot-humid	Hot-dry	National	National
3-percent discount rate								
Split AC	1.0	1.6	1.0	1.0	1.2	1.5	(4.5)	(18.2)
Split HP	2.1			8.5			3.9	(11.5)
Packaged AC	0.0			0.0			0.6	0.4
Packaged HP	0.0			0.0			1.1	1.1
Total	5.7			12.2			1.1	(28.1)
7-percent discount rate								
Split AC	(0.1)	0.4	0.3	0.0	(0.3)	0.3	(9.2)	(18.1)
Split HP	0.7			2.5			(1.2)	(13.1)
Packaged AC	0.0			0.0			0.1	(0.6)
Packaged HP	0.0			0.0			0.3	0.3
Total	1.3			2.5			(10.0)	(31.4)

* National results for all product classes with exception of split system central air conditioners.

The NPV results based on the aforementioned nine-year analytical period are presented in Table V–22. The impacts are counted over the lifetime of products purchased in 2021–2029. As mentioned previously, such results are presented for informational purposes only and is not indicative of any change in DOE's analytical methodology or decision criteria.

[99] OMB Circular A–4, section E (Sept. 17, 2003) (Available at: *http://www.whitehouse.gov/omb/circulars_a004_a-4*).

TABLE V–22—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR POTENTIAL STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS

[Units sold in 9-year period]

Product class	TSL 1 *			Recommended TSL *			TSL 3	TSL 4
	North	Hot-humid	Hot-dry	North	Hot-humid	Hot-dry	National	National
3-percent discount rate								
Split AC	0.2	0.5	0.3	0.3	0.2	0.5	(3.7)	(9.6)
Split HP	0.7			2.5			0.3	(6.4)
Packaged AC	0.0			0.0			0.2	(0.1)
Packaged HP	0.0			0.0			0.3	0.3
Total	1.7			3.5			(2.9)	(15.7)
7-percent discount rate								
Split AC	(0.1)	0.1	0.1	(0.1)	(0.2)	0.1	(5.5)	(10.3)
Split HP	0.3			1.0			(1.0)	(7.2)
Packaged AC	0.0			0.0			0.0	(0.4)
Packaged HP	0.0			0.0			0.1	0.1
Total	0.5			0.8			(6.4)	(17.8)

* National results for all product classes with exception of split system central air conditioners.

The above results reflect the use of the default decreasing price trend (see section IV.H.2) to estimate the change in price for central air conditioners and heat pumps over the analysis period. DOE also conducted a sensitivity analysis that considered one scenario with a constant price trend and one scenario with a slightly higher rate of price decline than the reference case. The results of these alternative cases are presented in appendix 10–C of the direct final rule TSD.

c. Indirect Impacts on Employment

DOE expects amended energy conservation standards for central air conditioners and heat pumps to reduce energy costs for consumers, with the resulting net savings being redirected to other forms of economic activity. Those shifts in spending and economic activity could affect the demand for labor. As described in section IV.N, DOE used an input/output model of the U.S. economy to estimate indirect employment impacts of the TSLs that DOE considered in this rulemaking. DOE understands that there are uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Therefore, DOE calculated results for near-term time frames (2021 to 2026), where these uncertainties are reduced.

The results suggest that the amended standards are likely to have a negligible impact on the net demand for labor in the economy. The net change in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment. Chapter 16 of the direct final rule TSD presents results regarding anticipated indirect employment impacts.

4. Impact on Product Utility or Performance

DOE has concluded that the amended standards it is adopting in this direct final rule would not lessen the utility or performance of central air conditioners and heat pumps. Manufacturers of these products currently offer central air conditioner and heat pump that meet or exceed the amended standards.

5. Impact of Any Lessening of Competition

As discussed in section III.I.1.e, EPCA directs DOE to consider any lessening of competition that is likely to result from standards. It also directs the Attorney General of the United States (Attorney General) to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination in writing to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. To assist the Attorney General in making this determination, DOE provided the Department of Justice (DOJ) with copies of the NOPR and the TSD for review. In its assessment letter responding to DOE, DOJ concluded that the proposed energy conservation standards for central air conditioners and heat pumps are unlikely to have a significant adverse impact on competition. DOE is publishing the Attorney General's assessment at the end of this direct final rule.

6. Need of the Nation To Conserve Energy

Enhanced energy efficiency, where economically justified, improves the Nation's energy security, strengthens the economy, and reduces the environmental impacts of energy production. Reduced electricity demand due to energy conservation standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. As a measure of this reduced demand, chapter 15 in the direct final rule TSD presents the estimated reduction in generating capacity, relative to the base case, for the TSLs that DOE considered in this rulemaking.

Energy conservation resulting from amended standards for central air conditioners and heat pumps are expected to yield environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases. Table V–23 provides DOE's estimate of cumulative reductions in air pollutant emissions resulting from each of the TSLs. The tables include both power sector emissions and upstream emissions. The emissions were calculated using the multipliers discussed in section IV.K. DOE reports annual emissions impacts for each TSL in chapter 13 of the direct final rule TSD.

TABLE V–23—CUMULATIVE EMISSIONS REDUCTION ESTIMATED FOR CENTRAL AIR CONDITIONER AND HEAT PUMP POTENTIAL STANDARDS

[Units sold in 30-year period]

	Trial standard level			
	1	Recommended	3	4
Power Sector Emissions				
CO_2 (million metric tons)	72.45	177.9	480.7	794.7
SO_2 (thousand tons)	40.16	98.84	267.3	443.8
NO_X (thousand tons)	81.71	200.5	541.6	894.3
Hg (tons)	0.149	0.368	0.994	1.651
CH_4 (thousand tons)	5.82	14.33	38.71	64.25
N_2O (thousand tons)	0.820	2.019	5.456	9.058
Upstream Emissions				
CO_2 (million metric tons)	4.230	10.44	28.06	46.34
SO_2 (thousand tons)	0.780	1.923	5.176	8.546
NO_X (thousand tons)	60.68	149.8	402.6	664.8
Hg (tons)	0.002	0.004	0.011	0.019
CH_4 (thousand tons)	335.4	828.0	2,225	3,674
N_2O (thousand tons)	0.039	0.095	0.256	0.422
Total Emissions				
CO_2 (million metric tons)	76.68	188.3	508.7	841.0
SO_2 (thousand tons)	40.94	100.8	272.4	452.4
NO_X (thousand tons)	142.4	350.3	944.2	1,559
Hg (tons)	0.151	0.372	1.005	1.669
CH_4 (thousand tons)	341.2	842.4	2,264	3,738
CH_4 (thousand tons CO_2eq) *	9,553	23,586	63,387	104,677
N_2O (thousand tons)	0.858	2.114	5.711	9.481
N_2O (thousand tons CO_2eq) *	227.5	560.3	1,514	2,512

* CO_2eq is the quantity of CO_2 that would have the same global warming potential (GWP).

As part of the analysis for this rule, DOE estimated monetary benefits likely to result from the reduced emissions of CO_2 and NO_X that DOE estimated for each of the TSLs considered for central air conditioners and heat pumps. As discussed in section IV.L, for CO_2, DOE used the most recent values for the SCC developed by an interagency process. The four sets of SCC values for CO_2 emissions reductions in 2015 resulting from that process (expressed in 2014$) are represented by $12.4/metric ton (the average value from a distribution that uses a 5-percent discount rate), $40.6/metric ton (the average value from a distribution that uses a 3-percent discount rate), $63.2/metric ton (the average value from a distribution that uses a 2.5-percent discount rate), and $118/metric ton (the 95th-percentile value from a distribution that uses a 3-percent discount rate). The values for later years are higher due to increasing damages (emissions-related costs) as the projected magnitude of climate change impacts increases.

Table V–24 presents the global value of CO_2 emissions reductions at each TSL. For each of the four cases, DOE calculated a present value of the stream of annual values using the same discount rate as was used in the studies upon which the dollar-per-ton values are based. DOE calculated domestic values as a range from 7 percent to 23 percent of the global values, and these results are presented in chapter 14 of the direct final rule TSD.

TABLE V–24—ESTIMATES OF GLOBAL PRESENT VALUE OF CO_2 EMISSIONS REDUCTION FOR CENTRAL AIR CONDITIONER AND HEAT PUMP POTENTIAL STANDARDS

[Units sold in 30-year period]

TSL	SCC Case *			
	5% discount rate, average	3% discount rate, average	2.5% discount rate, average	3% discount rate 95th percentile
	(billion 2015$)			
Power Sector Emissions				
1	456	2,171	3,487	6,614
Recommended	1,081	5,225	8,420	15,927
3	3,016	14,387	23,110	43,835
4	5,010	23,869	38,322	72,741

TABLE V–24—ESTIMATES OF GLOBAL PRESENT VALUE OF CO_2 EMISSIONS REDUCTION FOR CENTRAL AIR CONDITIONER AND HEAT PUMP POTENTIAL STANDARDS—Continued

[Units sold in 30-year period]

TSL	SCC Case *			
	5% discount rate, average	3% discount rate, average	2.5% discount rate, average	3% discount rate 95th percentile
	(billion 2015$)			
Upstream Emissions				
1	26	126	202	383
Recommended	63	305	491	929
3	174	833	1,340	2,539
4	288	1,381	2,220	4,209
Total FFC Emissions				
1	482	2,297	3,689	6,997
Recommended	1,143	5,530	8,912	16,855
3	3,190	15,220	24,450	46,375
4	5,298	25,249	40,542	76,950

* For each of the four cases, the corresponding SCC value for emissions in 2015 is $12.4, $40.6, $63.2, and $118 per metric ton (2015$). The values are for CO_2 only (*i.e.,* not CO_{2eq} of other greenhouse gases).

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other greenhouse gas (GHG) emissions to changes in the future global climate and the potential resulting damages to the world economy continues to evolve rapidly. Thus, any value placed on reducing CO_2 emissions in this rulemaking is subject to change. DOE, together with other Federal agencies, will continue to review various methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. However, consistent with DOE's legal obligations, and taking into account the uncertainty involved with this particular issue, DOE has included in this direct final rule the most recent values and analyses resulting from the interagency review process.

DOE also estimated the cumulative monetary value of the economic benefits associated with NO_X emissions reductions anticipated to result from amended standards for central air conditioners and heat pumps. The dollar-per-ton values that DOE used are discussed in section IV.L.2. Table V–25 presents the cumulative present values for NO_X emissions reductions for each TSL calculated using seven-percent and three-percent discount rates. This table presents values that use the low dollar-per-ton values, which reflect DOE's primary estimate. Results that reflect the range of NO_X dollar-per-ton values are presented in Table V–25.

TABLE V–25—ESTIMATES OF PRESENT VALUE OF NO_X EMISSIONS REDUCTION FOR CENTRAL AIR CONDITIONER AND HEAT PUMP POTENTIAL STANDARDS

[Units sold in 30-year period]

TSL	3% Discount rate	7% Discount rate
	(million 2015$)	
Power Sector Emissions		
1	123	45
Recommended	292	100
3	814	294
4	1,358	490
Upstream Emissions		
1	99	35
Recommended	236	79
3	657	232
4	1,090	385
Total FFC Emissions *		
1	222	80
Recommended	528	179
3	1,472	525
4	2,448	875

* Components may not sum to total due to rounding.

7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VI)) No other factors were considered in this analysis.

8. Summary of National Economic Impacts

The NPV of the monetized benefits associated with emissions reductions can be viewed as a complement to the NPV of the consumer savings calculated for each TSL considered in this rulemaking. Table V–26 presents the NPV values that result from adding the estimates of the potential economic benefits resulting from reduced CO_2 and NO_X emissions in each of four valuation scenarios to the NPV of consumer savings calculated for each TSL for the central air conditioners and heat pumps considered in this rulemaking, at both a seven-percent and three-percent discount rate. The CO_2 values used in the columns of each table correspond to the 2015 values in the four sets of SCC values discussed above.

TABLE V–26—CENTRAL AIR CONDITIONERS AND HEAT PUMPS: NET PRESENT VALUE OF CONSUMER SAVINGS COMBINED WITH PRESENT VALUE OF MONETIZED BENEFITS FROM CO_2 AND NO_X EMISSIONS REDUCTIONS FOR POTENTIAL STANDARDS

TSL	Consumer NPV at 3% discount rate added with:			
	SCC case $12.4/metric ton and 3% low NO_X values	SCC case $40.6/metric ton and 3% low NO_X values	SCC case $63.2/metric ton and 3% low NO_X values	SCC case $118/metric ton and 3% low NO_X values
	(billion 2015$)			
1	6.4	8.3	9.7	13.0
Recommended	13.8	18.2	21.6	29.5
3	5.8	17.8	27.0	48.9
4	(20.3)	(0.4)	14.9	51.3
TSL	Consumer NPV at 7% Discount Rate added with:			
	SCC case $12.4/metric ton and 7% low NO_X values	SCC case $40.6/metric ton and 7% low NO_X values	SCC case $63.2/metric ton and 7% low NO_X values	SCC case $118/metric ton and 7% low NO_X values
	(billion 2015$)			
1	1.8	3.7	5.0	8.4
Recommended	3.8	8.2	11.6	19.5
3	(6.3)	5.8	15.0	36.9
4	(25.3)	(5.3)	10.0	46.4

The national operating cost savings are domestic U.S. monetary savings that occur as a result of purchasing the covered products. The CO_2 reduction is a benefit that accrues globally due to decreased domestic energy consumption that is expected to result from this rule. Because CO_2 emissions have a very long residence time in the atmosphere, the SCC values in future years reflect future climate-related impacts that continue beyond 2100 through 2300.

C. Conclusion

When considering new or amended energy conservation standards, the standards that DOE adopts for any type (or class) of covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

For this direct final rule, DOE considered the impacts of amended standards for central air conditioners and heat pumps at each TSL, beginning with the maximum technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next-most-efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

To aid the reader in understanding the benefits and/or burdens of each TSL, tables in this section summarize the quantitative analytical results for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers who may be disproportionately affected by a standard and impacts on employment.

DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. There is evidence that consumers undervalue future energy savings as a result of: (1) A lack of information; (2) a lack of sufficient salience of the long-term or aggregate benefits; (3) a lack of sufficient savings to warrant delaying or altering purchases; (4) excessive focus on the short term, in the form of inconsistent weighting of future energy cost savings relative to available returns on other investments; (5) computational or other difficulties associated with the evaluation of relevant tradeoffs; and (6) a divergence in incentives (for example, renter versus owner or builder versus purchaser). Other literature indicates that with less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off at a higher than expected rate between current consumption and uncertain future energy cost savings. This undervaluation suggests that regulation that promotes energy efficiency can produce significant net private gains (as well as producing social gains by, for example, reducing pollution).

In DOE's current regulatory analysis, potential changes in the benefits and costs of a regulation due to changes in consumer purchase decisions are included in two ways. First, if consumers forego a purchase of a product in the standards case, this decreases sales for product manufacturers, and the cost to manufacturers is included in the MIA. Second, DOE accounts for energy savings attributable only to products actually used by consumers in the standards case; if a standard decreases the number of products purchased by consumers, this decreases the potential energy savings from an energy conservation standard. DOE provides estimates of changes in the volume of product purchases in chapter 9 of the direct final rule TSD. DOE's current analysis does not explicitly control for heterogeneity in consumer preferences,

preferences across subcategories of products or specific features, or consumer price sensitivity variation according to household income.[100]

While DOE is not prepared at present to provide a fuller quantifiable framework for estimating the benefits and costs of changes in consumer purchase decisions due to an energy conservation standard, DOE is committed to developing a framework that can support empirical quantitative tools for improved assessment of the consumer welfare impacts of appliance standards. DOE has posted a paper that discusses the issue of consumer welfare impacts of appliance standards, and potential enhancements to the methodology by which these impacts are defined and estimated in the regulatory process.[101] DOE welcomes comments on how to more fully assess the potential impact of energy conservation standards on consumer choice and how to quantify this impact in its regulatory analysis in future rulemakings.

1. Benefits and Burdens of TSLs Considered for Central Air Conditioner and Heat Pump Standards

Table V–27 and Table V–28 summarize the quantitative impacts estimated for each TSL for central air conditioners and heat pumps. The national impacts are measured over the lifetime of central air conditioners and heat pumps purchased in the 30-year period that begins in the anticipated first year of compliance with any amended standards (2021–2050 or, in the case of the recommended TSL, 2023–2052). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle results. The efficiency levels contained in each TSL are described in section V.A.

TABLE V–27—SUMMARY OF RESULTS FOR CENTRAL AIR CONDITIONER AND HEAT PUMP TSLS: NATIONAL IMPACTS

Category	TSL 1	Recommended TSL	TSL 3	TSL 4
FFC National Energy Savings				
Quads	1.3	3.2	8.6	14.2.
NPV of Consumer Costs and Benefits (2015$ billion)				
3% discount rate	5.7	12.2	1.1	(28.1).
7% discount rate	1.3	2.5	(10.0)	(31.4).
Cumulative Emissions Reduction (Total FFC Emissions)				
CO_2 (million metric tons)	76.68	188.3	508.7	841.0.
SO_2 (thousand tons)	40.94	100.8	272.4	452.4.
NO_X (thousand tons)	142.4	350.3	944.2	1,559.
Hg (tons)	0.151	0.372	1.005	1.669.
CH_4 (thousand tons)	341.2	842.4	2,264	3,738.
CH_4 (million tons CO_2eq) *	9,553	23,586	63,387	104,677.
N_2O (thousand tons)	0.858	2.114	5.711	9.481.
N_2O (thousand tons CO_2eq) *	227.5	560.3	1,514	2,512.
Value of Emissions Reduction (Total FFC Emissions)				
CO_2 (2015$ billion) **	0.482 to 6.997	1.143 to 16.855	3.190 to 46.375	5.298 to 76.950.
NO_X—3% discount rate (2015$ million)	222.2 to 506.6	528.1 to 1204.1	1471.5 to 3355.0	2448.1 to 5581.5.
NO_X—7% discount rate (2015$ million)	80.0 to 180.4	178.6 to 402.6	525.4 to 1184.5	875.0 to 1972.9.

* CO_2eq is the quantity of CO_2 that would have the same global warming potential (GWP).
** Range of the economic value of CO_2 reductions is based on estimates of the global benefit of reduced CO_2 emissions.
Note: Parentheses indicate negative values.

TABLE V–28—SUMMARY OF RESULTS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS BY TSL: MANUFACTURER AND CONSUMER IMPACTS

Category	TSL 1	Recommended TSL *	TSL 3	TSL 4
Manufacturer Impacts				
Industry NPV (2015$ million)				
No-new-standards case INPV = $4,496.1	3,852.0 to 4,466.2	3,803.9 to 4,381.9	3,382.0 to 4,512.2	3,360.6 to 4,889.6
Change in Industry NPV (%)	(14.3) to (0.7)	(15.4) to (2.5)	(24.8) to 0.4	(25.3) to 8.8
Consumer Average LCC Savings (2015$)				
Split Air Conditioners	N: $43	N: $43		
	HD: $169	HD: $150	($122).	($304)
	HH: $82	HH: $39		
Split Heat Pumps	$72	$131	($25)	($425)
Package Air Conditioners	N/A	N/A	$43	($80)
Package Heat Pumps	N/A	N/A	$115	$115

[100] P.C. Reiss and M.W. White, Household Electricity Demand, Revisited, *Review of Economic Studies* (2005) 72, 853–883.

[101] Alan Sanstad, Notes on the Economics of Household Energy Consumption and Technology Choice. Lawrence Berkeley National Laboratory (2010) (Available at: *http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/consumer_ee_theory.pdf* (Last accessed May 3, 2013).

TABLE V–28—SUMMARY OF RESULTS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS BY TSL: MANUFACTURER AND CONSUMER IMPACTS—Continued

Category	TSL 1	Recommended TSL *	TSL 3	TSL 4
Space-Constrained Air Conditioners	N/A	N/A	N/A	$58
Small-Duct High-Velocity	N/A	N/A	N/A	($540)
Shipment-Weighted Average **	$68	$75	($71)	($315)
Consumer Simple PBP (years)				
Split Air Conditioners	N: 10.5 HD: 5.4 HH: 5.5	N: 10.5 HD: 7.6 HH: 7.7	15.2.	19.2
Split Heat Pumps	5.2	4.9	9.4	14.9
Package Air Conditioners	N/A	N/A	8.9	12.3
Package Heat Pumps	N/A	N/A	5.2	5.2
Space-Constrained Air Conditioners	N/A	N/A	N/A	11.6
Small-Duct High-Velocity	N/A	N/A	N/A	34.3
Shipment-Weighted Average **	6.0	6.7	12.5	16.8
% of Consumers That Experience Net Cost				
Split Air Conditioners	N: 25% HD: 14% HH: 15%	N: 25% HD: 42% HH: 45%	63%.	75%
Split Heat Pumps	9%	20%	54%	79%
Package Air Conditioners	N/A	N/A	53%	69%
Package Heat Pumps	N/A	N/A	39%	39%
Space-Constrained Air Conditioners	N/A	N/A	N/A	60%
Small-Duct High-Velocity	N/A	N/A	N/A	90%
Shipment-Weighted Average *	14%	28%	59%	74%

Note: Parentheses indicate negative values. N = North region. HD = Hot-dry region; HH = Hot-humid region.

* There are no impacts for Package Air Conditioners. Package Heat Pumps, Space-Constrained Air Conditioners, and Small-Duct High-Velocity because the standard levels are at the baseline efficiency.

** Weighted by shares of each product class in total projected shipments in 2021. Does not include shipments for SCAC and SDHV.

First, DOE considered TSL 4, which would save an estimated total of 14.2 quads of energy, an amount DOE considers significant. TSL 4 has an estimated NPV of consumer benefit of −$31.4 billion using a 7-percent discount rate, and −$28.1 billion using a 3-percent discount rate.

The cumulative emissions reductions at TSL 4 are 841 Mt of CO_2, 452.4 thousand tons of SO_2, 1,559 thousand tons of NO_X, 1.669 tons of Hg, 3,738 thousand tons of CH_4, and 9.481 thousand tons of N_2O. The estimated monetary value of the CO_2 emissions reductions at TSL 4 ranges from $5.298 billion to $76.950 billion.

At TSL 4, the average LCC savings is −$304 for split air conditioners, −$425 for split heat pumps, −$80 for package air conditioners, $115 for package heat pumps, $58 for space-constrained air conditioners, and −$540 for small-duct high-velocity air conditioners. The simple PBP is 19.2 years for split air conditioners, 14.9 years for split heat pumps, 12.3 years for package air conditioners, 5.2 years for package heat pumps, 11.6 years for space-constrained air conditioners, and 34.3 years for small-duct high-velocity air conditioners. The share of consumers experiencing a net LCC cost is 75 percent for split air conditioners, 79 percent for split heat pumps, 69 percent for package air conditioners, 39 percent for package heat pumps, 60 percent for space-constrained air conditioners, and 90 percent for small-duct high-velocity air conditioners.

At TSL 4, the projected change in INPV ranges from a decrease of $1,135.6 million to an increase of $393.5 million. If the more severe range of impacts is reached, TSL 4 could result in a net loss of up to 25.3 percent of INPV for manufacturers.

After considering the analysis and weighing the benefits and the burdens, the Secretary has concluded that, at TSL 4 for central air conditioner and heat pump standards, the benefits of energy savings and emissions reductions would be outweighed by the negative NPV of total consumer benefits at a 3-percent and 7-percent discount rate, negative average consumer LCC savings for most product classes, and the reduction in industry value.

Next, DOE considered TSL 3, which would save an estimated total of 8.6 quads of energy, an amount DOE considers significant. TSL 3 has an estimated NPV of consumer benefit of −$10 billion using a 7-percent discount rate, and $1.1 billion using a 3-percent discount rate.

The cumulative emissions reductions at TSL 3 are 508.7 Mt of CO_2, 272.4 thousand tons of SO_2, 944.2 thousand tons of NO_X, 1.005 tons of Hg, 2,264 thousand tons of CH_4, and 5.711 thousand tons of N_2O. The estimated monetary value of the CO_2 emissions reductions at TSL 3 ranges from $3.190 billion to $46.375 billion.

At TSL 3, the average LCC savings is −$122 for split air conditioners, −$25 for split heat pumps, $43 for package air conditioners, and $115 for package heat pumps. The simple PBP is 15.2 years for split air conditioners, 9.4 years for split heat pumps, 8.9 years for package air conditioners, and 5.2 years for package heat pumps. The share of consumers experiencing a net LCC cost is 63 percent for split air conditioners, 54 percent for split heat pumps, 53 percent for package air conditioners, and 39 percent for package heat pumps. There are no impacts on space-constrained air conditioners or small-duct high-velocity air conditioners at TSL 3.

At TSL 3, the projected change in INPV ranges from a decrease of $1,114.2 million to an increase of $16.1 million. If the more severe range of impacts is reached, TSL 3 could result in a net loss of up to 24.8 percent of INPV for manufacturers.

After considering the analysis and weighing the benefits and the burdens, the Secretary has concluded that at TSL 3 for central air conditioner and heat pump standards, the benefits of energy savings, positive NPV of consumer benefit at a 3-percent discount rate, and emissions reductions would be outweighed by the negative NPV of consumer benefit at a 7-percent discount rate, negative average LCC savings for most product classes, and the potential reduction in INPV for manufacturers.

Next, DOE considered the Recommended TSL, which would save an estimated total of 3.2 quads of energy, an amount DOE considers significant. The Recommended TSL has an estimated NPV of consumer benefit of $2.5 billion using a 7-percent discount rate, and $12.2 billion using a 3-percent discount rate.

The cumulative emissions reductions under the Recommended TSL are 188.3 Mt of CO_2, 100.8 thousand tons of SO_2, 350.3 thousand tons of NO_X, 0.372 tons of Hg, 842.4 thousand tons of CH_4, and 2.114 thousand tons of N_2O. The estimated monetary value of the CO_2 emissions reductions ranges from $1.143 billion to $16.855 billion.

Under the Recommended TSL, the average LCC savings for split air conditioners is $43 in the north region, $150 in the hot dry region, $39 in the hot humid region, and $131 for split heat pumps. The simple payback period for split air conditioners is 10.5 years in the north region, 7.6 years in the hot dry region, 7.7 years in the hot humid region, and 4.9 years for split heat pumps. The share of consumers experiencing a net LCC cost for split air conditioners is 25 percent in the north region, 42 percent in the hot dry region, 45 percent in the hot humid region, and 20 percent for split heat pumps. There are no impacts to packaged air conditioners, packaged heat pumps, space-constrained air conditioners, and small-duct high-velocity air conditioners under the Recommended TSL.

Under the Recommended TSL, the projected change in INPV ranges from a decrease of $692.3 million to a decrease of $114.2 million. If the more severe range of impacts is reached, TSL 3 could result in a net loss of up to 15.4 percent of INPV for manufacturers.

After considering the analysis and weighing the benefits and the burdens, the Secretary has concluded that under the Recommended TSL for central air conditioner and heat pump standards, the benefits of energy savings, positive NPV of consumer benefit, positive impacts on consumers (as indicated by positive average LCC savings and favorable PBPs), and emission reductions, would outweigh the negative impacts on some consumers and the potential reduction in INPV for manufacturers.

Under the authority provided by 42 U.S.C. 6295(p)(4), DOE is issuing this direct final rule that establishes amended energy conservation standards for central air conditioners and heat pumps at the Recommended TSL. The amended energy conservation standards for central air conditioners and heat pumps as determined by the DOE test procedure at the time of the 2015–2016 ASRAC negotiations are presented in Table V–29.

TABLE V–29—AMENDED ENERGY CONSERVATION STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS AS DETERMINED BY THE DOE TEST PROCEDURE AT THE TIME OF THE 2015–2016 ASRAC NEGOTIATIONS

Product class	National		Southeast *	Southwest **	
	SEER	HSPF	SEER	SEER	EER
Split-System Air Conditioners with a Certified Cooling Capacity <45,000 Btu/h	14	.....	15	15	*** 12.2/10.2
Split-System Air Conditioners with a Certified Cooling Capacity ≥45,000 Btu/h	14	.....	14.5	14.5	*** 11.7/10.2
Split-System Heat Pumps	15	8.8			
Single-Package Air Conditioners †	14	.....	.....	.....	11.0
Single-Package Heat Pumps †	14	8.0			
Space-Constrained Air Conditioners †	12				
Space-Constrained Heat Pumps †	12	7.4			
Small-Duct High-Velocity Systems †	12	7.2			

* Southeast includes: The states of Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virginia, the District of Columbia, and the U.S. territories.

** Southwest includes the states of Arizona, California, Nevada, and New Mexico.

*** The 10.2 EER amended energy conservation standard applies to split-system air conditioners with a seasonal energy efficiency ratio greater than or equal to 16.

† The energy conservation standards for small-duct high velocity and space-constrained product classes remain unchanged from current levels.

Table V–30 shows the amended energy conservation standards for central air conditioners and heat pumps as determined by the November 2016 test procedure final rule.

TABLE V–30—AMENDED ENERGY CONSERVATION STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS AS DETERMINED BY THE NOVEMBER 2016 TEST PROCEDURE FINAL RULE

Product class	National		Southeast *	Southwest **	
	SEER2	HSPF2	SEER2	SEER2	EER2
Split-System Air Conditioners with a Certified Cooling Capacity <45,000 Btu/h	13.4	.....	14.3	14.3	*** 11.7/9.8
Split-System Air Conditioners with a Certified Cooling Capacity ≥45,000 Btu/h	13.4	.....	13.8	13.8	*** 11.2/9.8
Split-System Heat Pumps	14.3	7.5			

TABLE V–30—AMENDED ENERGY CONSERVATION STANDARDS FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS AS DETERMINED BY THE NOVEMBER 2016 TEST PROCEDURE FINAL RULE—Continued

Product class	National		Southeast *	Southwest **	
	SEER2	HSPF2	SEER2	SEER2	EER2
Single-Package Air Conditioners †	13.4	.....	.....	.....	10.6
Single-Package Heat Pumps †	13.4	6.7			
Space-Constrained Air Conditioners †	11.7				
Space-Constrained Heat Pumps †	11.9	6.3			
Small-Duct High-Velocity Systems †	12	6.1			

* Southeast includes: The states of Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virginia, the District of Columbia, and the U.S. territories.
** Southwest includes the states of Arizona, California, Nevada, and New Mexico.
*** The 9.8 EER amended energy conservation standard applies to split-system air conditioners with a seasonal energy efficiency ratio greater than or equal to 15.2.
† The energy conservation standards for small-duct high velocity and space-constrained product classes remain unchanged from current levels.

The following paragraph describes how DOE translated the energy conservation standards in Table V–29—which are in terms of SEER, HSPF, and EER as determined by the DOE test procedure at the time of the 2015–2016 ASRAC Negotiations—to the energy conservation standard levels in Table V–30—which are in terms of SEER2, HSPF2, and EER2 as determined by the November 2016 test procedure final rule. DOE used a methodology consistent with the recommendations of the CAC/HP Working Group to translate the SEER standard levels to SEER2 standard levels for the split-system and single-package product classes. Note that the heating load line slope factor established by the November 2016 test procedure final rule is different than the heating load line slope factors used by the CAC/HP Working Group in their Term Sheet recommendation #9. DOE translated the HSPF standard levels to HSPF2 standard levels for split-system and single-package heat pumps by adjusting for the intermediate heating load line slope factor established by the November 2016 test procedure final rule using interpolation. (November 2016 Test Procedure Final Rule, pp. 127–130)

Comments in response to the provisional translations for HSPF2 for split system and single-package heat pumps are summarized in the November 2016 test procedure final rule. (November 2016 Test Procedure Final Rule, pp. 127–130) Commenters agreed with the translation for split-system heat pumps, but industry commenters felt that the 6.8 value was too high for single-package heat pumps. Alternative HSPF2 values that were suggested in comments ranged from 6.5 (Docket No. EERE–2016–BT–TP–0029, Lennox, No. 25 at p. 10) to 6.7 (Docket No. EERE–2016–BT–TP–0029, Goodman, No. 39 at p. 10) Data provided under confidentiality supports the range suggested in comments. DOE combined that data with the data it used to validate its interpolated value of 6.8. DOE found that the combined data shows that 6.7 HSPF2 is an appropriate translation. For this reason, DOE is adopting 6.7 HSPF2 for single-package heat pumps in this direct final rule.

The August 2016 test procedure SNOPR and November 2016 test procedure final rule did not include translated levels for small-duct high velocity (SDHV) and space-constrained products. Neither did Recommendation #9 of the Term Sheet. Recommendation #9 did, however, state that the energy conservation standards for those product classes should remain unchanged from current levels (*i.e.,* that there would be no change in stringency). (ASRAC Term Sheet, No. 76 at pp. 4–5) On October 27, 2016, DOE published a notice of data availability (NODA) that provided provisional translations of the CAC/HP Working Group's recommended energy conservation standard levels for small-duct high velocity and space constrained products (which are in terms of the test procedure at the time of the 2015–2016 Negotiations) into levels consistent with the test procedure proposed in the August 2016 test procedure SNOPR. 81 FR 74727 (October 27, 2016). Table V–31 presents the provisional translations included in the October 2016 NODA. Note that multiple provisional translations from SEER to SEER2 are included for space-constrained air conditioners and heat pumps because, at the time of the NODA publication, DOE had not finalized the test procedure which would establish the minimum external static pressure requirements.

TABLE V–31—PROVISIONAL TRANSLATIONS OF CAC/HP WORKING GROUP-RECOMMENDED ENERGY CONSERVATION STANDARD LEVELS INCLUDED IN OCTOBER 2016 NODA

Product class	CAC/HP working group recommendation		August 2016 test procedure SNOPR translation	
	SEER	HSPF	SEER2	HSPF2
Small-Duct High-Velocity Systems	12	7.2	12	6.1
Space-Constrained Air Conditioners	.....	.....	* 11.6/** 11.8	
Space-Constrained Heat Pumps	12	.....	* 11.5/** 11.9	6.3

* Estimated SEER2 at 0.50 in. wc.
** Estimated SEER2 at 0.30 in. wc.

In developing its provisional translations for space-constrained air conditioners published in the NODA, DOE reviewed existing test data, adjusted relevant measurements based on blower performance data, and

translated the levels based on the average impact. For the space-constrained and SDHV heat pump translations published in the NODA, DOE also reviewed test data and confirmed that the 15% reduction from HSPF to HSPF2 that DOE observed for split-system and single-package heat pumps was appropriate also for space-constrained and SDHV heat pumps.

In written comments, manufacturers and AHRI expressed support for DOE's provisional translations for SDHV products. Unico stated that it reviewed all of its test reports from the previous two years and found its range of results validated DOE's translations for SDHV products. (Unico, No. 95 at p. 2). AHRI and Lennox also expressed support for DOE's SEER and HPSF to SEER2 and HSPF2 levels for SDHV products. (AHRI, No. 94 at p. 1; Lennox, No. 97 at p. 1) EEI commented that it did not agree with DOE's translation because the HSPF appears to drop by approximately 15.3%, even though there has been no change to the product. (EEI, No. 96 at p. 2).

Regarding the concern expressed by EEI, DOE's translations do not assume nor reflect any change to product design. EPCA requires DOE to consider changes in energy conservation standards if a test procedure change alters the measurement, but does not prohibit a test procedure change that alters the measurement. (42 U.S.C. 6293(e)) In the November 2016 test procedure final rule, DOE adopted provisions that amend the test procedure required to determine representations for CAC/HP, including SDHV products. These provisions impact the value of the test procedure results. For instance, the November 2016 test procedure final rule assumes higher heating loads for heat pumps in colder outdoor conditions, which will typically result in lower HSPF2 ratings. (November 2016 Test Procedure Final Rule, pp. 110–127) Simply stated, an SDHV product tested in accordance with the test procedure at the time of the 2015–2016 ASRAC Negotiations will get a different rating than the same SDHV product (without design changes) tested in accordance with the test procedure adopted in the November 2016 test procedure final rule. DOE's translations are intended to reflect these differences. DOE is using ''SEER2'', ''HSPF2'', and ''EER2'' to distinguish ratings determined by the November 2016 test procedure from the SEER, HSPF and EER ratings determined by past test procedures to mitigate confusion that may result from the possibility that products available before and after the November 2016 test procedure final rule may have a different SEER2/HSPF2/EER2 than SEER/HSPF/EER rating despite no changes to design.

Unico's SDHV data validate DOE's translations, which are also supported by AHRI and Lennox. DOE did not receive any other comments or data suggesting that its translations for SDHV products are inappropriate. For these reasons, DOE is adopting the SDHV translations presented in the October 2016 NODA in this final rule.

AHRI is concerned that the SEER2 translation DOE presented for space-constrained air conditioners is too high by 0.1. AHRI calculated SEER2 to be 11.7 at 0.30 in. wc. rather than 11.8. AHRI provided data for 4 space-constrained products to illustrate its results. (AHRI, No. 94 at p. 2). Lennox also commented that DOE's SEER2 translation for space-constrained air conditioners is too high by 0.1. (Lennox, No. 97 at p. 2) AHRI and Lennox also commented that DOE should adopt the same SEER2 standard for space-constrained air conditioners and heat pumps (AHRI, No. 94 at p.2; Lennox, No. 97 at p. 2) First Co. strongly disagrees with DOE's proposed translation of SEER to SEER2 values for space-constrained air conditioners because DOE's methodology for determining SEER2 fails to account for the significant SEER reduction resulting from what they claim to be ''new'' coil-only testing requirements for space-constrained air conditioners. First Co. is referring to amendments to the certification requirements of 10 CFR 429 adopted for CAC/HP in the June 2016 test procedure final rule, which became effective in July 2016 and are required for representations starting December 5, 2016. (10 CFR 429.16(a)(1)) First Co. stated that prior to the June 2016 test procedure final rule, space constrained units, which are manufactured and sold only for installation with blower coil indoor units, have been tested with blower coil units with high-efficiency motors (ECMs). The high-efficiency motors average 200W/1000 scfm or less for indoor power compared with the default fan power value of 365W/1000 scfm applied under the ''coil- only'' test. First Co. claims that the impact of the ''coil-only'' test alone is approximately a 10% reduction in SEER of these products from 12 SEER to 10.8 SEER, and that DOE's methodology is flawed because it uses a starting point of 365W/1000 (*i.e.,* the ''coil-only'' default fan power value of the current test procedure) and only considers the change in energy usage from 365W/1000 scfm to 441 W/1000 scfm. They claim that this ignores the increase in energy usage from 200W/1000 scfm to 365W/1000 scfm, and the resulting SEER reduction, caused by the imposition of the ''coil-only'' test. First Co. submits that SEER2 should be calculated by applying the following methodology, which takes into account the new ''coil-only'' test and the changes in the August 2016 test procedure SNOPR: replace 200W/1000 scfm (test data using ECM) with 411 W/1000 scfm and recalculate the SEER. First Co. indicates that applying this methodology, SEER will be reduced by approximately 10% for the coil only test and by an additional 4% to account for the suggested 411 W/1000 scfm number, resulting in a 10.4 SEER2 rating for space constrained air conditioners. (First Co., No. 93 at pp. 1,2)

DOE appreciates the space-constrained air conditioner translation data provided by AHRI. DOE combined AHRI's data with the data DOE used to develop DOE's provisional translations. Note that after the October 2016 NODA, DOE issued the November 2016 test procedure final rule in which it adopted a minimum external static pressure requirement of 0.3 in. wc. for space-constrained air conditioners and heat pumps. (November 2016 Test Procedure Final Rule, pp. 97–99) Consequently, DOE combined AHRI's data with DOE's data reflective of performance at that operating condition. Once combined, the data validates AHRI's assertion that 11.7 is the appropriate SEER2 level for space-constrained air conditioners at 0.3 in. wc. Thus, DOE is adopting 11.7 SEER2 as the standard level for space-constrained air conditioners in this final rule. DOE disagrees with AHRI and Lennox that 11.7 SEER2 should also be used for space-constrained heat pumps. While space-constrained air conditioners are required to certify at least one coil-only combination that is representative of the least efficient coil-only combination distributed in commerce, space-constrained heat pumps have no coil-only requirement. (10 CFR 429.16(a)(1)) AHRI derived 11.7 SEER2 using 406 W/1000 scfm (the default fan power at 0.3 in. wc.) for indoor fan power consumption. As discussed in the November 2015 test procedure SNOPR and subsequently referenced in the November 2016 test procedure final rule, this default fan power value is reflective of the weighted-average performance of indoor fan by motor type distribution projected for the effective date of this standard, which includes a significant majority of lower-efficiency PSC motors. 80 FR 69319–20 and (November 2016 Test Procedure Final Rule, pp. 104–110) First

Co. states that most space-constrained blower-coil systems currently sold include a high-efficiency ECM motor. (First Co., No. 93 at pp. 1–2) Brushless permanent magnet motors (often referred to as ''ECM'') are more efficient than PSC motors. Thus, 406 W/1000 scfm is not representative of the field operation of space-constrained blower-coil systems being sold. DOE's provisional analysis presented in the October 2016 NODA is consistent with First Co.'s claims, showing that higher-efficiency motors typically used in space-constrained blower-coil systems sold today consume less than 406 W/1000 scfm, resulting in a higher SEER2 level for space-constrained blower-coil systems compared to space-constrained coil-only systems. DOE did not receive any additional comments or data regarding the SEER2 level for space-constrained heat pumps. For these reasons, DOE finds that a higher SEER2 level for space-constrained heat pumps—which is based on blower-coil performance—compared to space-constrained air-conditioners—which is based on coil-only performance—is appropriate. DOE adopts its provisional translation of 11.9 SEER2 for space-constrained heat pumps for these reasons.

DOE provided a response to First Co.'s comment regarding the required coil-only test for testing of space constrained products in the November 30, 2016 test procedure final rule. (November 2016 Test Procedure Final Rule, pp. 146–148)

2. Summary of Benefits and Costs (Annualized) of the Amended Standards

The benefits and costs of the amended standards can also be expressed in terms of annualized values. The annualized monetary values are the sum of: (1) The annualized national economic value (expressed in 2015$) of the benefits from operation of products that meet the proposed standards (consisting primarily of operating cost savings from using less energy, minus increases in product purchase costs, which is another way of representing consumer NPV), and (2) the annualized monetary value of the benefits of emission reductions, including CO_2 emission reductions.[102]

Estimates of annualized benefits and costs of the amended standards for central air conditioners and heat pumps, expressed in 2015$, are shown in Table V–32. The results under the primary estimate are as follows.

Using a 7-percent discount rate for benefits and costs other than CO_2 reduction, (for which DOE used a 3-percent discount rate along with the average SCC series that uses a 3-percent discount rate ($40.6/t in 2015)), the estimated cost of the adopted standards is $741 million per year in increased product costs, while the estimated benefits are $1,041 million per year in reduced product operating costs, $337 million per year in CO_2 reductions, and $22 million per year in reduced NO_X emissions. In this case, the net benefit would amount to $659 million per year.

Using a 3-percent discount rate for all benefits and costs and the average SCC series that uses a 3-percent discount rate ($40.6/t in 2015), the estimated cost of the standards adopted in this rule is $747 million per year in increased product costs, while the estimated benefits are $1,488 million per year in reduced product operating costs, $337 million per year in CO_2 reductions, and $32 million per year in reduced NO_X emissions. In this case, the net benefit would amount to $1,110 million per year.

DOE also notes that, using a 7-percent discount rate for only the increased product costs and the reduced product operating costs, the net benefit would amount to $300 million per year. Using a 3-percent discount rate for only the increased product costs and the reduced product operating costs, the net benefit would amount to $741 million per year.

TABLE V–32—ANNUALIZED BENEFITS AND COSTS OF AMENDED STANDARDS (RECOMMENDED TSL) FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS *

	Discount rate (%)	Primary estimate *	Low net benefits estimate *	High net benefits estimate *
	million 2015$/year			
Benefits				
Consumer Operating Cost Savings	7	1,041	1,005	1,147
	3	1,488	1,425.	1,653.
CO_2 Reduction (using mean SCC at 5% discount rate) **	5	100	100	100.
CO_2 Reduction (using mean SCC at 3% discount rate) **	3	337	337	337.
CO_2 Reduction (using mean SCC at 2.5% discount rate) **	2.5	494	494	494.
CO_2 Reduction (using 95th percentile SCC at 3% discount rate) **.	3	1,027	1,027	1,027.
NO_X Reduction †	7	22	22	49.
	3	32	32	73.
Total Benefits ††	7 plus CO_2 range	1,163 to 2,090	1,127 to 2,054	1,296 to 2,223
	7	1,400	1,364	1,533
	3 plus CO_2 range	1,620 to 2,547	1,557 to 2,484	1,826 to 2,753
	3	1,857	1,794	2,063
Costs				
Consumer Incremental Installed Costs	7	741	784	723
	3	747	799	725

[102] To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2016, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (*e.g.,* 2020 or 2030), and then discounted the present value from each year to 2016. The calculation uses discount rates of 3 and 7 percent for all costs and benefits except for the value of CO_2 reductions, for which DOE used case-specific discount rates. Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in the compliance year, that yields the same present value.

TABLE V–32—ANNUALIZED BENEFITS AND COSTS OF AMENDED STANDARDS (RECOMMENDED TSL) FOR CENTRAL AIR CONDITIONERS AND HEAT PUMPS *—Continued

	Discount rate (%)	Primary estimate *	Low net benefits estimate *	High net benefits estimate *
	million 2015$/year			
Net Benefits				
Total ††	7 plus CO_2 range	422 to 1,349	342 to 1,269	573 to 1,500
	7	659	580	810
	3 plus CO_2 range	873 to 1,800	757 to 1,684	1,100 to 2,028
	3	1,110	994	1,338

* This table presents the annualized costs and benefits associated with central air conditioners and heat pumps shipped in 2023–2052. These results include benefits to consumers which accrue after 2050 from the products purchased in 2023–2052. The incremental installed costs include incremental equipment cost as well as installation costs. The CO_2 reduction benefits are global benefits due to actions that occur nationally. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO 2015* Reference case, Low Estimate, and High Estimate, respectively. In addition, incremental product costs reflect a modest decline rate for projected product prices in the Primary Estimate, a constant rate in the Low Net Benefits Estimate, and a higher decline rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in section IV.F.1. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

** The CO_2 reduction benefits are calculated using 4 different sets of SCC values. The first three use the average SCC calculated using 5%, 3%, and 2.5% discount rates, respectively. The fourth represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The SCC values are emission year specific. See section IV.L.1 for more details

† DOE estimated the monetized value of NOx emissions reductions using benefit per ton estimates from the *Regulatory Impact Analysis for the Clean Power Plan Final Rule,* published in August 2015 by EPA's Office of Air Quality Planning and Standards. (Available at: *http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis.*) See section IV.L.2 for further discussion. For the Primary Estimate and Low Net Benefits Estimate, DOE used a national benefit-per-ton estimate for NO_X emitted from the Electric Generating Unit sector based on an estimate of premature mortality derived from the ACS study (Krewski et al., 2009). For the High Net Benefits Estimate, the benefit-per-ton estimates were based on the Six Cities study (Lepuele et al., 2011); these are nearly two-and-a-half times larger than those from the ACS study.

†† Total Benefits for both the 3% and 7% cases are presented using only the average SCC with 3-percent discount rate. In the rows labeled "7% plus CO_2 range" and "3% plus CO_2 range," the operating cost and NO_X benefits are calculated using the labeled discount rate, and those values are added to the full range of CO_2 values.

VI. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

Section 1(b)(1) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993), requires each agency to identify the problem that it intends to address, including, where applicable, the failures of private markets or public institutions that warrant new agency action, as well as to assess the significance of that problem. The problems that the standards set forth in this direct final rule are intended to address are as follows:

(1) Insufficient information and the high costs of gathering and analyzing relevant information leads some consumers to miss opportunities to make cost-effective investments in energy efficiency.

(2) In some cases, the benefits of more-efficient equipment are not realized due to misaligned incentives between purchasers and users. An example of such a case is when the equipment purchase decision is made by a building contractor or building owner who does not pay the energy costs.

(3) There are external benefits resulting from improved energy efficiency of appliances and equipment that are not captured by the users of such products. These benefits include externalities related to public health, environmental protection, and national energy security that are not reflected in energy prices, such as reduced emissions of air pollutants and greenhouse gases that impact human health and global warming. DOE attempts to quantify some of the external benefits through use of social cost of carbon values.

The Administrator of the Office of Information and Regulatory Affairs (OIRA) in the OMB has determined that this regulatory action is a significant regulatory action under section (3)(f) of Executive Order 12866. Accordingly, pursuant to section 6(a)(3)(B) of the Order, DOE has provided to OIRA: (i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and (ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate. DOE has included these documents in the rulemaking record.

In addition, the Administrator of OIRA has determined that the regulatory action is an "economically" significant regulatory action under section (3)(f)(1) of Executive Order 12866. Accordingly, pursuant to section 6(a)(3)(C) of the Order, DOE has provided to OIRA an assessment, including the underlying analysis, of benefits and costs anticipated from the regulatory action, together with, to the extent feasible, a quantification of those costs; and an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, and an explanation why the planned regulatory action is preferable to the identified potential alternatives. These assessments can be found in the technical support document for this rulemaking.

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011. 76 FR 3281 (January 21, 2011). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining

regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, 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 specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, OIRA has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, DOE believes that this direct final rule is consistent with these principles, including the requirement that, to the extent permitted by law, benefits justify costs and that net benefits are maximized.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site (*http://energy.gov/gc/office-general-counsel*).

1. Description of Reasons Why Action is Being Considered

DOE has undertaken this rulemaking pursuant to 42 U.S.C. 6295(d)(3), which requires DOE to conduct a second round of amended standards rulemaking for residential central air conditioners and heat pumps. The Energy Policy and Conservation Act of 1975 (EPCA), as amended by the Energy Independence and Security Act of 2007 (EISA 2007), requires that not later than six years after issuance of any final rule establishing or amending a standard, DOE must publish either a notice of the determination that standards for the product do not need to be amended, or a notice of proposed rulemaking including new proposed energy conservation standards. (42 U.S.C. 6295(m)(1)) DOE's last final rule for residential central air conditioners and heat pumps was issued on June 27, 2011, so as a result, DOE must act by June 27, 2017.

2. Objectives of, and Legal Basis for, the Rule

As described in section II.A above, Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances (collectively referred to as ''covered products''), which includes the residential central air conditioners and heat pumps that are the subject of this rulemaking. (42 U.S.C. 6292(a)(3))

The National Appliance Energy Conservation Act of 1987 (NAECA; Pub. L. 100–12) included amendments to EPCA that established the original energy conservation standards for central air conditioners and heat pumps. (42 U.S.C. 6295(d)(1)–(2)) EPCA, as amended, also requires DOE to conduct two cycles of rulemakings to determine whether to amend the energy conservation standards for central air conditioners and heat pumps. (42 U.S.C. 6295(d)(3)) The first cycle culminated in a final rule published in the **Federal Register** on August 17, 2004 (the August 2004 Rule), which prescribed energy conservation standards for central air conditioners and heat pumps manufactured or imported on and after January 23, 2006. 69 FR 50997. DOE completed the second of the two rulemaking cycles by publishing a direct final rule on June 27, 2011 (2011 Direct Final Rule). 76 FR 37414. The 2011 Direct Final Rule (2011 DFR) amended standards for central air conditioners and heat pumps manufactured on or after January 1, 2015.

EPCA requires DOE to periodically review its already established energy conservation standards for a covered product. Not later than six years after issuance of any final rule establishing or amending a standard, DOE must publish a notice of determination that standards for the product do not need to be amended, or a notice of proposed rulemaking including new proposed standards. (42 U.S.C. 6295(m)(1)) Pursuant to this requirement, the next review that DOE would need to conduct must occur no later than six years from the issuance of the 2011 direct final rule. This direct final rule fulfills that requirement.

3. Description and Estimated Number of Small Entities Regulated

a. Methodology for Estimating the Number of Small Entities

For manufacturers of residential central air conditioners and heat pumps, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of this rule. The size standards are codified at 13 CFR part 121. The standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at: *http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.*

Residential central air conditioner and heat pump manufacturing is classified under NAICS 333415, ''Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.'' The SBA sets a threshold of 1,250 employees or fewer for an entity to be considered a small business for this category.

DOE reviewed the potential standard levels considered in today's direct final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. During its market survey, DOE used publicly available information to identify small manufacturers. DOE's research involved industry trade association membership directories (*e.g.,* AHRI), information from previous rulemakings, individual company Web sites, and market research tools (*e.g.,* Hoover's reports) to create a list of companies that manufacture or sell central air conditioner and heat pump products covered by this rulemaking. DOE also asked stakeholders and industry representatives if they were aware of any additional small manufacturers during manufacturer interviews. DOE

reviewed publicly available data and contacted various companies on its complete list of manufacturers to determine whether they met the SBA's definition of a small business manufacturer. DOE screened out companies that do not offer products impacted by this rulemaking, do not meet the definition of a ''small business,'' exclusively rebrand and distribute products manufactured by others, or are foreign owned and operated.

DOE identified 30 manufacturers of central air conditioner and heat pump products affected by this direct final rule. Of these, DOE identified three as domestic small businesses.

b. Manufacturer Participation

DOE contacted the identified small businesses to invite them to take part in a manufacturer impact analysis interview. DOE was able to reach and discuss potential standards with one small business. DOE also obtained information about small businesses and potential impacts on small businesses while interviewing large manufacturers.

c. Residential Central Air Conditioner and Heat Pump Industry Structure and Nature of Competition

Seven large manufacturers supply over 95 percent of the market for central air conditioners and heat pumps. Of the three domestic small businesses identified, DOE's research indicates that all three are independent coil manufacturers (ICMs). DOE defines an ICM as a manufacturer of indoor units that does not manufacture single-package units or outdoor units. ICMs match their indoor evaporators or air handlers with condensing units from original equipment manufacturers (OEMs). For the purpose of this rulemaking, DOE did not identify any domestic small businesses that are OEMs of central air conditioner and heat pump products impacted by this direct final rule.

4. Description and Estimate of Compliance Requirements

As discussed in section 2.a, manufacturers of central air conditioners and heat pumps may incur conversion costs to bring their manufacturing facilities and product designs into compliance with amended standards. Because DOE did not identify any small business OEMs of products impacted by this direct final rule, the following discussion of small business impacts focuses on the potential impacts facing small business ICMs. Like OEMs, ICMs operate factories and equipment and, accordingly, would be responsible for updating manufacturing practices to ensure products comply with amended energy conservation standards.

To evaluate impacts facing small ICMs, DOE used data from its engineering analysis and product teardown analysis to estimate investments in equipment and tooling that ICMs may incur as a result of this direct final rule. Indoor coils do not have SEER ratings on their own because they are a component of split-systems. Consequently, their rated efficiency depends on their interaction with the outdoor units with which they are paired. Generally, all else being equal, split-systems with larger indoor coils will be more efficient because the indoor coil has a larger heat transfer surface area. Accordingly, DOE estimated investments in equipment and tooling ICMs may make in response to this direct final rule to increase the heat transfer surface area of their indoor coils and, in turn, increase the overall efficiency of split-systems. DOE used the least-cost coil-only units from its engineering analysis to determine the typical size of indoor coil used by manufacturers at each efficiency level analyzed. DOE then estimated potential capital conversion costs (*i.e.,* investments in equipment and tooling) small ICMs would make to meet the recommended level. Focusing on equipment and tooling used to manufacture heat exchangers and outdoor cases, DOE estimated capital conversion costs of $2.3 million per small ICM. Using assumptions outlined in section 2.a and in chapter 12 of the direct final rule TSD, DOE calculated product conversion costs (*i.e.,* R&D expenditures) as 40 percent of total conversion costs, or $1.5 million per small ICM. This equates to total estimated conversion costs of $3.8 million per small ICM.

Using publicly available data, DOE estimated the average annual revenue of the three small ICMs to be $29.7 million. As negotiated by the CAC/HP Working Group, this direct final rule will not take effect until 2023. DOE therefore expects ICMs will be able to spread their conversion costs over the six-year period between publication of this direct final rule and the compliance year. Given these assumptions, DOE estimates total conversion costs resulting from this direct final rule to be 2.2 percent of small ICMs' six-year revenues.

5. Duplication, Overlap, and Conflict With Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the rule being considered today.

6. Significant Alternatives to the Rule

The discussion in the previous section analyzes impacts on small businesses that would result from the recommended standards, represented by TSL 2. In reviewing alternatives to the adopted standards, DOE examined energy conservation standards set at both lower and higher efficiency levels than those recommended in this direct final rule. TSL 1 would establish less stringent efficiency levels, potentially reducing impacts on small business manufacturers. However, it would come at the expense of a reduction in energy savings. Where TSL 2 is projected to save 3.2 quads of energy, TSL 1 would save only 1.3 quads of energy, or 41% of the savings achieved at TSL 2. In addition to TSL 1, DOE examined more stringent efficiency levels at TSLs 3 and 4. These levels would achieve significantly higher energy savings of 8.6 and 14.2 quads respectively; however, the financial burden facing manufacturers, including small businesses, would also be more severe at these levels. (See section V.B.2.a for a more detailed discussion of financial impacts facing manufacturers at each TSL.) DOE believes that establishing standards at the recommended level, TSL 2, balances the benefits of energy savings with the potential burdens placed on manufacturers of covered products, including small business manufacturers. Accordingly, DOE is not adopting one of the other TSLs considered in the analysis, or the other policy alternatives examined as part of the regulatory impact analysis and included in chapter 17 of the direct final rule TSD.

Additional compliance flexibilities for small business manufacturers may be available through other means. For example, individual manufacturers may petition for a waiver of the applicable test procedure. (See 10 CFR 431.401) Further, EPCA provides that a manufacturer whose annual gross revenue from all of its operations does not exceed $8 million may apply for an exemption from all or part of an energy conservation standard for a period not longer than 24 months after the effective date of a final rule establishing the standard. Additionally, Section 504 of the Department of Energy Organization Act, 42 U.S.C. 7194, provides authority for the Secretary to adjust a rule issued under EPCA in order to prevent ''special hardship, inequity, or unfair distribution of burdens'' that may be imposed on that manufacturer as a result of such rule. Manufacturers

should refer to 10 CFR part 430, subpart E, and Part 1003 for additional details.

C. Review Under the Paperwork Reduction Act

Manufacturers of central air conditioners and heat pumps must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for central air conditioners and heat pumps, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including central air conditioners and heat pumps. 76 FR 12422 (March 7, 2011); 80 FR 5099 (January 30, 2015). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 30 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act (NEPA) of 1969, DOE has determined that this direct final rule fits within the category of actions included in Categorical Exclusion (CX) B5.1 and otherwise meets the requirements for application of a CX. See 10 CFR part 1021, App. B, B5.1(b); 1021.410(b) and Appendix B, B(1)–(5). The proposed rule fits within the category of actions because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, and for which none of the exceptions identified in CX B5.1(b) apply. Therefore, DOE has made a CX determination for this rulemaking, and DOE does not need to prepare an Environmental Assessment or Environmental Impact Statement for this proposed rule. DOE's CX determination for this rule is available at *http://cxnepa.energy.gov/.*

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this rule and has determined that it 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. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. 61 FR 4729 (February 7, 1996). Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *http://energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.*

DOE has concluded that this direct final rule may require expenditures of $100 million or more by the private sector. Such expenditures may include: (1) Investment in research and development and in capital expenditures by central air conditioner and heat pump manufacturers in the years between the final rule and the compliance date for the new standards,

and (2) incremental additional expenditures by consumers to purchase higher-efficiency central air conditioners and heat pumps, starting at the compliance date for the applicable standard.

Section 202 of UMRA authorizes a Federal agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the rule. (2 U.S.C. 1532(c)) The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. The **SUPPLEMENTARY INFORMATION** section of this document and chapter 17 of the TSD for this rule respond to those requirements.

Under section 205 of UMRA, the Department is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. (2 U.S.C. 1535(a)) DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless DOE publishes an explanation for doing otherwise, or the selection of such an alternative is inconsistent with law. In accordance with the statutory provisions discussed in this document, this rule would establish amended energy conservation standards for central air conditioners and heat pumps that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified. A full discussion of the alternatives considered by DOE is presented in chapter 17 of the TSD for this rule.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 15, 1988), DOE has determined that this rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this direct final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that this regulatory action, which adopts amended energy conservation standards for central air conditioners and heat pumps, is not a significant energy action because the standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this rule.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (January 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' *Id.* at FR 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The ''Energy Conservation Standards Rulemaking Peer Review Report'' dated February 2007 has been disseminated and is available at the following Web site: *www1.eere.energy.gov/buildings/appliance_standards/peer_review.html.*

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this direct final rule prior to its effective date. The report will state that it has been determined that the rule is a ''major rule'' as defined by 5 U.S.C. 804(2). DOE also will submit the supporting analyses to the Comptroller General in the U.S. Government Accountability Office (''GAO'') and make them available to each House of Congress.

VII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this direct final rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on December 5, 2016.

David J. Friedman,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE is amending part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Section 430.32 is amended by revising paragraphs (c)(1) through (3) and adding paragraphs (c)(5) and (6) to read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(c) *Central air conditioners and heat pumps.* The energy conservation standards defined in terms of the heating seasonal performance factor are based on Region IV, the minimum standardized design heating requirement, and the provisions of 10 CFR 429.16. (1) Central air conditioners and central air conditioning heat pumps manufactured on or after January 1, 2015, and before January 1, 2023, must have Seasonal Energy Efficiency Ratio and Heating Seasonal Performance Factor not less than:

Product class	Seasonal energy efficiency ratio (SEER)	Heating seasonal performance factor (HSPF)
(i) Split systems—air conditioners	13	.....
(ii) Split systems—heat pumps	14	8.2
(iii) Single package units—air conditioners	14	.....
(iv) Single package units—heat pumps	14	8.0
(v) Small-duct, high-velocity systems	12	7.2
(vi)(A) Space-constrained products—air conditioners	12	.....
(vi)(B) Space-constrained products—heat pumps	12	7.4

(2) In addition to meeting the applicable requirements in paragraph (c)(1) of this section, products in product class (i) of paragraph (c)(1) of this section (*i.e.,* split-systems—air conditioners) that are installed on or after January 1, 2015, and before January 1, 2023, in the States of Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, or Virginia, or in the District of Columbia, must have a Seasonal Energy Efficiency Ratio (SEER) of 14 or higher. Any outdoor unit model that has a certified combination with a rating below 14 SEER cannot be installed in these States. The least efficient combination of each basic model must comply with this standard.

(3)(i) In addition to meeting the applicable requirements in paragraph (c)(1) of this section, products in product classes (i) and (iii) of paragraph (c)(1) of this section (*i.e.,* split systems—air conditioners and single-package units—air conditioners) that are installed on or after January 1, 2015, and before January 1, 2023, in the States of Arizona, California, Nevada, or New Mexico must have a Seasonal Energy Efficiency Ratio (SEER) of 14 or higher and have an Energy Efficiency Ratio (EER) (at a standard rating of 95 °F dry bulb outdoor temperature) not less than the following:

Product class	Energy efficiency ratio (EER)
(i) Split systems—air conditioners with rated cooling capacity less than 45,000 Btu/hr	12.2
(ii) Split systems—air conditioners with rated cooling capacity equal to or greater than 45,000 Btu/hr	11.7
(iii) Single-package units—air conditioners	11.0

(ii) Any outdoor unit model that has a certified combination with a rating below 14 SEER or the applicable EER cannot be installed in this region. The least-efficient combination of each basic model must comply with this standard.

* * * * *

(5) Central air conditioners and central air conditioning heat pumps manufactured on or after January 1, 2023, must have a Seasonal Energy Efficiency Ratio 2 and a Heating Seasonal Performance Factor 2 not less than:

Product class	Seasonal energy efficiency ratio 2 (SEER2)	Heating seasonal performance factor 2 (HSPF2)
(i)(A) Split systems—air conditioners with a certified cooling capacity less than 45,000 Btu/hr	13.4	.....
(i)(B) Split systems—air conditioners with a certified cooling capacity equal to or greater than 45,000 Btu/hr	13.4	.....
(ii) Split systems—heat pumps	14.3	7.5
(iii) Single-package units—air conditioners	13.4	.....

Product class	Seasonal energy efficiency ratio 2 (SEER2)	Heating seasonal performance factor 2 (HSPF2)
(iv) Single-package units—heat pumps	13.4	6.7
(v) Small-duct, high-velocity systems	12	6.1
(vi)(A) Space-constrained products—air conditioners	11.7	.....
(vi)(B) Space-constrained products—heat pumps	11.9	6.3

(6)(i) In addition to meeting the applicable requirements in paragraph (c)(5) of this section, products in product classes (i) and (iii) of paragraph (c)(5) of this section (*i.e.,* split systems—air conditioners and single-package units—air conditioners) that are installed on or after January 1, 2023, in the southeast or southwest must have a Seasonal Energy Efficiency Ratio 2 and a Energy Efficiency Ratio 2 not less than:

Product class	Southeast *	Southwest **	
	SEER2	SEER2	EER2 ***
(i)(A) Split-systems—air conditioners with a certified cooling capacity less than 45,000 Btu/hr	14.3	14.3	11.7/9.8 †
(i)(B) Split-systems—air conditioners with a certified cooling capacity equal to or greater than 45,000 Btu/hr	13.8	13.8	11.2/9.8 ††
(iii) Single-package units—air conditioners	.....	.....	10.6

* "Southeast" includes the States of Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virginia, the District of Columbia, and the U.S. Territories.

** "Southwest" includes the States of Arizona, California, Nevada, and New Mexico.

*** EER refers to the energy efficiency ratio at a standard rating of 95 °F dry bulb outdoor temperature.

† The 11.7 EER2 standard applies to products with a certified SEER2 less than 15.2. The 9.8 EER2 standard applies to products with a certified SEER2 greater than or equal to 15.2.

†† The 11.2 EER2 standard applies to products with a certified SEER2 less than 15.2. The 9.8 EER2 standard applies to products with a certified SEER2 greater than or equal to 15.2.

(ii) Any outdoor unit model that has a certified combination with a rating below the applicable standard level(s) for a region cannot be installed in that region. The least-efficient combination of each basic model must comply with this standard.

* * * * *

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Part III

Department of Defense

Department of the Army, Corps of Engineers

33 CFR Chapter II

Issuance and Reissuance of Nationwide Permits; Final Rule

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

[COE–2015–0017]

RIN 0710–AA73

Issuance and Reissuance of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is reissuing 50 existing nationwide permits (NWPs), general conditions, and definitions, with some modifications. The Corps is also issuing two new NWPs and one new general condition. The effective date for the new and reissued NWPs is March 19, 2017. These NWPs will expire on March 18, 2022. The NWPs will protect the aquatic environment and the public interest while effectively authorizing activities that have no more than minimal individual and cumulative adverse environmental effects.

DATES: These NWPs, general conditions, and definitions will go into effect on March 19, 2017.

ADDRESSES: U.S. Army Corps of Engineers, Attn: CECW–CO–R, 441 G Street NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202–761–4922 or access the U.S. Army Corps of Engineers Regulatory Home Page at *http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx*.

SUPPLEMENTARY INFORMATION:

Executive Summary

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. The purpose of this regulatory action is to reissue 50 existing NWPs and to issue two new NWPs. In addition, one new general condition is being issued. The NWPs can only be issued for a period of no more than five years and cannot be extended. These 52 NWPs go into effect on March 19, 2017 and expire on March 18, 2022.

The NWPs authorize activities that have no more than minimal individual and cumulative adverse environmental effects. The NWPs authorize a variety of activities, such as aids to navigation, utility line crossings, erosion control activities, road crossings, stream and wetland restoration activities, residential developments, mining activities, commercial shellfish aquaculture activities, and agricultural activities. The two new NWPs authorize the removal of low-head dams and the construction and maintenance of living shorelines. Some NWP activities may proceed without notifying the Corps, as long as those activities comply with all applicable terms and conditions of the NWPs, including regional conditions imposed by division engineers. Other NWP activities cannot proceed until the project proponent has submitted a pre-construction notification to the Corps, and for most NWPs that require pre-construction notifications the Corps has 45 days to notify the project proponent whether the activity is authorized by NWP.

Background

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that will result in no more than minimal individual and cumulative adverse environmental effects. The NWPs can only be issued for a period of five years or less, unless the Corps reissues those NWPs (see 33 U.S.C. 1344(e) and 33 CFR 330.6(b)). We are reissuing 50 existing NWPs and issuing two new NWPs. These NWPs will go into effect on March 19, 2017, and will expire on March 18, 2022. Division engineers will add regional conditions to these NWPs to ensure that, on a regional basis, these NWPs only authorize activities that have no more than minimal individual and cumulative adverse environmental effects.

Section 404(e) of the Clean Water Act provides the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States. The Secretary's authority to issue general permits has been delegated to the Chief of Engineers and his or her designated representatives. Nationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts (see 33 CFR 330.1(b)). Activities authorized by NWPs and other general permits must be similar in nature, cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment (see 33 U.S.C. 1344(e)(1)). Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(f)). The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

The phrase ''minimal adverse environmental effects when performed separately'' refers to the direct and indirect adverse environmental effects caused by a specific activity authorized by an NWP. The phrase ''minimal cumulative adverse effect on the environment'' refers to the collective direct and indirect adverse environmental effects caused by the all the activities authorized by a particular NWP during the time period that NWP is in effect (which can be no more than 5 years) in a specific geographic region. The appropriate geographic area for assessing cumulative effects is determined by the decision-making authority for the general permit. For each NWP, Corps Headquarters prepares national-scale cumulative effects analyses. Division engineers consider cumulative effects on a regional basis (*e.g.,* a state, Corps district, or other geographic area) when determining whether to modify, suspend, or revoke NWPs on a regional basis (see 33 CFR 330.5(c)). When evaluating NWP pre-construction notifications (PCNs), district engineers evaluate cumulative adverse environmental effects in an appropriate geographic area (*e.g.,* watershed, ecoregion, Corps district geographic area of responsibility, other geographic region).

When Corps Headquarters issues or reissues an NWP, it conducts a national-scale cumulative impact assessment in accordance with the National Environmental Policy Act (NEPA) definition of ''cumulative impact'' at 40 CFR part 1508.7. The NEPA cumulative effects analysis prepared by Corps Headquarters for an NWP examines the impact on the environment which results from the incremental impact of its action (*i.e.,* the activities that will be authorized by that NWP) and adds that incremental impact to ''other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions'' (40 CFR 1508.7). In addition to environmental impacts caused by activities authorized

by the NWP, other NWPs, and other types of DA permits, the Corps' NEPA cumulative effects analysis in each of its national decision documents discusses, in general terms, the environmental impacts caused by other past, present, and reasonably foreseeable future Federal, non-Federal, and private actions. For example, wetlands and other aquatic ecosystems are affected by a wide variety of Federal, non-Federal, and private actions that involve land use/land cover changes, pollution, resource extraction, species introductions and removals, and climate change (Millennium Ecosystem Assessment (MEA) 2005b).

Corps Headquarters fulfills the requirements of NEPA when it finalizes the environmental assessment in its national decision document for the issuance or reissuance of an NWP. An NWP verification issued by a district engineer does not require separate NEPA documentation. (See 53 FR 3126, the Corps' final rule for implementing the National Environmental Policy Act, which was published in the February 3, 1988, issue of the **Federal Register**.) When a district engineer issues an NWP verification, he or she is merely verifying that the activity is authorized by an NWP issued by Corps Headquarters. That verification is subject to any activity-specific conditions added to the NWP authorization by the district engineer. When reviewing a request for an NWP verification, the district engineer considers, among other factors, the ''cumulative adverse environmental effects resulting from activities occurring under the NWP'' (33 CFR 330.5(d)(1)). When documenting the decision to issue an NWP verification, the district engineer will explain that the NWP activity, plus any applicable regional conditions and any activity-specific conditions added by the district engineer (*e.g.,* mitigation requirements) will ensure that the adverse environmental effects caused by the NWP activity will only be minimal on an individual and cumulative basis.

If an NWP authorizes discharges of dredged or fill material into waters of the United States, the Corps also conducts a national-scale cumulative effects analysis in accordance with the Clean Water Act section 404(b)(1) Guidelines. The 404(b)(1) Guidelines approach to cumulative effects analysis for the issuance or reissuance of general permits is described at 40 CFR part 230.7(b).

For each NWP, Corps Headquarters issues a decision document, which includes a NEPA environmental assessment, a public interest review, and if applicable, a 404(b)(1) Guidelines analysis. Each NWP is a stand-alone general permit.

When the Corps issues or reissues an NWP, Corps divisions are required to prepare supplemental decision documents to provide regional analyses of the environmental effects of that NWP. Those supplemental decision documents are not subject to a public notice and comment process. The supplemental decision documents also support the division engineer's decision to modify, suspend, or revoke the NWP in a particular region. An NWP is modified on a regional basis through the addition of regional conditions, which restricts the use of the NWP in the geographic area(s) where those regional conditions apply. The supplemental decision document includes a regional cumulative effects analysis, and if the NWP authorizes discharges of dredged or fill material into waters of the United States, a regional 404(b)(1) Guidelines cumulative effects analysis. The geographic region used for the cumulative effects analyses in a supplemental decision document is at the division engineer's discretion. In the supplemental decision document, the division engineer may evaluate cumulative effects of the NWP at the scale of a Corps district, state, or other geographic area, such as a watershed or ecoregion. If the division engineer is not suspending or revoking the NWP in a particular region, the supplemental decision document also includes a statement finding that the use of that NWP in the region will cause only minimal individual and cumulative adverse environmental effects.

For some NWPs, the project proponent may proceed with the NWP activity as long as he or she complies with all applicable terms and conditions, including applicable regional conditions. When required, Clean Water Act section 401 water quality certification and/or Coastal Zone Management Act consistency concurrence must be obtained or waived (see general conditions 25 and 26, respectively). Other NWPs require project proponents to notify Corps district engineers of their proposed activities prior to conducting regulated activities, so that the district engineers can make case-specific determinations of NWP eligibility. The notification takes the form of a pre-construction notification (PCN). The purpose of a PCN is to give the district engineer an opportunity to review a proposed NWP activity (generally 45 days after receipt of a complete PCN) to ensure that the proposed activity qualifies for NWP authorization. If it does not qualify for NWP authorization, the district engineer will inform the applicant and advise him or her on the process for applying for another form of Department of the Army (DA) authorization. The PCN requirements for the NWPs are stated in the text of those NWPs, as well as a number of general conditions, especially general condition 32. Paragraph (b) of general condition 32 lists the information required for a complete PCN.

Twenty-one of the NWPs require PCNs for all activities, including the two new NWPs. Twelve of the proposed NWPs require PCNs for some authorized activities. Nineteen of the NWPs do not require PCNs, unless pre-construction notification is required to comply with certain general conditions or regional conditions imposed by division engineers. All NWPs require PCNs for any proposed NWP activity undertaken by a non-federal entity that might affect listed species or designated critical habitat under the Endangered Species Act (see general condition 18 and 33 CFR part 330.4(f)(2)). All NWPs require PCNs for any proposed NWP activity undertaken by a non-federal entity that may have the potential to cause effects to historic properties listed, or eligible for listing in, the National Register of Historic Places (see general condition 20 and 33 CFR part 330.4(g)(2)).

Except for NWPs 21, 49, and 50, and activities conducted by non-Federal permittees that require PCNs under paragraph (c) of general conditions 18 and 20, if the Corps district does not respond to the PCN within 45 days of a receipt of a complete PCN the activity is authorized by NWP (see 33 CFR 330.1(e)(1)). Regional conditions imposed by division engineers may also add PCN requirements to one or more NWPs.

When a Corps district receives a PCN, the district engineer reviews the PCN and determines whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. The district engineer applies the criteria in paragraph 2 of section D, ''District Engineer's Decision.'' If the district engineer reviews the PCN and determines that the proposed activity will result in more than minimal individual and cumulative adverse environmental effects, he or she will notify that applicant and offer the prospective permittee the opportunity to submit a mitigation proposal to reduce the adverse environmental effects so that they are no more than minimal (see 33 CFR 330.1(e)(3)).

Mitigation requirements for NWP activities can include permit conditions

(*e.g.,* time-of-year restrictions or use of best management practices) to avoid or minimize adverse effects on certain species or other resources. Mitigation requirements may also consist of compensatory mitigation requirements to offset authorized losses of jurisdictional waters and wetlands so that the net adverse environmental effects are no more than minimal. Any compensatory mitigation that the district engineer requires for an NWP activity must comply with the Corps' compensatory mitigation regulations at 33 CFR part 332.

At the conclusion of his or her review of the PCN, the district engineer prepares a decision document to explain his or her conclusions. The decision document explains the rationale for adding conditions to the NWP authorization, including mitigation requirements that the district engineer determines are necessary to ensure that the verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects. The decision document includes the district engineer's consideration of cumulative adverse environmental effects resulting from the use of that NWP within a watershed, county, state, or a Corps district. If an NWP verification includes multiple authorizations using a single NWP (*e.g.,* linear projects with crossings of separate and distant waters of the United States authorized by NWPs 12 or 14) or non-linear projects authorized with two or more different NWPs (*e.g.,* an NWP 28 for reconfiguring an existing marina plus an NWP 19 for minor dredging within that marina), the district engineer will evaluate the cumulative effects of those NWPs within the appropriate geographic area. Mitigation required by the district engineer can help ensure that the NWP activity results only in minimal adverse environmental effects. The decision document is part of the administrative record for the NWP verification.

Because the required NEPA cumulative effects and 404(b)(1) Guidelines cumulative effects analyses are conducted by Corps Headquarters in its decision documents for the issuance or reissuance of the NWPs, district engineers do not need to do comprehensive cumulative effects analyses for each NWP verification. For an NWP verification, the district engineer only needs to evaluate the cumulative adverse environmental effects of the applicable NWP(s) at an appropriate geographic scale (*e.g.,* Corps district, watershed, ecoregion). In his or her decision document, the district engineer will include a statement declaring whether the proposed NWP activity, plus any required mitigation, will or will not result in more than minimal individual and cumulative adverse environmental effects.

Some NWP activities that require PCNs also require agency coordination (see paragraph (d) of general condition 32). If, in the PCN, the applicant requests a waiver of an NWP limit that the terms of the NWP allow the district engineer to waive (*e.g.,* the 300 linear foot limit for the loss of intermittent and ephemeral stream bed authorized by NWP 29), and the district engineer determines, after coordinating the PCN with the resource agencies, that the proposed NWP activity will result in no more than minimal adverse environmental effects, the district engineer's decision document explains the basis his or her decision.

If the district engineer determines, after considering mitigation, that there will be more than minimal cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for the proposed activity. That determination will be based on consideration of the information provided in the PCN and other available information. Discretionary authority may also be exercised in cases where the district engineer has sufficient concerns for any of the Corps public interest review factors (see 33 CFR 330.4(e)(2)).

Regional conditions may be imposed on the NWPs by division engineers to take into account regional differences in aquatic resource functions and services across the country and to restrict or prohibit the use of NWPs to protect those resources. Through regional conditions, a division engineer can modify an NWP to require submission of PCNs for certain activities. Regional conditions may also restrict or prohibit the use of an NWP in certain waters or geographic areas, if the use of that NWP in those waters or areas might result in more than minimal individual or cumulative adverse environmental effects. Regional conditions may not be less stringent than the NWPs.

A district engineer may impose activity-specific conditions on an NWP authorization to ensure that the NWP activity will result in no more than minimal individual and cumulative adverse effects on the environment and other public interest review factors. In addition, activity-specific conditions will often include mitigation requirements, including avoidance and minimization, and possibly compensatory mitigation, to reduce the adverse environmental effects of the proposed activity so that they are no more than minimal. Compensatory mitigation requirements for NWP activities must comply with the applicable provisions of 33 CFR part 332. Compensatory mitigation may include the restoration, establishment, enhancement, and/or preservation of wetlands. Compensatory mitigation may also include the rehabilitation, enhancement, or preservation of streams, as well as the restoration, enhancement, and protection/maintenance of riparian areas next to streams and other open waters. District engineers may also require compensatory mitigation for impacts to other types of aquatic resources, such as seagrass beds, shallow sandy bottom marine areas, and coral reefs.

Compensatory mitigation can be provided through mitigation banks, in-lieu fee programs, and permittee-responsible mitigation. If the required compensatory mitigation will be provided through mitigation bank or in-lieu fee program credits, the conditions in the NWP verification must comply with the requirements at 33 CFR 332.3(k)(4), and specify the number and resource type of credits that need to be secured by the permittee. If the required compensatory mitigation will be provided through permittee-responsible mitigation, the conditions added to the NWP authorization must comply with 33 CFR 332.3(k)(3).

Today's final rule reissuing the 50 existing NWPs with some modifications and issuing two new NWPs reflects the Corps commitment to environmental protection. In response to the comments received on the June 1, 2016, proposed rule, we made changes to the text of the NWPs, general conditions, and definitions so that they are clearer and can be more easily understood by the regulated public, government personnel, and interested parties. The terms and conditions of these NWPs protect the aquatic environment and other public interest review factors. The changes to the NWPs, general conditions, definitions, and other provisions are discussed below.

Making the text of the NWPs clearer and easier to understand will also facilitate compliance with these permits, which will also benefit the aquatic environment. The NWP program allows the Corps to authorize activities with only minimal adverse environmental impacts in a timely manner. The NWP program also provides incentives to project proponents to design their activities to avoid and minimize adverse impacts to jurisdictional waters and wetlands to qualify for the streamlined NWP authorization. In FY 2016, the average

evaluation time for a request for NWP authorization was 40 days, compared to the average evaluation time of 217 days for a standard individual permit application. Regional general permits issued by district engineers provide similar environmental protections and incentives to project proponents. In addition, the NWPs help the Corps better protect the aquatic environment by focusing its limited resources on those activities that have the potential to result in more severe adverse environmental effects.

Benefits and Costs of the NWPs

The NWPs provide benefits by encouraging project proponents to minimize their proposed impacts to waters of the United States and design their projects within the scope of the NWPs, rather than applying for individual permits for activities that could result in greater adverse impacts to the aquatic environment. The NWPs also benefit the regulated public by providing convenience and time savings compared to standard individual permits. The minimization encouraged by terms and conditions of an NWP, as well as compensatory mitigation that may be required for specific activities authorized by an NWP, helps reduce adverse environmental effects to jurisdictional waters and wetlands, as well as resources protected under other laws, such as federally-listed endangered and threatened species and designated critical habitat, as well as historic properties. For an analysis of the monetized benefits of the NWPs, refer to the Regulatory Impact Analysis which is available at *www.regulations.gov*, docket number COE–2015–0017.

The costs of the NWPs relate to the paperwork burden associated with completing the PCNs. See the section on Paperwork Reduction Act for a response to comments and additional discussion of the paperwork burden.

Grandfather Provision for Expiring NWPs

An activity completed under the authorization provided by a 2012 NWP continues to be authorized by that NWP (see 33 CFR part 330.6(b)). Activities authorized by the 2012 NWPs that have commenced or are under contract to commence by March 18, 2017, will have one year (*i.e.,* until March 18, 2018) to complete those activities under the terms and conditions of the 2012 NWPs (see 33 CFR 330.6(b)). Activities previously authorized by the 2012 NWPs that have not commenced or are not under contract to commence by March 18, 2017, will require reauthorization under the 2017 NWPs, provided those activities still comply with the terms and conditions of qualify for authorization under the 2017 NWPs. If those activities no longer qualify for NWP authorization because they do not meet the terms and conditions of the 2017 NWPs (including any regional conditions imposed by division engineers), the project proponent will need to obtain an individual permit, or seek authorization under a regional general permit, if such a general permit is available in the applicable Corps district and can be used to authorize the proposed activity.

In response to the June 1, 2016, proposed rule, several commenters requested that the Corps provide a longer grandfathering period for activities authorized under the 2012 NWPs. A few commenters suggested changing the grandfather period to 2 years and some commenters recommended changing it to 3 years.

The one-year grandfathering period in 33 CFR 330.6(b) was established in the November 22, 1991, final rule amending 33 CFR part 330 (see 56 FR 59110). It would require a separate rulemaking to change section 330.6(b) to establish a longer grandfathering period for authorized NWP activities. We believe the one-year period is sufficient for project proponents to complete their NWP activities. If they determine more time is needed to complete the NWP activity, the one-year period gives them sufficient time to request verification under the reissued NWP(s). If a proposed activity was authorized by the 2012 NWPs, but is no longer authorized by these new or reissued NWPs, then the project proponent should apply for an individual permit during the grandfather period to try to obtain the individual permit before the one-year grandfather period expires.

Clean Water Act Section 401 Water Quality Certifications and Coastal Zone Management Act Consistency Determinations

The NWPs issued today will become effective on March 19, 2017. This **Federal Register** notice begins the 60-day Clean Water Act Section 401 water quality certification (WQC) and the 90-day Coastal Zone Management Act (CZMA) consistency determination processes.

After the 60-day period, the latest version of any written position taken by a state, Indian Tribe, or U.S. EPA on its WQC for any of the NWPs will be accepted as the state's, Indian Tribe's, or EPA's final position on those NWPs. If the state, Indian Tribe, or EPA takes no action by March 7, 2017, WQC will be considered waived for those NWPs.

After the 90-day period, the latest version of any written position taken by a state on its CZMA consistency determination for any of the NWPs will be accepted as the state's final position on those NWPs. If the state takes no action by April 6, 2017, CZMA consistency concurrence will be presumed for those NWPs.

Discussion of Public Comments

Overview

In response to the June 1, 2016, **Federal Register** notice, we received more than 54,000 comment letters, of which approximately 53,200 were form letters pertaining to NWP 12. In addition, we received over 700 form letters opposing the reissuance of NWP 21 and over 50 form letters opposing the issuance of proposed new NWP B. In addition to the various form letters, we received a several hundred individual comment letters. Those individual comment letters, as well as examples of the various form letters, are posted in the *www.regulations.gov* docket (COE–2015–0017) for this rulemaking action. We reviewed and fully considered all comments received in response to the proposed rule.

Response to General Comments

Many commenters expressed general support for the proposed rule, as well as the NWP program as a whole. Several commenters voiced their concerns about the proposed NWPs being able to be issued before the 2012 NWPs expire. One commenter said the NWPs are duplicative of state and local government permit programs. Another commenter requested that the final NWPs include a statement informing the public that many of the categories of activities authorized by NWP are also regulated by state or local government wetland regulatory programs. A commenter stated that Corps district engineers should not have the authority to add conditions to NWPs or be able to suspend NWP authorizations. One commenter expressed appreciation of the policy statements included in the NWPs, stating that such statements promote consistency in program implementation among Corps districts. One commenter requested that the Corps issue the NWPs for a period of ten years. One commenter stated that because of the effects of climate change, the predictability and confidence in the use of the NWPs are likely to decline, and recommend shortening the renewal cycle for certain NWPs, and require more frequent monitoring of specific

projects that have been approved by NWPs.

We worked to develop and issue the final NWPs before the 2012 NWPs expire on March 18, 2017. While there are a number of states that have aquatic resource regulatory programs that are similar to the Corps regulatory program, there are often important differences between the Corps' regulatory program and those state regulatory programs. In states where there is close alignment between the Corps and state regulatory programs, programmatic general permits can be developed and issued by district engineers to reduce duplication and streamline the authorization process for the regulated public. In areas where local governments also have adopted regulatory programs to protect aquatic resources, there is likely to be variability from the Corps regulatory program. Despite the existence of state and local regulatory programs in some areas, the Corps still has the responsibility for implementing section 404 of the Clean Water Act, as well as section 10 of the Rivers and Harbors Act of 1899. For section 404 of the Clean Water Act, Michigan and New Jersey are exceptions where they have assumed the section 404 program. We appreciate the acknowledgment that policy statements made through the NWP program help improve Corps regulatory program consistency.

The ability for division and district engineers to modify, suspend, or revoke NWPs on a regional or case-by-case basis is a key tool for ensuring that the NWPs only authorize activities that cause no more than minimal individual and cumulative adverse environmental effects. There is substantial variation in aquatic resource types across the country, as well as a large amount of variability among geographic regions in the quantity of those resources. Those regional differences require division and district engineers to have the authority to tailor the NWPs to address regional and site-specific concerns. The NWPs can only be issued for a period of 5 years because of the statutory language in section 404(e) of the Clean Water Act, as well as the Corps' regulations at 33 CFR 330.6(b). Section 330.6(b) states that if ''an NWP is not modified or reissued within five years of its effective date it automatically expires and becomes null and void.'' Nationwide permits are an important tool for adapting to the effects of climate change, by authorizing a variety of activities such as utility line crossings, road crossings, bank stabilization activities, living shorelines, and aquatic habitat restoration and enhancement activities. The 5-year cycle for reissuing the NWPs is sufficient time to make necessary changes to the NWPs to ensure the NWPs only authorize those activities that result in no more than minimal individual and cumulative adverse environmental effects.

Many commenters objected to the proposed NWPs, stating that they authorize activities that result in more than minimal individual and cumulative adverse environmental effects and that they do not authorize categories of activities that are similar in nature. A few commenters said that since the Corps does not require pre-construction notifications (PCNs) for all NWP activities, it could not ensure that NWP activities result in no more than minimal individual and cumulative adverse environmental effects. One commenter said that Corps districts should improve their tracking of cumulative impacts. A number of commenters opposed the NWPs, stating that they authorize activities associated with larger projects that have substantial environmental impacts. Several commenters said that the NWPs should either not authorize activities that impact streams and rivers occupied by anadromous salmon, or compensatory mitigation should always be required for those activities. One commenter stated that the NWPs should not be used in areas with substantial cumulative impacts, such as essential fish habitat and areas inhabited by ESA-listed species.

The NWP program provides a three-tiered approach to ensure compliance with section 404(e) of the Clean Water Act. Those three tiers are: (1) The terms and conditions of the NWPs issued by Corps Headquarters; (2) the authority of division engineers to modify, suspend, or revoke NWPs on a regional basis; and (3) the authority of district engineers to modify, suspend, or revoke NWPs on a case-by-case basis. We interpret the requirement for general permits to authorize categories of activities that are similar in nature broadly, to provide program efficiency, to keep the number of NWPs manageable, and to facilitate implementation by the Corps and project proponents that need to obtain Department of the Army (DA) authorization for activities that have only minimal adverse environmental effects.

The NWP activities that do not require PCNs are those activities that have characteristics that do not result in more than minimal adverse environmental effects, such as small structures in navigable waters subject to section 10 of the Rivers and Harbors Act of 1899 or minor fills in waters of the United States associated with maintenance activities or temporary impacts. While we recognize that many NWP activities are components of larger overall projects, the Corps' authorities under the NWP program are limited to discharges of dredged or fill material into waters of the United States that are regulated under Section 404 of the Clean Water Act, and structures and work in navigable waters that are regulated under Section 10 of the Rivers and Harbors Act of 1899. The Corps does not regulate other components of those larger overall projects, such as activities that occur in upland areas. In many cases, the NWPs are authorizing minor features that are part of those larger overall projects.

Division engineers can impose regional conditions on the NWPs to protect rivers and streams inhabited by anadromous fish, including salmon. For those salmonids that are listed as endangered or threatened under the Endangered Species Act (ESA), general condition 18 requires PCNs for all NWP activities that might affect those listed species or their designated critical habitat, or that occur in their designated critical habitat. District engineers have the discretion to require compensatory mitigation to offset stream losses caused by NWP activities. A division engineer also has the authority to modify, suspend, or revoke one or more NWPs in a geographic region if he or she determines the use of that NWP or NWPs will result in more than minimal cumulative adverse environmental effects. An area that has essential fish habitat or is inhabited by ESA-listed species is not necessarily experiencing more than minimal cumulative impacts due to activities authorized by NWPs. The physical, chemical, and biological characteristics of essential fish habitat may be altered by a variety of human activities other than the activities authorized by NWPs. Essential fish habitat may be altered by land use and land cover changes in the watershed, point source and non-point source pollution, excess nutrients, resource extraction activities, introductions and removals of species, and changing environmental conditions, including climate change. Species may be listed as endangered or threatened because of habitat destruction and modification, overexploitation, disease or predation, the inadequacy of existing regulatory mechanisms, and other man-made or natural factors affecting their continued existence (see section 4(a)(1)(A)–(E) of the Endangered Species Act).

One commenter said the NWPs should not authorize activities that result in adverse environmental impacts. A commenter asserted that the

NWPs should not authorize activities in marine or estuarine waters. One commenter stated that the terms and conditions of the NWPs should not be changed to be less protective of the environment. One commenter said that the NWPs should be subjected to a multi-agency peer review process. Several commenters said that public notices should be issued for NWP PCNs to disclose proposed NWP activities and increase public participation. A number of commenters suggested that NWPs should require no net loss of aquatic resources. A number of commenters asked why the proposed NWPs use the term ''no more than minimal adverse environmental effects'' instead of ''no more than minimal adverse effects on the aquatic environment.''

Section 404(e) of the Clean Water Act recognizes that activities authorized by general permits, including NWPs, will result in adverse environmental impacts, but limits those adverse impacts so that they can only be no more than minimal. Regulated activities that occur in marine and estuarine waters often result in no more than minimal adverse environmental effects, as long as they comply with the NWP terms and conditions that are imposed on such activities. We have adopted terms and conditions for the NWPs to be sufficiently protective of the aquatic environment while allowing activities that result in only minimal adverse environmental effects to be conducted. The NWPs are already subject to multi-agency peer review process, through the rulemaking requirements of Executive Order 12866, Regulatory Planning and Review.

Requiring public notices for PCNs would be contrary to the purpose of the general permit program established through section 404(e) of the Clean Water Act, for a streamlined authorization process for activities that result in no more than minimal individual and cumulative adverse environmental effects. In addition, it is unlikely that there would be any meaningful public comment submitted to Corps districts in response to public notices for the minor activities authorized by these NWPs that would warrant the reduction in permitting efficiency providing such a comment period would cause. Compensatory mitigation can only be required by the district engineer after he or she reviews the PCN and determines that compensatory mitigation is necessary to comply with the ''no more than minimal adverse environmental effects'' requirement for NWPs (see 33 CFR 330.1(e)(3)). There is no federal statute or regulation that requires ''no net loss'' of aquatic resources. The ''no overall net loss'' goal for wetlands articulated in the 1990 U.S. EPA-Army Memorandum of Agreement for mitigation for Clean Water Act section 404 permits states that the section 404 permit program will contribute to that national goal. The 1990 Memorandum of Agreement only applies to standard individual permits.

The NWP program provides valuable protection to the Nation's aquatic resources by establishing incentives to avoid and minimize losses of jurisdictional waters and wetlands in order to qualify for the streamlined NWP authorizations. A large majority of authorized fills in jurisdictional waters and wetlands authorized by general permits and individual permits are less than 1/10-acre (Corps-EPA 2015, Figure 5). The 2017 NWPs use the term ''no more than minimal adverse environmental effects'' to be consistent with the text of section 404(e) of the Clean Water Act and 33 CFR 322.2(f)(1). When making no more than minimal adverse environmental effects determinations for proposed NWP activities, the district engineer considers the adverse effects to the aquatic environment and any other factor of the public interest (*e.g.,* 33 CFR 330.1(d)). The use of the term ''no more than minimal adverse environmental effects'' does not expand the Corps' scope of analysis. The Corps' control and responsibility remains limited to the activities it has the authority to regulate, and the effects to the environment caused by those activities.

One group of commenters requested a public hearing on the proposed NWPs because of their concerns about the permitting of oil and gas pipelines. Another organization requested a public hearing because of the proposal to reissue NWP 48. We denied the requests for a public hearing on the proposed 2017 NWPs because we determined that a public hearing is unlikely to provide information that was not already provided through the thousands of comments we received on the proposal to reissue NWP 12, and the many comments we received on the proposed NWP 48. See our responses to comments on NWP 12 and 48 below for more information.

One commenter said that Corps districts should not be allowed to suspend NWPs to use regional general permits (RGPs) instead of the NWPs if the overall project crosses state lines or international boundaries. Regional general permits are an acceptable permitting mechanism to authorize activities requiring Department of the Army (DA) authorization that are part of an overall larger project that crosses state boundaries or international boundaries. The NWPs already provide an expedited review process for regulated activities that result in no more than minimal adverse environmental effects, although we recognize that it takes more time to issue NWP verifications that require compliance with other federal laws, such as section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act. For an NWP activity that requires Clean Water Act section 401 water quality certification and/or Coastal Zone Management Act (CZMA) consistency concurrence, the district engineer may issue a provisional NWP verification, but that activity is not authorized by NWP until the project proponent obtains the required water quality certification or waiver, and/or the required CZMA consistency concurrence or presumption of concurrence.

A few commenters suggested that the Corps develop procedures to expedite the review of proposed NWP activities and that additional mitigation should not be required in states that have regulatory programs similar to the Corps regulatory program. One commenter said that there should be waivers in NWPs for activities reviewed and permitted by states. When an NWP activity that also requires authorization under state law requires compensatory mitigation, the Corps district is encouraged to work with its state counterparts to develop compensatory mitigation requirements that satisfy both federal and state permit requirements. Waivers for NWP authorization or NWP limits cannot be issued solely on the basis that activities may be regulated by both the Corps and state regulatory agencies. The requirements in Section 404(e) of the Clean Water Act for general permits, including NWPs, may be different from the requirements for state-issued general permits. For categories of activities authorized by NWPs, those NWPs satisfy the permitting requirements of section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899.

One commenter said that the expiration dates of NWP verification letters issued by Corps districts do not correspond to the expiration date of the NWPs themselves. Another commenter stated that individual permits, rather than NWPs, should be required for all wetland fills. One commenter requested an expedited review process for emergency projects. One commenter requested information on how cumulative impacts are assessed by the Corps.

On January 28, 2013 (78 FR 5733), we issued a final rule amending 33 CFR 330.6(a)(3)(ii) to allow district engineers to issue NWP verifications that expire on the same date the NWPs expire, unless the district engineer modifies, suspends, or revokes the NWP authorization. Not all wetland fills result in more than minimal adverse environmental effects, so authorization by NWP is appropriate when the wetland fill activity is authorized by an NWP and complies with all applicable terms and conditions, including any regional conditions imposed by the division engineer and any activity-specific conditions imposed by the district engineer. Those activity-specific conditions may cover wetland compensatory mitigation requirements. Emergency projects that are not covered by NWPs or regional general permits may be addressed under the Corps' emergency permitting procedures at 33 CFR 325.2(e)(4). Our general approach for evaluating cumulative effects in the NWP program is described above in this final rule.

National Environmental Policy Act Compliance

We have prepared a decision document for each NWP. Each decision document contains an environmental assessment (EA) to fulfill the requirements of the National Environmental Policy Act (NEPA). The EA includes the public interest review described in 33 CFR part 320.4(b). The EA generally discusses the anticipated impacts the NWP will have on the human environment and the Corps' public interest review factors. If a proposed NWP authorizes discharges of dredged or fill material into waters of the United States, the decision document also includes an analysis conducted pursuant to the Clean Water Act section 404(b)(1), in particular 40 CFR part 230.7. These decision documents evaluate, from a national perspective, the environmental effects of each NWP.

The final decision document for each NWP is available on the internet at: *www.regulations.gov* (docket ID number COE–2015–0017) as Supporting Documents for this final rule. Before the 2017 NWPs go into effect, division engineers will issue supplemental decision documents to evaluate environmental effects on a regional basis (*e.g.,* a state or Corps district) and to determine whether regional conditions are necessary to ensure that the NWPs will result in no more than minimal individual and cumulative adverse environmental effects on a regional basis. The supplemental decision documents are prepared by Corps districts, but must be approved and issued by the appropriate division engineer, since the NWP regulations at 33 CFR 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations in a specific geographic area within his or her division. For some Corps districts, their geographic area of responsibility covers an entire state. For other Corps districts, their geographic area of responsibility may be based on watershed boundaries. For some states, there may be more than one Corps district responsible for implementing the Corps regulatory program, including the NWP program. In states with more than one Corps district, there is a lead Corps district responsible for preparing the supplemental decision documents for all of the NWPs. The supplemental decision documents will also discuss regional conditions imposed by division engineers to protect the aquatic environment and other public interest review factors and ensure that any adverse environmental effects resulting from NWP activities in that region will be no more than minimal, individually and cumulatively.

For the NWPs, the assessment of cumulative effects occurs at three levels: National, regional, and the activity-specific verification stage. Each national NWP decision document includes a national-scale NEPA cumulative effects analysis. Each supplemental decision document has a cumulative effects analysis conducted for the geographic region covered by the supplemental decision document, which is usually a state or Corps district. When a district engineer issues an NWP verification letter in response to a PCN or a voluntary request for a NWP verification, the district engineer prepares a brief decision document. That decision document explains the district engineer's determination whether the proposed NWP activity, after considering permit conditions which might include mitigation requirements, will result in no more than minimal individual and cumulative adverse environmental effects.

If the NWP is not suspended or revoked in a state or a Corps district, the supplemental decision document includes a certification that the use of the NWP in that district, with any applicable regional conditions, will result in no more than minimal cumulative adverse environmental effects. When a division engineer adds regional conditions to one or more NWPs, the district engineer announces those regional conditions in a public notice.

After the NWPs are issued or reissued, district engineers will monitor the use of NWPs, and those evaluations may result the district engineer recommending that the division engineer modify, suspend, or revoke one or more NWPs in a particular geographic region or watershed. For such recommendations, the district engineer would present information indicating that the use of one or more NWPs in a particular geographic area may result in more than minimal individual or cumulative adverse environmental effects. In such cases, the division engineer will amend the applicable supplemental decision documents to account for the modification, suspension, or revocation of those NWPs, and issue a public notice announcing the new regional conditions or the suspension or revocation of the applicable NWP(s).

A few commenters said that the Corps' cumulative effects analyses were properly conducted, and a few commenters expressed opinions that those analyses were inadequate. One commenter said that cumulative effects analyses should not be limited to the NWP verification stage, but should also be conducted at national and regional scales to improve resource protection. One commenter stated that in its draft decision documents, the Corps failed to assess the cumulative impacts of the NWPs and did not take into account the full scope of adverse impacts to the nation's waters. Another commenter said that the Corps' cumulative effects analysis did not properly consider past actions and reasonably foreseeable future actions.

All of the national decision documents have a cumulative impact analysis conducted in accordance with the Council on Environmental Quality's NEPA regulations at 40 CFR 1508.7 (see section 4.3 of each national decision document). For those NWPs that authorize discharges of dredged or fill material into waters of the United States, each the national decision document includes a cumulative effects analysis conducted under 40 CFR 230.7(b)(3). Cumulative effects analyses are also conducted at regional scales, in the supplemental decision documents approved by division engineers. When issuing an NWP verification, the district engineer makes a determination confirming that the use of the NWP will result in no more than minimal cumulative adverse environmental effects. If the district engineer determines, after considering mitigation proposed by the applicant, that the use

of that NWP will result in more than minimal individual or cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit.

The cumulative impact analyses in the national decision documents, especially the NEPA cumulative effects analyses, examine the wide variety of activities that affect the structure, dynamics, and functions of the nation's waters and wetlands. The ecological functionality or ecological condition of those waters and wetlands are directly and indirectly affected by many types of human activities, not just discharges of dredged or fill material regulated under section 404 of the Clean Water Act or structures or work regulated under section 10 of the Rivers and Harbors Act of 1899. The Corps' NEPA cumulative effects analyses considers past actions in the aggregate, consistent with the Council on Environmental Quality's 2005 guidance entitled ''Guidance on the Consideration of Past Actions in Cumulative Effects Analyses.'' The aggregate effects of past actions includes the present effects of past actions that were authorized by earlier versions of the NWPs, as well as other DA permits. In the national decision documents, the Corps added more discussion of the contribution of reasonably foreseeable future actions to NEPA cumulative effects, based on general information on reasonably foreseeable future actions that can be discerned at a national scale for categories of activities associated with NWP activities. Many of the reasonably foreseeable future actions related to the operation of the facility, after the permitted activities were completed. The Corps does not have the authority to regulate the operation of facilities that may be been constructed under activities authorized by NWPs or other DA permits, unless those operation activities involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States.

One commenter declared that NWP verifications do not need to include NEPA analyses because compliance with NEPA is accomplished through the national decision documents issued by Corps Headquarters. Another commenter expressed the opinion that the national decision documents, the supplemental decision documents signed by division engineers, and NWP verifications issued by district engineers do not comply with NEPA. A number of commenters said that making the draft decision documents available for public review during the comment period for the proposed NWPs does not comply with NEPA requirements. One commenter said that the comment period for the draft decision documents should be 90 days. A few commenters asserted that the draft decision documents prematurely made a ''finding of no significant impact.'' One commenter said the national decision documents support a ''finding of no significant impact'' under NEPA for each of the NWPs. Several commenters stated that each NWP requires an environmental impact statement.

When district engineers evaluate NWP PCNs, they are not required to conduct NEPA analyses because the Corps fulfills the requirements of NEPA through the environmental assessments in the combined decision documents prepared by Corps Headquarters when an NWP is issued, reissued, or modified. The NWP verification can be simply confirmation that a proposed NWP activity complies with the terms and conditions of applicable NWP(s), and will result in no more than minimal individual and cumulative adverse environmental effects. The administrative record for an NWP verification will include a brief document explaining the district engineer's determination regarding the NWP authorization for that activity, and whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. The requirements of NEPA are fulfilled by the national decision documents issued by Corps Headquarters. The supplemental decision documents signed by division engineers and the NWP verifications issued by district engineers are part of the tiered decision-making process to demonstrate compliance with the ''no more than minimal individual and cumulative adverse environmental effects'' requirements for general permits. This tiered process is consistent with the requirements under section 404(e) of the Clean Water Act and for NWPs issued under the authority of section 10 of the Rivers and Harbors Act of 1899, 33 CFR 322.2(f).

The Council on Environmental Quality's NEPA regulations require agencies to ''involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments'' (40 CFR 1501.4(b)) but do not require that environmental assessments be made available in draft form for public comment. However, the Corps' NWP regulations require that the draft decision documents prepared by Corps Headquarters are made available for public comment (see 33 CFR 330.5(b)(3)). Thus we made them available for public review and comment. We believe that 60 days is a sufficient comment period for the public to provide meaningful comments on the draft decision documents.

In its draft decision documents for these proposed NWPs, the Corps did not make a ''finding of no significant impact''; the draft decision documents had place-holders stating that those decisions could be made for the final NWPs. The Corps' ''finding of no significant impact'' in each national decision document for an issued or reissued NWP marks the completion of the NEPA process. When the Corps issues an EA with a finding of no significant impact, the NEPA process is concluded and an environmental impact statement is not necessary. Because the NWPs only authorize activities that have no more than minimal adverse environmental effects, individually and cumulatively, the issuance or reissuance of an NWP does not result in significant impacts to quality of the human environment and does not trigger the requirement to prepare an environmental impact statement.

One commenter said that a purpose and need statement should be included in each national decision document. This commenter also stated that the Corps' alternatives analysis and its evaluation of direct, indirect, and cumulative impacts is inadequate. One commenter stated that the division engineer's supplemental decision documents and the imposition of regional conditions does not comply with NEPA and the Clean Water Act. Several commenters recommended that the final decision documents discuss impacts to climate change.

The NWPs authorize categories of activities that generally satisfy specific purposes (*e.g.,* residential development, maintenance, bank stabilization, aquatic habitat restoration). The national decision documents describe, in general, the purposes for which the NWP activity would be used, and the needs of citizens that would be fulfilled by the authorized activities. Therefore, a more specific purpose and need statement in the national decision documents is not necessary. Each of the national decision documents includes a NEPA alternatives analysis, as well as general evaluations of anticipated direct, indirect, and cumulative impacts. The NWPs are issued or reissued prior to site-specific activities being proposed or authorized, so it is not possible to provide more than general, prospective impact analyses. The supplemental decision documents issued by division engineers provide regional analyses to support the use of NWPs in those regions, and with

regional conditions that are imposed by division engineers, help ensure compliance with section 404(e) of the Clean Water Act. As stated above, the Corps fulfills the requirements of NEPA when it issues the national decision document for the issuance, reissuance, or modification of an NWP. The national decision documents have been revised to discuss climate change.

Compliance With Section 404(e) of the Clean Water Act

The NWPs are issued in accordance with Section 404(e) of the Clean Water Act and 33 CFR part 330. Section 404(e)(1) allows the Corps to issue nationwide permits for ''categories of activities that are similar in nature.'' We interpret the ''similar in nature'' requirement to be applied in a broad manner, as a general category, rather than as a requirement that NWP activities must be identical to each other. We believe that this approach is consistent with implementing this general permit program in a practical, efficient manner.

Nationwide permits, as well as other general permits, are intended to reduce administrative burdens on the Corps and the regulated public while maintaining environmental protection, by efficiently authorizing activities that have no more than minimal adverse environmental effects, consistent with Congressional intent in the 1977 amendments to the Federal Water Pollution Control Act. Keeping the number of NWPs manageable is a key component for making the NWPs protective of the environment and streamlining the authorization process for those general categories of activities that have no more than minimal individual and cumulative adverse environmental effects.

The various terms and conditions of these NWPs, including the NWP regulations at 33 CFR 330.1(d) and 33 CFR 330.4(e), allow district engineers to exercise discretionary authority to modify, suspend, or revoke NWP authorizations to ensure compliance with Section 404(e) of the Clean Water Act. District engineers also have the authority to exercise discretionary authority and require an individual permit for any proposed activity that will result in more than minimal individual and cumulative adverse environmental effects. For each NWP that may authorize discharges of dredged or fill material into waters of the United States, the national and supplemental decision documents include national and regional 404(b)(1) Guidelines analyses, respectively. The 404(b)(1) Guidelines analyses are conducted in accordance with 40 CFR 230.7.

The 404(b)(1) Guidelines analyses in the national and supplemental decision documents also include cumulative effects analyses, in accordance with 40 CFR 230.7(b)(3). A 404(b)(1) Guidelines cumulative effects analysis is provided in addition to the NEPA cumulative effects analysis because the implementing regulations for NEPA and the 404(b)(1) Guidelines define ''cumulative impacts'' or ''cumulative effects'' differently.

Many commenters asserted that the proposed NWPs will authorize activities that will cause more than minimal adverse environmental effects. Several commenters stated that the proposed NWPs do not comply with the 404(b)(1) Guidelines. Several commenters said that the proposed NWPs authorize activities with only minimal adverse environmental effects. One commenter indicated that the proposed NWPs authorize categories of activities that are not similar in nature. Another commenter said eliminating the NWPs that authorize separate and distant crossings of waters of the United States by separate NWP authorization would violate the Clean Water Act. One commenter stated that activities authorized by NWPs have resulted in significant degradation of waters of the United States. One commenter suggested that NWP PCNs should include an alternatives analysis.

The terms and conditions of the NWPs, including the PCN requirements that are in many of the NWPs, are designed to ensure that the NWPs authorize only those categories of activities that have no more than minimal individual and cumulative adverse environmental effects. For those NWPs that authorize discharges of dredged or fill material into waters of the United States, each national decision document includes a 404(b)(1) Guidelines analysis. As stated above, we interpret the ''categories of activities that are similar in nature'' requirement broadly to keep the NWP program manageable in terms of the number of NWPs. With the NWPs issued today, for linear projects (*e.g.,* utility lines and roads) we are continuing our approach of authorizing separate and distant crossings of waters of the United States through separate NWP authorizations, consistent with 33 CFR 330.2(i). As demonstrated by our 404(b)(1) Guidelines analyses provided in the national decision documents, we have determined that the activities authorized by the NWPs do not result in significant degradation. Alternatives analyses are not required for specific activities authorized by NWPs (see 40 CFR 230.7(b)(1)). Paragraph (a) of general condition 23 requires that project proponents avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site, but an analysis of off-site alternatives is not required.

2015 Revisions to the Definition of ''Waters of the United States''

In the June 1, 2016, proposed rule, we solicited comments from NWP users and other interested parties on how the revisions to the definition of ''waters of the United States'' published in the June 29, 2015, edition of the **Federal Register** (80 FR 37054) might affect the applicability and efficiency of the proposed NWPs. We also requested comments on changes to the NWPs, general conditions, and definitions that would help ensure that activities that result in no more than minimal individual and cumulative adverse environmental effects can continue to be authorized by the NWPs. On October 9, 2015, the United States Court of Appeals for the Sixth Circuit issued a stay of the June 29, 2015, final rule pending further order of that court.

Many commenters recommended writing the final NWPs so that they are neutral with respect to any particular regulation defining ''waters of the United States'' pending the outcome of the litigation that is occurring for the June 29, 2015, final rule. These commenters suggested that the final NWPs should use general terms relating to jurisdiction that would be applied using whichever regulation is in effect at the time a PCN or voluntary request for NWP verification is being processed and evaluated by the district engineer. Many commenters stated that the Corps should not implement the 2015 final rule until the litigation is completed. Several commenters expressed support for implementing the 2015 final rule. Several commenters said that the Corps should delay issuing the final NWPs until after the litigation on the 2015 final rule has concluded.

We have changed the text of some NWPs, general conditions, and definitions so that they do not cite specific provisions of 33 CFR part 328, unless those provisions were not addressed in the 2015 final rule. We continue to rely on general terms relating to jurisdiction, such as ''adjacent'' and ''ordinary high water mark,'' which have been used in the Corps regulatory program and the NWP program for many years. When a Corps district receives a PCN or a voluntary request for NWP verification, the district

will process that PCN or request in accordance with the current regulations and guidance for identifying waters of the United States. If the stay issued by the Sixth Circuit is still in effect, the current regulations and guidance will be the definition of ''waters of the United States'' published in the November 13, 1986, issue of the **Federal Register** (51 FR 41206) plus the January 2003 clarifying guidance regarding the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers,* 531 U.S. 159 (2001) (see 68 FR 1995) and the December 2008 guidance entitled ''Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States & Carabell* v. *United States.*'' Our districts will not implement the 2015 final rule defining ''waters of the United States'' unless the stay is lifted and that rule goes back into effect. The 2012 NWPs expire on March 18, 2017, and they cannot be extended. Section 404(e) of the Clean Water Act imposes a 5-year limit for general permits, including the NWPs. Therefore, we have to reissue the NWPs before the litigation on the 2015 final rule is completed.

Many commenters suggested that the Corps conduct additional rulemaking to modify the NWPs if the stay of the 2015 final rule is lifted. Many commenters recommended increasing the acreage limits and PCN thresholds for the NWPs in case the 2015 final rule goes back into effect. Several commenters said the Corps should retain the current acreage limits, PCN thresholds, and general conditions until the litigation concerning the 2015 final rule is concluded. Several commenters requested that the Corps withdraw the proposed NWP rule until the litigation on the definition of ''waters of the United States'' is resolved. Several commenters said that it was inappropriate for the Corps to seek comment on the effects of the 2015 final rule on the NWPs because the 2015 final rule was only in effect for several weeks before the stay was issued by the Sixth Circuit. They said that there was not sufficient time to collect data and examples of the effects of the 2015 final rule on the utility of the NWPs, and to provide meaningful comment to the Corps.

If the Corps determines that the NWPs issued today need to be modified to address changes in the geographic scope of Clean Water Act jurisdiction or other regulation changes, the Corps will conduct rulemaking in accordance with the Administrative Procedure Act prior to making those changes. We are retaining the proposed acreage limits and PCN thresholds for these NWPs. It would not be prudent to withdraw the proposed NWPs pending the outcome of the litigation on the 2015 final rule because the 2012 NWPs expire on March 18, 2017, and cannot be extended. We appreciate the challenges with providing data on the effects of the 2015 final rule on the proposed NWPs, but we believe it was necessary to ask those questions because of concerns that were expressed by multiple stakeholders since the 2015 final rule was issued.

Many commenters requested that the Corps clarify the definitions of ''adjacent'' and ''waterbody'' regardless of whichever regulatory definition of ''waters of the United States'' is in effect. One commenter asked that the Corps define what constitutes a valid waste treatment system. One commenter stated that if the 2015 final rule goes back into effect, more activities will be regulated and thus may require NWP authorization, which will increase financial burdens on the regulated public. Another commenter said that under an increased number of waters and wetlands subject to Clean Water Act jurisdiction, the NWPs would no longer be consistent with Congressional intent for a streamlined permitting process for activities resulting in no more than minimal individual and cumulative adverse environmental effects. One commenter said that any substantial changes to the final NWPs that are made in response to comments must comply with the notice and comment requirements of the Administrative Procedure Act.

We do not believe it would be appropriate to clarify the definition of ''adjacent'' in these NWPs. When evaluating a PCN or voluntary request for NWP verification, Corps districts will apply the definition of ''adjacent'' that is in effect at the time the PCN or NWP verification request is received. We have modified the definition of ''waterbody'' to remove references to specific regulations. Wetlands adjacent to a waterbody will be identified through the regulations and guidance in effect when the PCN or NWP verification is being reviewed by the district engineer. Waste treatment systems will be identified on a case-by-case basis by district engineers to determine when the waste treatment exclusion applies under the Clean Water Act. Notwithstanding which regulations defining ''waters of the United States'' are in effect at a particular time, the NWPs continue to provide a streamlined authorization process for categories of regulated activities that result in no more than minimal adverse environmental effects. We believe that the changes made for the final NWPs are a logical outgrowth of the proposed rule and are reasoned responses to comments received on the June 1, 2016, proposed rule.

Acreage Limits and Pre-Construction Notification Thresholds

In the June 1, 2016, proposed rule we requested comment on whether to retain the ½-acre limit that has been imposed on a number of NWPs (*i.e.,* NWPs 12, 14, 21, 29, 39, 42, 43, 44, 50, 51, and 52), or to impose different acreage limits on those NWPs. We sought comment on the acreage limits to help determine whether there are alternative acreage limits that would be more effective at ensuring that the NWPs continue to meet their intended purpose of providing a streamlined authorization process for activities that result in no more than minimal individual and cumulative adverse environmental effects. In the proposed rule we said that comments suggesting changes to the acreage limits should include relevant data and other information that explain why the acreage limits should be changed. Different acreage limits can be suggested for NWPs that authorize different categories of activities.

The proportion of commenters stating that the acreage limits for the NWPs should be unchanged was roughly the same as the proportion of commenters recommending increases in acreage limits. Many of the commenters favoring increases in acreage limits did so because of their concerns regarding the effect of the 2015 final rule defining ''waters of the United States'' on the NWPs if the stay issued by the Sixth Circuit is lifted. Several commenters said the ½-acre limit should be increased to one or two acres. A few commenters recommended decreasing the acreage limits. One commenter suggested lowering the ½-acre limit to 5,000 square feet. Some commenters said that acreage and linear foot limits should be imposed on all NWPs. One commenter recommended establishing acreage limits that are based on a sliding scale that is proportional to the project size in acres.

We are retaining the current acreage limits for those NWPs that have acreage limits. Comments suggesting changes to the acreage limits of a specific NWP are summarized in the section of the preamble that discusses the comments received on that NWP. We believe the current acreage limits, along with the current PCN thresholds, provide effective environmental protection while allowing district engineers flexibility to take into account site-

specific characteristics of the affected aquatic resources. In addition, division engineers have the authority to modify NWPs on a regional basis to reduce acreage limits through regional conditions. In areas of the United States where higher acreage limits (*e.g.,* one or two acres) would be appropriate for general permit authorizations, district engineers have the authority to issue regional general permits. A number of NWPs are self-limiting, in that the category of activities authorized by that NWP acts as a limit (*e.g.,* NWP 10, which authorizes a single, non-commercial mooring buoy). For those self-limiting NWPs, acreage and linear foot limits are not necessary to control the adverse environmental effects of those activities. Imposing acreage limits by using a sliding scale related to overall project size would not ensure compliance with the ''no more than minimal adverse environmental effects'' requirement for the NWPs because projects larger in size (and general environmental impact) would have higher acreage limits and thus larger impacts to jurisdictional waters and wetlands. That suggested approach would add complexity to the NWP program and involve challenges in determining what the project size is for a particular proposal.

Two commenters stated that the limits of the NWPs should be based on the quality of the aquatic resources that would be impacted by the NWP activities. Another commenter said there should be no acreage limits on the NWPs. Several commenters said that the acreage limits should not include temporary impacts. Two commenters recommended increasing the acreage limit for NWPs that authorize activities associated with renewable energy generation and transmission projects. One commenter said the ½-acre limit is arbitrary. Another commenter asserted that the NWP acreage limits are too high and reduce the number of activities subject to public review.

Basing the limits of NWPs on the quality of aquatic resources that would be impacted by a proposed NWP activity is not practical because the rapid ecological assessment methods that would be needed to implement such an approach are not uniformly available across the country for all types of jurisdictional waters and wetlands. Acreage limits are necessary for some NWPs because the type of activity authorized by NWPs with acreage limits are not self-limiting due to the nature of the category of the activity authorized by the NWP. For example, NWP 29, which authorizes discharges of dredged of fill material into waters of the United States to construct residential developments, requires an acreage limit to satisfy the ''no more than minimal adverse environmental effects'' requirement because residential developments can vary substantially in size and in the amount of losses of jurisdictional waters and wetlands they can cause. Under the NWP definition of ''loss of waters of the United States'' temporary impacts are not applied to the acreage limit; only permanent adverse effects are applied. We are retaining the ½-acre limit for renewable energy generation and transmission projects. The ½-acre limit found in several NWPs was adopted in 2000 when many of those NWPs were issued for the first time. The current acreage limits are based, in part, on past experience in soliciting public comment on proposed activities that require DA authorization, and those acreage limits relate to regulated activities that generated little or no public comment.

Section 404(e) of the Clean Water Act states that NWPs and other general permits may only authorize activities that ''will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.'' 33 U.S.C. 1433(e). Section 404(e) does not define the term ''minimal,'' so we consider common definitions of ''minimal,'' experience, and sound judgement when addressing compliance with section 404(e) through the establishment of acreage and other limits for the NWPs.

For a program that is national in scope, such as the NWP program, defining ''minimal'' is extremely challenging because of the substantial variation in the structure, functions, and dynamics exhibited by the various types of aquatic resources found across the country subject to regulation under the Corps' permitting authorities. The value that society places on those aquatic resources also varies substantially across the country, and from person to person. In paragraph 2 of Section D, District Engineer's Decision, we have identified a number of factors for district engineers to consider when making their ''no more than minimal adverse environmental effects'' determinations for proposed NWP activities. All the factors listed above result in a degree of complexity that makes it infeasible to use a quantitative scientific approach to define an acreage limit that will be applied across the country and will ensure that NWP activities will have no more than minimal individual and cumulative adverse environmental effects. Since a quantitative scientific approach is not feasible, we have to rely on other approaches for establishing acreage and other limits and ensuring compliance with section 404(e) of the Clean Water Act.

The ½-acre limit found in many of these NWPs, as well as other quantitative limits in the NWPs, is in effect a policy decision that is made through the rulemaking process. The rulemaking process includes solicitation of public comment on what various interested parties think the acreage and other numeric limits should be. The Corps also uses its experience on soliciting public comment on specific activities, and the number and quality of comments it receives in response to a public notice for a proposed activity. For proposed activities that will result in small amounts of losses of jurisdictional waters and wetlands, those public notices rarely result in substantive comments that will affect the permit decision. In addition to the acreage and other numeric limits, the PCN process is a valuable tool for satisfying the ''no more than minimal adverse environmental effects'' requirement for the NWPs. The combination of acreage and other numeric limits, with the PCN requirements, provides district engineers with the opportunity and the responsibility to make site-specific decisions on whether the ''no more than minimal adverse environmental effects'' requirement has been satisfied. In addition, division engineers have the authority to modify, suspend, or revoke one or more NWPs to reduce the national limits on a regional basis. For those activities that do not qualify for NWP authorization because they exceed the acreage or other limits, the project proponent must obtain DA authorization through other types of permits, such as individual permits or regional general permits.

The regional conditioning process provides division engineers with the opportunity to lower acreage limits on a regional basis to take into account local variations in aquatic resource type, functions, and services. In addition, the PCN requirements allow district engineers evaluate proposed activities on a case-by-case basis and impose conditions to ensure that those activities cause no more than minimal adverse environmental effects. In response to a PCN, a district engineer can also exercise discretionary authority to require an individual permit if mitigation cannot be done to satisfy the ''no more than minimal adverse environmental effects'' requirement for NWPs.

Several commenters expressed support for retaining the 300 linear foot limit for losses of stream bed that is in a number of NWPs. A few commenters suggested increasing the 300 linear foot limit, and one commenter said that limit should be 500 linear feet. Several other commenters recommended removing the 300 linear foot limit for stream losses and relying solely on the ½-acre limit. Several commenters expressed support for limiting losses of intermittent and ephemeral stream bed to ½-acre when district engineers waive the 300 linear foot limit for such losses. One commenter said that limits for stream bed impacts should quantified as linear feet instead of acres. A few commenters said the 300 linear foot limit should not apply to ephemeral streams. A few commenters suggested that the limits for stream impacts should be based on stream order and stream type.

We have retained the 300 linear foot limit for losses of stream bed in those NWPs that have that limit. The 300 linear foot limit is used in conjunction with the ½-acre limit to further restrict losses of stream bed, although district engineers have the authority to waive the 300 linear foot limit in a case-by-case basis if they determine that the loss of intermittent or ephemeral stream bed (up to ½-acre) would result in no more than minimal adverse environmental effects, individually and cumulatively. Under no circumstances may the loss of stream bed exceed ½-acre under those NWPs that have both a ½-acre limit for losses of waters of the United States and a 300 linear foot limit for losses of stream bed.

Because the physical, chemical, and biological processes in streams occur within the area occupied by the stream channel (with contributions of areas outside the stream channel, such as floodplains, riparian areas, and hyporheic zones), acres are appropriate for quantifying stream impacts. The use of acres to quantify losses of stream bed is discussed in more detail in the ''Definitions'' section preamble for the definition of ''loss of waters of the United States.'' Regulated activities that result in the loss of ephemeral streams that are determined to be waters of the United States are subject to the terms and conditions of the NWPs, including any applicable acreage or linear foot limits. Limiting stream impacts using a classification system based on stream order or stream type would requiring choosing a classification system that would be applied across the country for the NWP program. We believe that is not a practical option for complying with the ''no more than minimal adverse environmental effects'' requirement because of challenges in relating stream order to the degree of adverse environmental effects. When evaluating PCNs, district engineers can take into account the stream type and the location of the stream in the watershed when determining whether a proposed activity is authorized by NWP. They can also use appropriate stream assessment tools, if such tools are available.

We also solicited comments on changing the PCN thresholds for those NWPs that require pre-construction notification. Many commenters said the current PCN thresholds should remain unchanged. Several commenters expressed support for the use of PCNs to provide flexibility and help ensure that NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects. Two commenters stated that PCNs are an important tool in helping to assess the cumulative impacts of NWP activities. Several commenters recommended that PCNs be required for all NWP activities so that the impacts of the NWP program can be fully evaluated. One commenter said that PCNs should be made available to the public.

In this final rule, we have retained the PCN thresholds that were in the proposal rule. We acknowledge that PCNs are an important mechanism to ensure that the NWPs only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects. Pre-construction notifications allow district engineers to evaluate the activity- and site-specific circumstances of proposed NWP activities to decide whether those activities are eligible for NWP authorization or require individual permits. In addition, PCNs provide district engineers with the opportunity to impose activity-specific conditions on the NWPs, including mitigation requirements, to comply with the general permit requirements. Pre-construction notifications also facilitate compliance with section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act. In our automated information system, we record all NWP PCNs and voluntary requests for NWP verification, which assists in our monitoring of cumulative impacts that result from activities authorized by NWPs. For those NWPs that do not require PCNs or are not voluntarily reported to the Corps, we estimate their contribution to cumulative impacts.

A number of categories of NWP activities do not require PCNs because they are unlikely to cause more than minimal cumulative adverse environmental effects. However, division engineers may modify these NWPs on a regional basis to require PCNs if they have concerns about the potential for more than minimal cumulative adverse environmental effects occurring as a result of those NWP activities. Requiring PCNs for all NWP activities is not practical and would be contrary to the streamlined authorization process envisioned by section 404(e) of the Clean Water Act. Specific activities authorized by NWPs do not require public notices and making those PCNs available to the public would add no value to the verification process. The public notice and comment process for the NWPs takes place at the appropriate phase: The rulemaking process for the issuance or reissuance of an NWP. If the Corps were to accept public comment on PCNs, it would turn the general permit process into an individual permit process.

Several commenters recommended increasing the PCN thresholds for a number of NWPs. Some commenters suggested increasing the PCN threshold for all NWPs. A few commenters said that PCN thresholds should be raised only if the Sixth Circuit lifts its stay on the 2015 final rule defining ''waters of the United States.'' One commenter stated that PCNs should not be required for NWP activities that only result in temporary impacts. One commenter objected to the use of PCNs, stating that PCNs reduce the efficiency of the NWPs. One commenter said that reliance on the PCN process to determine whether a proposed NWP activity results in no more than minimal adverse environmental effects violates section 404(e) of the Clean Water Act.

Recommendations for changing PCN thresholds for specific NWPs are discussed below, in the preamble discussion for each NWP. Most of the PCN thresholds apply to ''losses of waters of the United States'' which are based on permanent losses, not temporary impacts that are restored after completion of the authorized work. We believe the PCN process increases the efficiency of the NWP program, by allowing district engineers to determine whether activities will have no more than minimal adverse environmental effects. If the NWP PCN process were not available, the acreage and other limits of the NWPs would probably have to be decreased to ensure compliance with section 404(e) of the Clean Water Act. That would result in more activities requiring individual permits. Section 404(e) of the Clean Water Act is silent

on whether general permit can use a PCN process to comply with the statutory requirements for general permits. We believe that NWP PCNs are consistent with Congressional intent as it pertains to section 404(e), because if PCNs were not an available tool we would have to decrease the limits of the NWPs and require individual permits for those activities that do not satisfy the lower limits that allow activities to proceed under NWP authorization without PCNs.

Waivers of Certain Nationwide Permit Limits

In the June 1, 2016, proposal to reissue the NWPs, we announced our commitment to improve our tracking of waivers issued by district engineers, by adding a field to our automated information system to indicate whether a waiver was issued for an NWP verification. We also requested comments on five aspects of the use of waivers in the NWPs. This tool allows district engineers to waive certain NWP limits when they find that proposed activities, after agency coordination, will result in no more than minimal adverse environmental effects.

We solicited comments on these five topics relating to waivers: (1) Changing the numeric limits that can be waived; (2) whether to retain the authority of district engineers to issue activity-specific waivers of certain NWP limits; (3) whether to impose a linear foot cap on waivers to the 500 linear foot limit for NWPs 13 and NWP 54 or the 20 foot limit in NWP 36; (4) whether to impose a linear foot cap on losses of intermittent and ephemeral stream bed potentially eligible for waivers of the 300 linear foot limit for losses of stream bed; and (5) whether to require compensatory mitigation to offset all losses of stream bed authorized by waivers of the 300 linear foot limit for the loss of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. We also requested that commenters provide data and other information supporting their views on these questions.

Many commenters expressed support for the current waivers and the processes for evaluating waiver requests. A few commenters said there should not be any changes to the existing waivable limits of the NWPs. Many commenters opposed the use of waivers. Several commenters expressed support for the Corps' commitment to modify its automated information system to explicitly track the use of waivers, beginning with the 2017 NWPs. Several commenters stated that the Corps should issue annual reports on the approval of waivers in NWP verifications. A few commenters said that agency coordination should be required for all PCNs requesting waivers of certain NWP limits. A few commenters stated that public notices should be issued for waiver requests.

We are retaining the waiver provisions in the 2017 NWPs as they were proposed in the June 1, 2016, **Federal Register** notice. Waivers are an important tool to provide flexibility in the NWP program to authorize activities that are determined by district engineers to have no more than minimal adverse environmental effects after coordinating certain waiver requests with other government resources agencies. A waiver can only occur after the district engineer makes a written determination that a waiver is appropriate and that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer does not respond to a complete PCN within 45 days of receipt of that PCN, the waiver is not authorized through a default authorization.

In response to several commenters and in keeping with our overall commitment toward increasing transparency of regulatory decisions, we will develop quarterly reports that show overall summary statistics pertaining to the use of each NWP, aggregated per Corps District, and display it on our Web site. Some statistics that may be reported regarding the NWPs may include number of verifications provided per quarter, acres of waters of the United States permanently lost, as well as including summary information on the use of waivers during the previous quarter. All data provided will be aggregated by NWP and all information on waivers will pertain only to those NWPs that include a waiver provision. With the exception of NWP 36 (boat ramps), all PCNs requesting waivers of specific limits must be coordinated with the resource agencies in accordance with paragraph (d) of general condition 32. We do not believe agency coordination is necessary for requested waivers under NWP 36 because the width of a boat ramp or the amount of fill used to construct a boat ramp will not be much larger than the 20 foot width limit or the 50 cubic yard limit. Requiring public notices for waiver requests would be inconsistent with the general principles of general permits. We believe that agency coordination is sufficient to obtain additional information to assist in the district engineer's decision on activity-specific waiver requests.

Many commenters said that there should be no caps on waivers, but several commenters suggested that there should be waiver caps on all NWPs. One commenter stated that the limits under which a waiver can occur should be increased if the Sixth Circuit's stay of the 2015 rule defining ''waters of the United States'' is lifted and that rule goes back into effect. One commenter stated that all NWPs should have waivable limits. Several commenters indicated that some of the acreage limits of the NWPs should be able to be waived by district engineers. A few of those commenters recommended allowing district engineers to waive the ½-acre limit, and allow up to 5 acres of losses of waters of the United States under a waiver issued by the district engineer.

We have not added any additional caps to waivers, because the PCN process, the agency coordination process, and the requirement for district engineers to make written determinations in response to waiver requests are sufficient to ensure that NWPs that include waiver provisions continue to comply with section 404(e) of the Clean Water Act. Many of the NWPs that have waiver provisions have a ½-acre limit that cannot be waived. We do not agree that all limits for the NWPs should be waivable. Hard limits or caps, especially for the acreage limits (*e.g.,* the ½-acre limit in NWPs 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52), are critical tools for ensuring the NWPs only authorize those activities that will result in no more than minimal adverse environmental effects, individually and cumulatively. In areas of the country where categories of activities that result in the loss of greater than ½-acre of waters of the United States (or other limits for other NWPs) generally result in no more than minimal adverse environmental effects, district engineers can issue regional general permit to authorize those activities.

Several commenters said that compensatory mitigation should not be required for all waivers, and should only be required on a case-by-case basis. A few commenters recommended requiring compensatory mitigation for waivers for losses of stream bed. One commenter supported the use of alternative approaches for providing compensatory mitigation for waivers.

District engineers will continue to make case-by-case determinations on whether compensatory mitigation is necessary to offset losses of waters of the United States authorized by NWPs, including losses authorized by waivers of certain NWP limits. Those decisions will be made in accordance with 33 CFR 330.1(e)(3) and general condition 23, mitigation. Regional conditions added

by division engineers may also specify additional compensatory mitigation requirements for one or more NWPs. Compensatory mitigation for losses of stream bed is determined by district engineers on a case-by-case basis. When district engineers require stream compensatory mitigation for NWP activities, that compensatory mitigation may consist of stream rehabilitation, enhancement, or preservation in accordance with paragraph (d) of general condition 23 and 33 CFR 332.3(e)(3). Mitigation may also be provided for stream impacts authorized by NWP through the restoration, enhancement, or protection/maintenance of riparian areas next to streams (see paragraph (e) of general condition 23).

Compliance With the Endangered Species Act

In the June 1, 2016, proposed rule (see 81 FR 35192–35195), the Corps explained that the NWP regulations at 33 CFR 330.4(f) and NWP general condition 18, endangered species, ensure that all activities authorized by NWPs comply with section 7 of the Endangered Species Act (ESA). Section 330.4(f)(2) and paragraph (c) of general condition 18 require non-federal permittees to submit PCNs ''if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat.'' Federal permittees should follow their procedures for ESA section 7 compliance (see 33 CFR 330.4(f)(1)). The Corps evaluates the non-federal permittee's PCN and makes an effect determination for the proposed NWP activity for the purposes of ESA section 7. The Corps established the ''might affect'' threshold in 33 CFR 330.4(f)(2) and paragraph (c) of general condition 18 because it is more stringent than the ''may affect'' threshold for section 7 consultation in the U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) ESA Section 7 consultation regulations at 50 CFR part 402. The word ''might'' is defined as having ''less probability or possibility'' than the word ''may'' (Merriam-Webster's Collegiate Dictionary, 10th edition).

Paragraph (b)(7) of general condition 32 requires the project proponent to identify, in the PCN, the listed species that might be affected by the proposed NWP activity or utilizes the designated critical habitat in which the NWP activity is proposed to occur. If the project proponent is required to submit a PCN because the proposed activity might affect listed species or critical habitat, the activity is not authorized by NWP until either the Corps district makes a ''no effect'' determination or makes a ''may affect'' determination and completes formal or informal ESA section 7 consultation.

When evaluating a PCN, the Corps either will make a ''no effect'' determination or a ''may affect'' determination. If the Corps makes a ''may affect'' determination, the district will notify the non-federal applicant and the activity is not authorized by NWP until ESA Section 7 consultation has been completed. If the non-federal project proponent does not comply with 33 CFR 330.4(f)(2) and general condition 18, and does not submit the required PCN, then the activity is not authorized by NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to respond to the unauthorized activity.

Federal agencies, including state agencies (*e.g.,* certain state Departments of Transportation) to which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, are required to follow their own procedures for complying with Section 7 of the ESA (see 33 CFR 330.4(f)(1) and paragraph (b) of general condition 18). This includes circumstances when an NWP activity is part of a larger overall federal project or action. The federal agency's ESA section 7 compliance covers the NWP activity because it is undertaking the NWP activity and possibly other related activities that are part of a larger overall federal project or action.

On October 15, 2012, the Chief Counsel for the Corps issued a letter to the FWS and NMFS (the Services) clarifying the Corps' legal position regarding compliance with the ESA for the February 13, 2012, reissuance of 48 NWPs and the issuance of two new NWPs. That letter explained that the issuance or reissuance of the NWPs, as governed by NWP general condition 18 (which applies to every NWP and which relates to endangered and threatened species), and 33 CFR part 330.4(f), results in ''no effect'' to listed species or critical habitat, and therefore the reissuance/issuance action itself does not require ESA section 7 consultation. Although the reissuance/issuance of the NWPs has no effect on listed species or their critical habitat and thus requires no ESA section 7 consultation, the terms and conditions of the NWPs, including general condition 18, and 33 CFR 330.4(f) ensure that ESA consultation will take place on an activity-specific basis wherever appropriate at the field level of the Corps, FWS, and NMFS. The principles discussed in the Corps' October 15, 2012, letter apply to the 2017 NWPs as well.

Division engineers can add regional conditions to the NWPs to protect listed species and critical habitat, and to facilitate compliance with general condition 18. For the 2017 NWPs, Corps districts coordinated with regional or local offices of the FWS and NMFS to identify regional conditions for these NWPs. Regional conditions can add PCN requirements to one or more NWPs in areas inhabited by listed species or where designated critical habitat occurs. Regional conditions can also be used to establish time-of-year restrictions when no NWP activity can take place to ensure that individuals of listed species are not adversely affected by such activities. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts additional information and measures to ensure protection of listed species and critical habitat, the requirements established by general condition 18 (which apply to all uses of all NWPs), and other provisions of the Corps regulations ensure full compliance with ESA section 7.

In the Corps regulatory program's automated information system (ORM2), the Corps collects data on all individual permit applications, all NWP PCNs, all voluntary requests for NWP verifications where the NWP or general conditions do not require PCNs, and all verifications of activities authorized by regional general permits. For all written authorizations issued by the Corps, the collected data include authorized impacts and required compensatory mitigation, as well as information on all consultations conducted under section 7 of the ESA. Every year, the Corps districts evaluate over 30,000 NWP PCNs and requests for NWP verifications when PCNs are not required, and provides written verifications for those activities when district engineers determine those activities result in no more than minimal adverse environmental effects. During the evaluation process, district engineers assess potential impacts to listed species and critical habitat and conduct ESA section 7 consultations whenever they determine proposed NWP activities may affect listed species or designated critical habitat. District engineers will exercise discretionary authority and require individual permits when proposed NWP activities will result in more than minimal adverse environmental effects.

Each year, the Corps conducts thousands of ESA section 7 consultations with the FWS and NMFS

for activities authorized by NWPs. These section 7 consultations are tracked in ORM2. During the period of March 19, 2012, to September 30, 2016, Corps districts conducted 1,402 formal consultations and 9,302 informal consultations for NWP activities under ESA section 7. During that time period, the Corps also used regional programmatic consultations for 9,829 NWP verifications to comply with ESA section 7. Therefore, each year NWP activities are covered by an average of more than 4,500 formal, informal, and programmatic ESA section 7 consultations with the FWS and/or NMFS.

In response to the June 1, 2016, proposed rule many commenters expressed their support for the Corps' ''no effect'' determination for the issuance or reissuance of the NWPs for the purposes of ESA section 7. Several commenters recommended that, for the 2017 NWPs, the Corps conduct national programmatic ESA section 7 consultations with the FWS and NMFS. A few commenters said ESA section 7 consultation is required for the issuance or reissuance of the NWPs. Several commenters stated their agreement with the Corps' determination that the issuance or reissuance of NWPs does not trigger a need to consult under ESA section 7. One commenter said that the Corps should not conduct a voluntary national programmatic ESA section 7 consultation for the NWPs. One commenter asked why the Corps uses the term ''might affect'' instead of ''may affect'' in its regulations at 33 CFR 330.4(f)(2) and in general condition 18.

The Corps has not changed its position, as articulated in the June 1, 2016, proposed rule, that the issuance or reissuance of the NWPs by Corps Headquarters has ''no effect'' on listed species or critical habitat. Therefore, ESA section 7 consultation is not required whenever Corps Headquarters issues or reissues NWPs. As discussed above and in the June 1, 2016, proposed rule, when district engineers evaluate PCNs or voluntary requests for NWP verification, they will determine whether the proposed activities ''may affect'' listed species or designated critical habitat, and will conduct ESA section 7 consultation for any proposed NWP activity that ''may affect'' listed species or designated critical habitat. Project proponents that want to use NWPs for activities that require DA authorization are required to submit PCNs whenever their proposed activities might affect listed species or designated critical habitat, or if listed species or designated critical habitat are in the vicinity of the proposed activity, so that district engineers can determine whether those proposed activities will have ''no effect'' on listed species or critical habitat, or whether they ''may affect'' listed species or critical habitat and thus require either informal or formal ESA section 7 consultation. The requirements of ESA section 7 may also be fulfilled through programmatic section 7 consultations. As discussed above, the term ''might affect'' is a lower threshold than ''may affect.''

One commenter asked whether activities authorized by the 2012 NWPs, for which ESA section 7 consultation was conducted, would be grandfathered under the 2017 NWPs. One commenter said that the Corps should allow state agencies, who can act as federal sponsors, to make their own effects determinations for listed species and critical habitat. A few commenters requested that activity-specific ESA section 7 consultations be completed within 30 to 60 days.

Activities authorized under the 2017 NWPs must comply with general condition 18. If ESA section 7 consultation was conducted for an activity authorized under one of the 2012 NWPs and the project proponent needs more time to complete the authorized activity, there is a possibility that the previous section 7 consultation could continue to apply to the 2017 NWP authorization. The project proponent should discuss that situation with the district engineer to determine whether the previous section 7 consultation applies or whether a new ESA section 7 consultation is needed. Unless a state agency is a department of transportation which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, it remains the Corps' responsibility to make ESA section 7 effect determinations for activities authorized by the NWPs that will be conducted by non-federal permittees. The timeframes for formal ESA section 7 consultation are established by the statute, as well as the FWS's and NMFS's interagency consultation regulations at 50 CFR part 402. The Corps cannot change those timeframes. For informal ESA section 7 consultations, there are no timeframes in law or regulation. Under informal section 7 consultation, the Corps must obtain written concurrence from the FWS and/or NMFS for the informal consultation process to be completed.

Compliance With the Essential Fish Habitat Provisions of the Magnuson-Stevens Fishery Conservation and Management Act

The NWP program's compliance with the essential fish habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act is achieved through EFH consultations between Corps districts and NMFS regional offices. This approach continues the EFH Conservation Recommendations provided by NMFS Headquarters to Corps Headquarters in 1999 for the NWP program. Corps districts that have EFH designated within their geographic areas of responsibility coordinate with NMFS regional offices, to the extent necessary, to develop NWP regional conditions that conserve EFH and are consistent the NMFS regional EFH Conservation Recommendations. For NWP activities, Corps districts will conduct consultations in accordance with the EFH consultation regulations at 50 CFR 600.920. Division engineers may add regional conditions to the NWPs to address the requirements of the Magnuson-Stevens Act.

Compliance With Section 106 of the National Historic Preservation Act

The Corps has determined that the NWP regulations at 33 CFR 330.4(g) and NWP general condition 20, historic properties, ensure that all activities authorized by NWPs comply with section 106 of the NHPA. General condition 20 requires non-federal permittees to submit PCNs for any activity that might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. The Corps then evaluates the PCN and makes an effect determination for the proposed NWP activity for the purposes of NHPA section 106. We established the ''might have the potential to cause effects'' threshold in paragraph (c) of general condition 20 to require PCNs for those activities so that the district engineer can evaluate the proposed NWP activity and determine whether it has no potential to cause effects to historic properties or whether it has potential to cause effects to historic properties and thus require section 106 consultation.

If the project proponent is required to submit a PCN and the proposed activity might have the potential to cause effects to historic properties, the activity is not authorized by NWP until either the Corps district makes a ''no potential to cause effects'' determination or completes NHPA section 106 consultation.

When evaluating a PCN, the Corps will either make a ''no potential to cause effects'' determination or a ''no historic

properties affected,'' ''no adverse effect,'' or ''adverse effect'' determination. If the Corps makes a ''no historic properties affected,'' ''no adverse effect,'' or ''adverse effect'' determination, it will notify the non-federal applicant and the activity is not authorized by NWP until NHPA Section 106 consultation has been completed. If the non-federal project proponent does not comply with general condition 20, and does not submit the required PCN, then the activity is not authorized by NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to respond to the unauthorized activity.

The only activities that are immediately authorized by NWPs are ''no potential to cause effect'' activities under section 106 of the NHPA, its implementing regulations at 36 CFR part 800, and the Corps' ''Revised Interim Guidance for Implementing Appendix C of 33 CFR part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR part 800,'' dated April 25, 2005, and amended on January 31, 2007. Therefore, the issuance or reissuance of NWPs does not require NHPA section 106 consultation because no activities that might have the potential to cause effects to historic properties can be authorized by NWP without first completing activity-specific NHPA Section 106 consultations, as required by general condition 20. Programmatic agreements (see 36 CFR 800.14(b)) may also be used to satisfy the requirements of the NWPs in general condition 20 if a proposed NWP activity is covered by that programmatic agreement.

NHPA section 106 requires a federal agency that has authority to license or permit any undertaking, to take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register, prior to issuing a license or permit. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Thus, in assessing application of NHPA section 106 to NWPs issued or reissued by the Corps, the proper focus is on the nature and extent of the specific activities ''authorized'' by the NWPs and the timing of that authorization.

The issuance or reissuance of the NWPs by the Chief of Engineers imposes express limitations on activities authorized by those NWPs. These limitations are imposed by the NWP terms and conditions, including the general conditions that apply to all NWPs regardless of whether pre-construction notification is required. With respect to historic properties, general condition 20 expressly prohibits any activity that ''may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places,'' until the requirements of section 106 of the NHPA have been satisfied. General condition 20 also states that if an activity ''might have the potential to cause effects'' to any historic properties, a non-federal applicant must submit a PCN and ''shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that consultation under Section 106 of the NHPA has been completed.'' Permit applicants that are Federal agencies should follow their own requirements for complying with section 106 of the NHPA (see 33 CFR 330.4(g)(1) and paragraph (b) of general condition 20), and if a PCN is required the district engineer will review the federal agency's NHPA section 106 compliance documentation and determine whether it is sufficient to address NHPA section 106 compliance for the NWP activity.

Thus, because no NWP can or does authorize an activity that may have the potential to cause effects to historic properties, and because any activity that may have the potential to cause effects to historic properties must undergo an activity-specific consultation before the district engineer can verify that the activity is authorized by NWP, the issuance or reissuance of NWPs has ''no effect'' on historic properties. Accordingly, the action being ''authorized'' by the Corps (*i.e.,* the issuance or re-issuance of the NWPs themselves) has no effect on historic properties.

To help ensure protection of historic properties, general condition 20 establishes a higher threshold than the threshold set forth in the Advisory Council's NHPA section 106 regulations for initiation of section 106 consultation. Specifically, while section 106 consultation must be initiated for any activity that ''has the potential to cause effects to'' historic properties, for non-federal permittees general condition 20 requires submission of a PCN to the Corps if ''the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties.'' General condition 20 also prohibits the proponent from conducting the NWP activity ''until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that consultation under Section 106 of the NHPA has been completed.'' (See paragraph (c) of general condition 20.) The PCN must ''state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property.'' (See paragraph (b)(8) of general condition 32.)

During the process for developing regional conditions, Corps districts can coordinate or consult with State Historic Preservation Officers, Tribal Historic Preservation Officers, and tribes to identify regional conditions that can provide additional assurance of compliance with general condition 20 and 33 CFR 330.4(g)(2). Such regional conditions can add PCN requirements to one or more NWPs where historic properties occur. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts and additional information and measures to ensure protection of historic properties, the requirements established by general condition 20 (which apply to all uses of all NWPs), and other provisions of the Corps regulations and guidance ensure full compliance with NHPA section 106.

Based on the fact that NWP issuance or reissuance has no potential to cause effects on historic properties and that any activity that ''has the potential to cause effects'' to historic properties will undergo activity-specific NHPA section 106 consultation, there is no requirement that the Corps undertake programmatic consultation for the NWP program. Regional programmatic agreements can be established by Corps districts and State Historic Preservation Officers and/or Tribal Historic Preservation Officers to comply with the requirements of section 106 of the NHPA.

Tribal Rights

We received a number of comments from tribes regarding NWP general condition 17, which addresses tribal rights. One commenter said that general condition 17 does not adequately reflect the Corps' responsibility to uphold tribal treaty rights. Another commenter said that general condition 17 should be modified to ensure that all reserved tribal treaty rights are not impaired, not just reserved water rights and treaty fishing and hunting rights. The general condition should be expanded to address all tribal rights provided under federal law, either through statute or by common law. For example, general

condition 17 should cover rights regarding tribal lands. One commenter said that the NWPs should provide opportunities to consult on specific NWP activities that may impact tribal treaty resources or access to usual and accustomed hunting and fishing grounds. A few commenters stated that general condition 17 should require PCNs for all NWP activities to ensure they do not impair treaty rights. Another commenter stated that NWPs should not authorize activities that have more than a *de minimis* impact on treaty rights. One commenter cited the 1998 Department of Defense (DoD) American Indian and Alaska Native Policy to demonstrate the need to change general condition 17 to be consistent with that policy and ensure that the Corps conducts meaningful consultations with tribes to ensure that NWP activities will not impair treaty rights.

In response to these comments, and to address the full suite of tribal rights, we have made changes to general condition 17 to make this general condition consistent with the 1998 Department of Defense American Indian and Alaska Native Policy (1998 DoD Policy) and therefore cover all tribal rights, including protected tribal resources and tribal lands. We have revised general condition 17 as follows: ''No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.'' The 1998 DoD Policy is available at: *http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/techbio/DoDPolicy.pdf* .

To assist users of the NWPs in complying with general condition 17, we have added definitions for the following terms to Section F, Definitions: protected tribal resources, tribal rights, and tribal lands. These definitions were taken from the 1998 DoD Policy.

We believe that the revised general condition will not change the number of activities that qualify for NWP authorization. Compared to prior versions of this general condition, the revised general condition more clearly identifies the tribal rights that must be considered by district engineers. The proposed general condition 17 applied to all tribal rights, and provided some examples of those tribal rights: ''. . . including, but not limited to, reserved water rights and treaty fishing and hunting rights.'' In other words, the proposed general condition 17 and the general condition that was in prior sets of NWPs was not limited to those examples of tribal rights. In general condition 17 for the 2017 NWPs, we have replaced those examples to more explicitly cover the suite of tribal rights, including treaty rights, protected tribal resources, and tribal lands. We also believe that replacing the word ''impair'' with ''no more than minimal adverse effects on'' will provide more clarity and consistency in application, because it is congruous with the threshold for general permit authorization, that is, an NWP activity can cause no more than minimal individual and cumulative adverse environmental effects.

The threshold for consultation with tribes established by the 1998 DoD Policy is actions that ''may have the potential to significantly affect'' protected tribal resources, tribal rights, and tribal lands. The 1998 DoD Policy uses the word ''significantly'' as a synonym for ''material'' or ''important.'' For the modification of general condition 17, we have replaced the word ''impair'' with the phrase ''cause more than minimal adverse effects'' to be consistent with the threshold for general permits established by section 404(e) of the Clean Water Act. In other words, under general condition 17 no ''NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.'' If the district engineer reviews an NWP PCN or a voluntary request for an NWP verification, and determines that the proposed NWP activity will cause more than minimal adverse effects to tribal rights (including treaty rights), protected tribal resources, or tribal lands, and the applicant's mitigation proposal cannot reduce the adverse effects to that they are no more than minimal, he or she will exercise discretionary authority and require an individual permit for the proposed activity.

Regional Conditioning of Nationwide Permits

Under section 404(e) of the Clean Water Act, NWPs can only be issued for those activities that result in no more than minimal individual and cumulative adverse environmental effects. For activities that require authorization under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Corps' regulations at 33 CFR 322.2(f) have a similar requirement. An important mechanism for ensuring compliance with these requirements is regional conditions imposed by division engineers to address local environmental concerns. Coordination with federal and state agencies and Tribes, and the solicitation of public comments, assist division and district engineers in identifying and developing appropriate regional conditions for the NWPs. Effective regional conditions protect local aquatic ecosystems and other resources and helps ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse effects on the aquatic environment, and are not contrary to the public interest.

There are two types of regional conditions: (1) Corps regional conditions and (2) water quality certification/Coastal Zone Management Act consistency determination regional conditions.

Corps regional conditions may be added to NWPs by division engineers after a public notice and comment process and coordination with appropriate federal, state, and local agencies, as well as Tribes. The process for adding Corps regional conditions to the NWPs is described at 33 CFR 330.5(c).

Corps regional conditions approved by division engineers cannot remove or reduce any of the terms and conditions of the NWPs, including general conditions. Corps regional conditions cannot decrease PCN requirements. In other words, Corps regional conditions can only be more restrictive than the NWP terms and conditions established by Corps Headquarters when it issues or reissues an NWP.

Water quality certification (WQC) regional conditions are added to the NWPs as a result of water quality certifications issued by states, Tribes, or the U.S. EPA. Regional conditions are also added to the NWPs through the state Coastal Zone Management Act consistency review process. These WQC/CZMA regional conditions are reviewed by Corps division engineers to determine whether they are consistent with the Corps regulations for permit conditions at 33 CFR 325.4. Regulatory Guidance Letter 92–4, issued on September 14, 1992, provides additional guidance and information on WQC and CZMA conditions for the NWPs.

For the 2017 NWPs, the division engineer will issue supplemental decision documents for each NWP in a specific region (*e.g.,* a state or Corps district). Each supplemental decision document will evaluate the NWP on a regional basis (*e.g.,* by Corps district geographic area of responsibility or by state) and discuss the need for NWP regional conditions for that NWP. Each supplemental decision document will also include a statement by the division engineer, which will certify that the NWP, with approved regional conditions, will authorize only those activities that will have no more than

minimal individual and cumulative adverse environmental effects.

After the division engineer approves the Corps regional conditions, each Corps district will issue a final public notice for the NWPs. The final public notice will announce both the final Corps regional conditions and any final WQC/CZMA regional conditions. The final public notices will also announce the final status of water quality certifications and CZMA consistency determinations for the NWPs. Corps districts may adopt additional regional conditions after following public notice and comment procedures, if they identify a need to add or modify regional conditions, and the division engineer approves those regional conditions. Information on regional conditions and the suspension or revocation of one or more NWPs in a particular geographic area can be obtained from the appropriate district engineer.

In cases where a Corps district has issued a regional general permit that authorizes similar activities as one or more NWPs, during the regional conditioning process the district will clarify the use of the regional general permit versus the NWP(s). For example, the division engineer may revoke the NWP(s) that authorize the same categories of activities as the regional general permit so that only the regional general permit is available for use to authorize those activities.

Two commenters supported the use of regional conditions for the NWPs. Three commenters said that there is inconsistency in regional conditions and that those inconsistencies add delays and costs in obtaining NWP verifications. A few commenters said that Corps Headquarters should review and approve regional conditions, as well as other requirements districts impose on NWP activities. One commenter requested that the Corps compile all regional conditions into one document to assist users of the NWPs that do work in more than one Corps district. One commenter stated that districts should not propose regional conditions until after the final NWPs are issued because there are changes made to the NWPs in response to public comments.

There is substantial variation in aquatic resources across the country, the ecological functions and services those aquatic resources provide, and the values local people place on those aquatic resources. Because of that regional variability, there will be differences in regional conditions among Corps divisions and districts. Regional conditions that may be appropriate in one Corps district might not be appropriate in another Corps district, even if that Corps district is located in the same Corps division. Regional conditions are critical for ensuring that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects. Corps divisions and districts have the best understanding of aquatic resources in their geographic areas of responsibility, so Corps Headquarters review and approval of regional conditions is not necessary for the regional conditioning process. After the regional conditions are approved by the division engineer, the Corps district should post those regional conditions on its Web site.

There are not sufficient resources available for Corps Headquarters to compile and maintain a single document with all the NWP regional conditions, including Corps regional conditions and WQC/CZMA regional conditions, and revising that document whenever regional conditions are changed. Proposing regional conditions at nearly the same time as the proposed NWPs are published in the **Federal Register** for public comment provides efficiency and allows time for discussions among interested parties to develop regional conditions that will protect local resources. There is not sufficient time between the date the final NWPs are issued and their effective date for districts to seek comment on proposed regional conditions, submit their supplemental decision documents to the division engineer, and get the regional conditions approved by the division engineer before the 2017 NWPs go into effect.

Section 401 of the Clean Water Act

One commenter said that reissuance of the NWPs in a timely manner is critical for state water quality certification programs. Regardless of when the final NWPs are issued, states will have 60 days to make their water quality certification decisions for the 2017 NWPs. If there are less than 60 days between the date the final NWPs are issued and March 19, 2017 (*i.e.,* the effective date of these NWPs), if a project proponent wants to use an NWP that requires water quality certification before the end of the 60-day period, he or she must obtain an individual water quality certification or waiver from the state if that state has not yet made its water quality certification decision for the NWP. General condition 25, water quality, requires each project proponent to obtain an individual water quality certification or waiver for discharges authorized by the NWP if the state or authorized tribe has not previously certified compliance of the NWP with CWA section 401 (see 33 CFR 330.4(c)).

Section 307 of the Coastal Zone Management Act (CZMA)

One commenter inquired about the CZMA consistency determination process for lands held in trust by the United States for tribes, and whether the state has a role in making a consistency determination for those lands. One commenter asked if a tribe has adopted coastal zone management regulations under the tribal government's inherent authority, would the Corps seek a consistency concurrence from that tribe? Or would the Corps defer to the tribal permitting process to protect coastal resources?

For lands held in trust by the federal government for a tribe, NWP activities occurring on those lands that directly affect the coastal zone must be consistent, to the maximum extent practicable, with the approved state coastal zone management program (see 33 CFR 320.4(h)). Under the Coastal Zone Management Act, only states have the authority to develop coastal zone management programs and make determinations regarding consistency with those state coastal zone management programs. If a tribe has developed its own coastal management regulations, the Corps will not seek consistency concurrence from that tribe because the Coastal Zone Management Act only gives states the authority to develop coastal zone management programs and make consistency determinations. Tribal permit requirements are an alternative means of protecting coastal resources on tribal lands.

Nationwide Permit Verifications

Certain NWPs require the permittee to submit a PCN, and thus request confirmation from the district engineer prior to commencing the proposed NWP activity, to ensure that the NWP activity complies with the terms and conditions of the NWP. The requirement to submit a PCN is identified in the NWP text, as well as certain general conditions. General condition 18 requires non-federal permittees to submit PCNs for any proposed activity that might affect ESA-listed species or designated critical habitat, if listed species or designated critical habitat are in the vicinity of the proposed activity, or if the proposed activity is located in critical habitat. General condition 20 requires non-federal permittees to submit PCNs for any proposed activity that may have the potential to cause effects to any historic

properties listed in, determined to be eligible for listing in, or potentially eligible for listing in, the National Register of Historic Places.

In the PCN, the project proponent must specify which NWP or NWPs he or she wants to use to provide the required Department of Army authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. For voluntary NWP verification requests (where a PCN is not required), the request should also identify the NWP(s) the project proponent wants to use. The district engineer should verify the activity under those NWP(s), as long as the proposed activity complies with all applicable terms and conditions, including any applicable regional conditions imposed by the division engineer. All NWPs have the same general requirements: that the authorized activities can only cause no more than minimal individual and cumulative adverse environmental effects. Therefore, if the proposed activity complies with the terms and all applicable conditions of the NWP the applicant wants to use, then the district engineer should issue the NWP verification unless he or she exercises discretionary authority and requires an individual permit. If the proposed activity does not meet the terms and conditions of the NWP identified by the applicant in his or her PCN, and that activity meets the terms and conditions of another NWP identified by the district engineer, the district engineer will process the PCN under the NWP identified by the district engineer. If the district engineer exercises discretionary authority, he or she should explain to the applicant why the proposed activity is not authorized by NWP.

Pre-construction notification requirements may be added to NWPs by division engineers through regional conditions to require PCNs for additional activities. For an activity where a PCN is not required, a project proponent may submit a PCN voluntarily, if he or she wants written confirmation that the activity is authorized by NWP. Some project proponents submit permit applications without specifying the type of authorization they are seeking. In such cases, district engineer will review those applications and determine if the proposed activity qualifies for NWP authorization or another form of DA authorization, such as a regional general permit (see 33 CFR 330.1(f)).

In response to a PCN or a voluntary NWP verification request, the district engineer reviews the information submitted by the prospective permittee. If the district engineer determines that the activity complies with the terms and conditions of the NWP, he or she will notify the permittee. Activity-specific conditions, such as compensatory mitigation requirements, may be added to an NWP authorization to ensure that the NWP activity results in only minimal individual and cumulative adverse environmental effects. The activity-specific conditions are incorporated into the NWP verification, along with the NWP text and the NWP general conditions. In general, NWP verification letters will expire on the date the NWP expires (see 33 CFR 330.6(a)(3)(ii)), although district engineers have the authority to issue NWP verification letters that will expire before the NWP expires, if it is in the public interest to do so.

If the district engineer reviews the PCN or voluntary NWP verification request and determines that the proposed activity does not comply with the terms and conditions of an NWP, he or she will notify the project proponent and provide instructions for applying for authorization under a regional general permit or an individual permit. District engineers will respond to NWP verification requests, submitted voluntarily or as required through PCNs, within 45 days of receiving a complete PCN. Except for NWPs 21, 49, and 50, and for proposed NWP activities that require Endangered Species Act section 7 consultation and/or National Historic Preservation Act section 106 consultation, if the project proponent has not received a reply from the Corps within 45 days, he or she may assume that the project is authorized, consistent with the information provided in the PCN. For NWPs 21, 49, and 50, and for proposed NWP activities that require ESA Section 7 consultation and/or NHPA Section 106 consultation, the project proponent may not begin work before receiving a written NWP verification. If the project proponent requested a waiver of a limit in an NWP, the waiver is not granted unless the district engineer makes a written determination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects, and issues an NWP verification.

Climate Change

Climate change represents one of the greatest challenges our country faces with profound and wide-ranging implications for the health and welfare of Americans, economic growth, the environment, and international security. Evidence of the warming of climate system is unequivocal and the emission of greenhouse gases from human activities is the primary driver of these changes (IPCC 2014). Already, the United States is experiencing the impacts of climate change and these impacts will continue to intensify as warming intensifies. It will have far-reaching impacts on natural ecosystems and human communities. These effects include sea level rise, ocean warming, increases in precipitation in some areas and decreases in precipitation in other areas, decreases in sea ice, more extreme weather and climate events including more floods and droughts, increasing land surface temperatures, increasing ocean temperatures, and changes in plant and animal communities (IPCC 2014). Climate change also affects human health in some geographic area by increasing exposure to ground-level ozone and/or particulate matter air pollution (Luber et al. 2014). Climate change also increases the frequency of extreme heat events that threaten public health and increases risk of exposure to vector-borne diseases (Luber et al. 2014). Climate impacts affect the health, economic well-being, and welfare of Americans across the country, and especially children, the elderly, and others who are particularly vulnerable to specific impacts. Climate change can affect ecosystems and species through a number of mechanisms, such as direct effects on species, populations, and ecosystems; compounding the effects of other stressors; and the direct and indirect effects of climate change mitigation or adaptation actions (Staudt et al. 2013). Other stressors include land use and land cover changes, natural resource extraction (including water withdrawals), pollution, species introductions, and removals of species (Staudt et al. 2013, Bodkin 2012, MEA 2005d) and changes in nutrient cycling (Julius et al. 2013).

Mitigation and adaptation can reduce the risk of impacts caused climate change (IPCC 2014). Mitigation actions reduce emissions of greenhouse gases and help avert the most damaging impacts of climate change. Activities authorized by NWPs, such as the construction of land-based renewable energy generation facilities authorized by NWP 51 and the construction and maintenance of utility lines authorized by NWP 12 to transport and transmit natural gas and electricity will support activities that help mitigate the impacts of climate change by supporting reductions in greenhouse gas emissions.

Adaptation can reduce risks associated with climate change and help protect communities and ecosystems. Adaptation occurs at various levels, including individuals, local

governments, state governments, and the federal government (NRC 2010). Adaptation involves decision-making to deal with climate change to avoid or minimize disruptions to American society, its economy, and the environment (NRC 2010). Examples of adaptation to respond to climate change include improving water consumption, implementing sustainable forestry and agricultural practices, and restoring and protecting ecosystems that provide carbon storage and other ecosystem services including by serving as a natural buffer against extreme weather impacts (IPCC 2014). Adaptation to sea level rise and lake level changes can involve retrofitting and protecting public infrastructure such as stormwater management facilities, wastewater systems, roads, bridges, and ports. The improvement of stormwater management facilities and other infrastructure can be a response to changes in precipitation patterns. Impacts to water supplies and the distribution of water can result in the need for adaptation measures such as repairing and improving utility lines such as water supply lines. The production and distribution of energy also involves climate change adaptation measures, including switching to renewable energy generation facilities such as solar, wind, and water energy, and improving the utility lines that transmit the energy generated by those facilities. Adaptation for coastal communities and residents will involve approaches to respond to erosion and flooding, as well as sea level rise. Adaptation requires regional approaches, because there is increasing scientific uncertainty regarding climate risks and vulnerabilities as the geographic scale of scope of impact analysis increases, as well as the various stressors that interact with climate change to affect communities and ecosystems (NRC 2010).

The adaptation actions described above comprise only a partial list taken from a report on climate change adaptation (NRC 2010). Those actions were selected from the report because some of those actions may be authorized by one or more NWP(s), if those actions involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. The NWPs are, and will be, and important tool for climate change adaptation, to fulfill the needs of society and communities, and to avoid and minimize adverse effects to jurisdictional waters and wetlands that help provide resilience to changing environmental conditions.

Response to Comments on Specific Nationwide Permits

NWP 1. *Aids to Navigation.* We did not propose any changes to this NWP and did not receive any comments on this NWP. This NWP is reissued without change.

NWP 2. *Structures in Artificial Canals.* We did not propose any changes to this NWP and did not receive any comments on this NWP. This NWP is reissued without change.

NWP 3. *Maintenance.* We proposed to modify this NWP to state that it also authorizes regulated activities associated with the removal of previously authorized structures or fills. We also proposed to modify paragraph (c) of this NWP to clarify that the use of temporary mats in jurisdictional waters and wetlands is also authorized by this NWP, if those mats are used to minimize impacts during regulated maintenance activities.

Many commenters supported all proposed modifications of NWP 3. Several commenters objected to the reissuance of this NWP, and some stated that it does not authorize a category of activities that is similar in nature. Two commenters opposed the reissuance of NWP 3, stating that it allows for piecemealing of maintenance activities and does not require evaluation of practicable alternatives. A few commenters said that maintenance activities should require individual permits.

This NWP only authorizes maintenance activities, a general category of activities that is similar in nature. General condition 15 requires each NWP activity to be a single and complete project, and states that the same NWP cannot be used more than once for the same single and complete project. Other than on-site avoidance and minimization measures, NWPs do not require the evaluation of practicable alternatives (see paragraph (a) of general condition 23, mitigation, and 40 CFR 230.7(b)(1)). Maintenance activities involving discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States usually have no more than minimal adverse environmental effects, individually and cumulatively, so authorization by NWP is appropriate. District engineers have the authority to exercise discretionary authority and require individual permits for any maintenance activities they determine will result in more than minimal adverse environmental effects.

Two commenters requested clarification regarding the use of the phrase ''previously authorized'' under paragraph (a), and whether it is necessary to supply the district engineer with documentation of the previous authorization. One commenter questioned whether a grandfathering provision is required for any currently serviceable structure or fill authorized by 33 CFR 330.3. Several commenters objected to the proposal to modify paragraph (a) of this NWP to authorize the removal of previously authorized structures or fills, and several commenters expressed their support for that proposed modification. Several commenters requested further clarification of the meaning of ''minimum necessary'' in paragraph (a), while one commenter said that there is no need to clarify this term. Two commenters asked for an explanation of the circumstances under which an activity would be considered a maintenance activity authorized by this NWP.

The term ''previously authorized'' means the structure or fill was authorized by an individual permit or a general permit, or the structure or fill was authorized under the provisions of 33 CFR 330.3. To qualify for NWP 3 authorization, it is not necessary for the project proponent to produce a copy of the prior authorization. In many cases it might not be possible to produce a copy of a written authorization because the discharge, structure, or work may have been authorized by a general permit that does not require reporting, or it was authorized by regulation without a reporting requirement. Once a structure or fill is authorized, it remains authorized unless the district engineer suspends or revokes the authorization (see 33 CFR 325.6). The district engineer has the discretion to determine what constitutes the minimum necessary for the purposes of this NWP. In general terms, in the context of this NWP maintenance consists of repairing, rehabilitating, or replacing previously authorized structures or fills.

One commenter suggested adding a 200-foot limit to paragraph (a) of this NWP. Three commenters suggested adding ''stabilization'' after the phrase ''repair, rehabilitation, or replacement'' to clarify that stabilization activities are authorized by paragraph (a) of this NWP. One commenter recommended authorizing wetland dike maintenance under paragraph (a). One commenter said that there should be a limit on the size of structures or fills that can be removed under paragraph (a). Two commenters requested clarification regarding whether NWP 3 requires the removal of structures. Two commenters stated that in site-specific cases it may be environmentally preferable to

abandon a structure or pipeline and keep it in place. A few commenters stated that maintenance activities often go beyond the intent of this NWP and, occasionally in emergency situations, are more extensive than necessary to respond to the emergency. They said those activities should require PCNs after the emergency response is completed if additional work is required.

Since this NWP authorizes maintenance activities and only allows minor deviations, we do not believe it would be appropriate to impose a quantitative limit on this NWP other than the 200-foot limit in paragraph (b). Stabilization activities can be authorized by NWP 13 or other NWPs. Wetland dikes that were previously authorized and are currently serviceable can be maintained under the authorization provided by this NWP. The intent of the proposed modification of this NWP with respect to authorizing the removal of structures or fills is to provide Department of the Army authorization when the landowner or other appropriate entity wants to remove a structure or fill from jurisdictional waters and wetlands, in case the prior authorization does not cover the removal of the structure or fill. This NWP does not require the removal of structures or fills. If it would be environmentally preferable to keep the structure or fill in place, then the structure or fill can remain in place unless the district engineer takes action under his or her authority to require the responsible party to remove the structure or fill. For example, under paragraph (c) of general condition 1, navigation, the district engineer can require a permittee to remove structures or works from navigable waters of the United States. If a district engineer determines that an activity, including an activity conducted to respond to an emergency, did not comply with the terms and conditions of NWP 3, and an excessive amount of work was done, he or she can take action to address the alleged non-compliance. One potential approach might be to require an individual permit for that activity.

For paragraph (b) of NWP 3, one commenter recommended removing the 200-foot limit. Two commenters suggested increasing that limit to 300 feet. One commenter said that any new riprap should be limited to being placed in the original project footprint. One commenter asked whether new or additional riprap to protect a structure or fill could be authorized by this NWP. Two commenters said the use of riprap should be discouraged, and other means of controlling erosion should be used. A number of commenters said that the use of riprap in paragraph (b) should not require a PCN. One commenter said that in some cases, it is not possible to restore the waterway in the vicinity of the existing structure to the approximate dimensions that existed when the structure was built, because of changes to the stream channel that naturally occurred over time since the structure was originally constructed. One commenter stated support for the language requiring restoration of the waterway to those approximate dimensions.

We are retaining the 200-foot limit in paragraph (b) because we believe it is an appropriate limit, along with the PCN requirement, for ensuring that authorized activities result in no more than minimal adverse environmental effects. We have removed the last two sentences of this paragraph. The use of riprap or other erosion control measures such as bioengineering to protect the structure or fill from erosion may be authorized by other NWPs, such as NWP 13. The use of the word ''approximate'' in that sentence in paragraph (b) allows for the restoration of the waterway even though changes to the watershed and other alterations may have caused stream dimensions to change over time. Because all activities authorized by paragraph (b) require PCNs, district engineers will have the opportunity to consider the changes that have occurred to the stream over time, and determine whether the proposed activity is authorized by NWP 3 despite those changes.

Several commenters supported the addition of timber mats to the temporary activities authorized by this NWP. One commenter said that the use of timber mats in waters of the United States always requires Department of the Army authorization. One commenter requested clarification of the circumstances under which the use of timber mats in waters of the United States is a regulated activity. One commenter questioned whether the use of wetland mats requires a PCN. One commenter recommended limiting the use of temporary mats so that impacts do not exceed 300 linear feet of stream bed and/or 1/2-acre of waters of the United States. One commenter recommended adding the word ''promptly'' prior to ''removed'' so that the fourth sentence of paragraph (c) would read: ''After conducting the maintenance activity, temporary fills must be promptly removed in their entirety and the affected areas returned to preconstruction elevations.''

We have retained the use of timber mats in paragraph (c) of this NWP. District engineers will determine on a case-by-case basis whether using timber mats to conduct NWP activities requires Department of the Army authorization. For this NWP, only activities authorized by paragraph (b) require PCNs, unless an NWP general condition triggers a PCN requirement (*e.g.,* paragraph (c) of general condition 18, endangered species or paragraph (c) of general condition 20, historic properties) or a regional condition. Since temporary mats authorized by paragraph (c) are temporary features, it is not necessary to impose quantitative limits on their use. We do not agree that the ''promptly'' should be added to the fourth sentence of paragraph (c) because there will be circumstances where temporary fills need to remain in place for a longer time period. An example would be to allow the affected areas to stabilize before removing temporary fills.

A few commenters said that PCNs should be required for all activities authorized by this NWP. One commenter said that proposed removals of previously authorized structures or fills should require PCNs. Some commenters said that tribes should be notified of proposed NWP 3 activities because of potential impacts to tribal trust resources. Two commenters stated that PCNs should be required for any proposed activity under paragraph (a) that would result in more than a minor deviation from the structure's configuration or the filled area.

Because this NWP only authorizes maintenance activities, we do not believe that PCNs should be required for all activities. Division engineers have discretion to impose regional conditions on this NWP to require PCNs for some or all activities, including removal activities, if they believe additional PCNs are necessary to ensure that activities authorized in a region result in no more than minimal adverse environmental effects. For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions that protect tribal trust resources. Corps districts may also establish coordination procedures with tribes to ensure that NWP 3 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. Maintenance activities that result in more than minor deviations in the structure's configuration or filled area are not authorized under paragraph (a), unless it is a structure or fill that was destroyed or damaged by a storm, flood, fire, or other discrete event, and the structure or fill needs to be reconstructed. For repair, rehabilitation, or replacement activities conducted after storms or

other discrete events, the structure or fill should be similar to what was damaged or destroyed, and constructed in the same general footprint as the original structure or fill.

One commenter said that a PCN should be required for any placement of new or additional riprap under paragraph (b). One commenter stated that the placement of riprap to protect an existing structure should not require a PCN. Several commenters recommended removing the PCN requirement for activities authorized by paragraph (b), because they believe that the removal of accumulated sediment results in only minimal adverse environmental effects. Three commenters suggested not requiring PCNs for removal of accumulated sediments within an existing structure, such as a culvert. One commenter asked whether the PCN requirement for activities authorized by paragraph (b) only applies to activities in section 10 waters.

All activities authorized by paragraph (b) of this NWP require PCNs. As discussed above, we have removed the last two sentences of this paragraph. The project proponent has the option of using NWP 13 or another NWP to authorize the placement of riprap to protect the existing structure, which in some circumstances does not require a PCN. The removal of accumulated sediment within an area extending 200 feet from a structure or fill has the potential to result in more than minimal adverse environmental effects, so we believe requiring a PCN for those sediment removal activities is appropriate. We have modified paragraph (a) to clarify that it authorizes the removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill. Therefore, the removal of accumulated sediment and debris in those areas does not require a PCN unless a general condition or regional condition triggers a PCN requirement for those activities. The removal of accumulated sediment and debris outside of the immediate vicinity of the structure or fill, and up to 200 feet from that structure or fill, could be authorized by paragraph (b) and would therefore require a PCN. The PCN requirement for activities authorized under paragraph (b) of this NWP applies to activities that require section 10 and/or section 404 authorization.

One commenter expressed concern regarding impacts to endangered or threatened species caused by activities authorized by this NWP. One commenter recommended a cumulative impact analysis for NWP 3. One commenter said that compensatory mitigation should be required for all NWP 3 activities. Several commenters stated that this NWP should require use of best management practices to avoid sediment inputs to downstream waters. One commenter said that NWP 3 activities must comply with state or local floodplain management requirements.

Any proposed NWP 3 activity conducted by a non-federal permittee that might affect an ESA-listed species or designated critical habitat requires a PCN because of the requirements of general condition 18. Cumulative effects analyses under the National Environmental Policy Act and Clean Water Act section 404(b)(1) guidelines have been conducted for the 2017 NWP 3. Those cumulative effects analyses are presented in the national decision document for this NWP. We do not agree that compensatory mitigation should be required for all activities authorized by this NWP, because maintenance activities generally cause no more than minimal adverse environmental effects. For those NWP 3 activities that require PCNs, district engineers will determine whether compensatory mitigation or another form of mitigation is necessary to ensure the proposed activities will result in no more than minimal adverse environmental effects, in accordance with 33 CFR 330.1(e)(3). General condition 12, soil erosion and sediment controls, requires the use of appropriate soil erosion and sediment controls for NWP activities. General condition 10, fills in 100-year floodplains, requires fills in those floodplains to comply with applicable Federal Emergency Management Agency (FEMA)-approved state or local floodplain management requirements.

One commenter stated that maintenance of any structure should not create or maintain a fish passage barrier. Another commenter recommended adding terms to this NWP requiring authorized activities to improve aquatic life movements. One commenter recommended that this NWP authorize stream channelization to improve aquatic life movements. One commenter stated that maintenance of any structure should not create or maintain a channel restriction. One commenter stated that treated wood should not be used for maintenance activities to protect water quality.

General condition 2, aquatic life movements, requires NWP activities to be constructed so that they do not substantially disrupt the life cycle movements of indigenous aquatic species, unless the activity's primary purpose is to impound water. We can only condition the NWP to minimize adverse effects on aquatic life movements so that those adverse effects are no more than minimal, but actions the permittee takes to improve aquatic life movements in a waterbody may be considered as mitigation that would be considered in the district engineer's verification decision. While stream channelization may benefit some species, other species are likely to be adverse affected by those activities because they alter their habitat. General condition 9, management of water flows, requires that NWP activities maintain water flows to the maximum extent practicable, and that the capacity of open waters should be maintained. Treated wood may be considered a suitable material for maintenance activities, as long as the district engineer determines that its use complies with general condition 6, suitable material.

One commenter recommended adding terms to this NWP to provide specific requirements regarding slope stability. One commenter asked whether it is more appropriate to conduct pipeline maintenance under NWP 3 or NWP 12. One commenter said that NWP 3 should authorize up to 200 linear feet of stream realignment.

The appropriate slope for maintenance activities should be determined on a case-by-case basis, after considering site- and activity-specific factors. Either NWP 3 or NWP 12 may be used to authorize pipeline maintenance activities that require DA authorization because they involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. Stream realignment is not a maintenance activity and may be authorized by another NWP, a regional general permit, or an individual permit.

This NWP is reissued with the modifications discussed above.

NWP 4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* We did not propose any changes to this NWP and we did not receive any comments on this NWP. This NWP is reissued without change.

NWP 5. *Scientific Measurement Devices.* We did not propose any changes to this NWP and we did not receive any comments on this NWP. This NWP is reissued without change.

NWP 6. *Survey Activities.* We did not propose any changes to this NWP. One commenter objected to the proposed reissuance of this NWP, stating that individual permits should be required for these survey activities. Several commenters requested a definition of

''temporary pads'' and asked for clarification whether the use of timber mats would be considered as fill for access roads. Several commenters suggested expanding this NWP to include temporary access to survey locations. One commenter said that tribes should be provided with advance notice of proposed NWP 6 activities. Another commenter stated that wetland areas should be protected to the extent possible using best management practices.

The activities authorized by this NWP generally result in no more than minimal adverse environmental effects so authorization by general permit is appropriate. In regions where there are concerns that the activities authorized by this NWP might result in more than minimal individual and cumulative adverse environmental effects, division engineers have the authority to modify, suspend, or revoke this NWP. We do not think it is necessary to define the term ''temporary pad.'' Timber mats may be used for temporary access to survey sites to minimize adverse environmental effects. District engineers will determine on a case-by-case basis whether the use of timber mats requires DA authorization as a discharge of fill material into waters of the United States. Temporary access activities requiring DA authorization may be authorized by NWP 33. For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions that protect tribal trust resources. Corps districts may also establish coordination procedures with tribes to ensure that NWP 6 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. Paragraph (a) of general condition 23, mitigation, requires adverse effects to jurisdictional wetlands and other waters of the United States to be minimized to the maximum extent practicable on the project site.

One commenter requested that limits be placed on exploratory trenching. Another commenter recommended limiting discharges of fill material to 25 cubic yards. This commenter also suggested that project proponents wanting to construct numerous small pads with a total fill volume exceeding 25 cubic yards should be required to obtain individual permits.

The requirements in NWP 6 for exploratory trenching ensure that impacts from those activities are temporary and therefore a limit is unnecessary. Likewise, because of the nature of the activities authorized by this NWP and the small volumes of dredged or fill material involved in those activities, it is not necessary to add a 25 cubic yard limit. If there are regional concerns about the volumes of dredged or fill material being discharged under this NWP, the division engineer can modify this NWP and impose a volume limit on regulated discharges. Each temporary pad that is a single and complete project is subject to the 1/10-acre limit.

This NWP is reissued without change.

NWP 7. *Outfall Structures and Associated Intake Structures.* In the June 1, 2016, proposed rule, we did not propose any changes to this NWP. Several commenters said they support the reissuance of this NWP. One commenter recommended limiting bank stabilization for outfall structures to 25 feet along the bank. One commenter said that outfall structures should be installed in a manner that avoids permanent impacts to streams, and that velocity dissipation devices should be required to ensure that discharges from outfalls do not cause erosion. One commenter stated that outfall structures should not be located immediately adjacent to oyster or clam beds so that those clams and oysters can continue to be fit for human consumption. One commenter said that outfall structures should not be located in areas used by fish for foraging or spawning, or in areas inhabited by marine vegetation. Another commenter said that advance notice of proposed NWP 7 activities should be provided to tribes to avoid unresolved tribal treaty issues.

The stabilization of banks next to outfall structures may be authorized by NWP 13, and such activities would be subject to the terms and conditions of that NWP. A requirement to install velocity dissipation devices is more appropriately identified on a case-by-case basis by district engineers when they evaluate PCNs for activities authorized by this NWP. General condition 5, shellfish beds, protects areas of concentrated shellfish populations. Important fish spawning areas are protected through the requirements of general condition 3, spawning areas. Division and district engineers may modify, suspend, or revoke this NWP if there are regional or site-specific concerns about the effects of outfall structures on shellfish, spawning areas, or marine vegetation. For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions that protect tribal trust resources. Corps districts may also establish coordination procedures with tribes to ensure that NWP 7 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

This NWP is reissued without change.

NWP 8. *Oil and Gas Structures on the Outer Continental Shelf.* We did not propose any changes to this NWP. One commenter objected to the proposed reissuance of this NWP and said that individual permits should be required for these activities. Another commenter stated that these activities should require environmental impact statements and consultation with the National Marine Fisheries Service to address potential impacts to marine mammals.

For oil and gas structures on the outer continental shelf, and for the purposes of this NWP, the Corps' authority is limited to evaluating effects on navigation and national security. Because of their location on the outer continental shelf, these activities are unlikely to have more than minimal adverse effects on navigation and national security, but the PCN review process will ensure compliance with general permit requirements. A proposed oil and gas structure on the outer continental shelf that may result in ''take'' of marine mammals requires separate authorization under the Marine Mammal Protection Act. Requests for Marine Mammal Protection Act incidental harassment or take authorizations are obtained through a separate process administered by the National Oceans and Atmospheric Administration.

This NWP is reissued without change.

NWP 9. *Structures in Fleeting and Anchorage Areas.* We did not propose any changes to this NWP. One commenter said that the U.S. Coast Guard does not establish anchorage or fleeting areas and requested that this language be removed from the NWP. According to the U.S. Coast Guard's regulations at 33 CFR 101.105, a barge fleeting facility means ''a commercial area, subject to permitting by the Army Corps of Engineers, as provided in 33 CFR part 322, part 330, or pursuant to a regional general permit the purpose of which is for the making up, breaking down, or staging of barge tows.'' The barge fleeting activity would have to be authorized by the Corps under section 10 of the Rivers and Harbors Act of 1899, rather than being designated by the U.S. Coast Guard.

We have modified this NWP by removing the phrase ''the U.S. Coast Guard has established'' and adding the phrase ''have been established'' after the word ''areas.'' This modification will provide authorization under section 10 of the Rivers and Harbors Act of 1899 for barge fleeting activities that have not been covered because of the wording of NWP 9 that has been in place since 1982.

This NWP is reissued with the modification discussed above.

NWP 10. *Mooring buoys.* We did not propose any changes to this NWP. One commenter said that compensatory mitigation should be required for all NWP 10 activities. Several commenters requested that the Corps provide tribes with advance notice of proposed NWP 10 activities and consult on those activities. One commenter stated that the Corps should conduct a study of the entire shoreline of Puget Sound to assess the impact of NWP 10 activities. One commenter recommended prohibiting the use of NWP 10 in any waterbody where downgrades or closures of shellfish beds occur because of the number of vessels in the waterway. Several commenters suggested limiting the density of mooring buoys to one per acre. Several commenters recommended require PCNs for all NWP 10 activities.

Activities authorized by this NWP do not result in losses of aquatic resources and, as a general rule, do not require compensatory mitigation. Mooring buoys are located in open waters and float on those waters. The anchor used to secure the mooring buoy occupies little of the bottom of the waterbody. In addition, mooring buoys can help reduce the adverse effects the use of vessels can have on bottom habitat of navigable waters, by reducing the use of anchors that disturbs that bottom habitat each time an anchor is used. For example, mooring buoys can be a mitigation measure to reduce adverse effects to corals.

For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions that protect tribal trust resources. Corps districts may also establish coordination procedures with tribes to ensure that NWP 10 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. Regional concerns about the mooring buoys authorized by this NWP are more appropriately addressed by division and district engineers, who have the authority to modify, suspend, or revoke NWP authorizations on a regional or activity-specific basis. The Corps does not regulate the discharge of pollutants from boats, discharges of stormwater, or non-point source pollutants that cause restrictions or closures of shellfish beds.

We do not agree that there should be a national limit of one mooring buoy per acre. Mooring buoys are small structures that cause no more than minimal individual and cumulative environmental effects, but in areas where there is potential for these activities to result in more than minimal adverse environmental effects, division and district engineers will use their authorities to modify, suspend, or revoke NWP 10 authorizations as appropriate. Division engineers can modify this NWP to require PCNs in certain waterbodies.

This NWP is reissued without change.

NWP 11. *Temporary Recreational Structures.* We did not propose any changes to this NWP and did not receive any comments on this NWP. This NWP is reissued without change.

NWP 12. *Utility Line Activities.* In the June 1, 2016, proposed rule we proposed to make several changes to this NWP. We proposed to clarify that this NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States for crossings of those waters associated with the construction, maintenance, repair, and removal of utility lines. In addition, we proposed to modify the definition of ''utility line'' to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. We also proposed to add a paragraph to this NWP to authorize, to the extent that DA authorization is required, discharges of dredged or fill material into waters subject to section 404 of the Clean Water Act and structures and work in waters subject to section 10 of the Rivers and Harbors Act of 1899, necessary to remediate inadvertent returns of drilling fluids that can occur during horizontal directional drilling operations to install utility lines under jurisdictional waters and wetlands. Other proposed changes to NWP 12 are discussed in more detail in the preamble to the June 1, 2016, proposal (see 81 FR 35198–35199).

Several commenters expressed their support for the proposed modifications to NWP 12. Some of these commenters agreed with the clarification that, for utility lines authorized by NWP 12, the Corps is only authorizing regulated activities to cross waters of the United States, including navigable waters. Several commenters said that utility lines crossing multiple waterbodies should require individual permits, instead of authorizing each separate and distant crossing by NWP. In contrast, several commenters said they support the use of NWP 12 to authorize separate and distant crossings of waters of the United States. One commenter suggested clarifying that ''crossing'' only refers to regulated activities, and not to activities such as horizontal directional drilling and aerial crossing of jurisdictional waters. Several commenters said this NWP does not authorize activities that are similar in nature. A couple of these commenters asserted that this NWP does not authorize activities that are similar in nature because pipelines can carry a variety of types of fluids, some of which are harmful and some of which are benign. Other commenters made the ''not similar in nature'' objection, stating that pipelines that carry fluids such as oil are different than pipelines that carry water or sewage, which are different than utility lines that carry electricity.

We are retaining the long-standing practice articulated in the NWP regulations at 33 CFR 330.2(i), in which each separate and distant crossing of waters of the United States is authorized by NWP. The utility line activities authorized by NWP 12 are similar in nature because they involve linear pipes, cables, or wires to transport physical substances or electromagnetic energy from a point of origin to a terminal point. For the purposes of this NWP, the term ''crossing'' refers to regulated activities. However, it should be noted that installing utility lines under a navigable water of the United States subject to section 10 of the Rivers and Harbors Act of 1899 via horizontal directional drilling, as well as aerial crossings of those navigable waters, require authorization under section 10 of the Rivers and Harbors Act of 1899. The substations, tower foundations, roads, and temporary fills that are also authorized by NWP 12 (when those activities require Department of the Army (DA) authorization) are integral to the fulfilling the purpose of utility lines, and thus fall within the ''categories of activities that are similar in nature'' requirement for general permits stated in section 404(e) of the Clean Water Act.

Many commenters objected to the reissuance of NWP 12, stating that it authorizes oil and gas pipelines that should be subject to the individual permit process instead. Many commenters said that these activities should be subject to a public review process. Many of these commenters cited the risk of oil spills as a reason why oil pipelines should be evaluated under the Corps' individual permit process. Many commenters based their concerns on their views that the Corps is the only federal agency that regulates oil pipelines.

The Corps does not regulate oil and gas pipelines, or other types of pipelines, per se. For utility lines, including oil and gas pipelines, our legal authority is limited to regulating discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States, under section 404

of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899, respectively. We do not have the authority to regulate the operation of oil and gas pipelines, and we do not have the authority to address spills or leaks from oil and gas pipelines. General condition 14, proper maintenance, requires that NWP activities, including NWP 12 activities, be properly maintained to ensure public safety. The proper maintenance required by general condition 14 also ensures compliance with the other NWP general conditions, many of which are designed to protect the environment, as well as any regional conditions imposed by the division engineer and activity-specific conditions imposed by the district engineer. In addition, we do not have the legal authority to regulate the construction, maintenance, or repair of upland segments of pipelines or other types of utility lines. For example, for a recent oil pipeline (*e.g.,* the Flanagan South pipeline), the segments of the oil pipeline that were subject to the Corps' jurisdiction (*i.e.,* the crossings of waters of the United States, including navigable waters of the United States, that were authorized by the 2012 NWP 12) was only 2.3% of the total length of the pipeline; the remaining 97.7% of the oil pipeline was constructed in upland areas outside of the Corps' jurisdiction. Interstate natural gas pipelines are regulated by the Federal Energy Regulatory Commission. The Federal Energy Regulatory Commission also regulates some electric transmission projects.

There are other federal laws that address the operation of pipelines and spills and leaks of substances from pipelines. Those laws are administered by other federal agencies. Under the Natural Gas Pipeline Safety Act of 1968, the Department of Transportation (DOT) regulates pipeline transportation of natural gas and other gases. The DOT also regulates the transportation and storage of liquefied natural gas. Under the Hazardous Liquid Pipeline Safety Act, the DOT regulates pipeline transportation of hazardous liquids including crude oil, petroleum products, anhydrous ammonia, and carbon dioxide. The DOT administers its pipeline regulations through the Office of Pipeline Safety (OPS), which is in its Pipelines and Hazardous Materials Safety Administration (PHMSA). Specific to oil pipelines, the PHMSA is responsible for reviewing oil spill response plans for onshore oil pipelines.

Oil spills are also addressed through the Oil Pollution Act of 1990, which is administered by the U.S. Environmental Protection Agency and the U.S. Coast Guard. Under the Oil Pollution Act of 1990, EPA is responsible for addressing oil spills occurring in inland waters and the U.S. Coast Guard is responsible for addressing oil spills in coastal waters and deepwater ports. The U.S. EPA has issued regulations governing its oil spill prevention program, and requires oil spill prevention, control, and countermeasures, and facility response plans (see 40 CFR part 300 and 40 CFR part 112). Oil spill prevention, control, and countermeasures are intended to ensure that oil facilities prevent discharges of oil into navigable waters or adjoining shorelines. Their facility response plan regulations require certain facilities to submit response plans to address worst case oil discharges or threats of a discharge. The U.S. Coast Guard has the authority to ensure the effective cleanup of oil spills in coastal waters and require actions that prevent further discharges of oil from the source of the oil spill. Activities regulated under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act that are determined by the U.S. EPA or U.S. Coast Guard to be necessary to respond to discharges or releases of oil or hazardous substances may be authorized by NWP 20.

Many commenters based their objections to the reissuance of NWP 12 on the inability for public involvement to occur during the Corps' NWP verification process for specific pipelines. Many commenters said the Corps' authorization process should be modified to prevent the segmentation of pipelines and that the Corps should fully evaluate the environmental impacts of individual fossil fuel pipelines, including the burning of those fossil fuels. Many commenters cited climate change as a reason why oil and gas pipelines should be evaluated under the individual permit process instead of the Corps using NWP to authorize crossings of waters of the United States.

The purpose of the NWPs, as well as regional general permits, is to provide a streamlined authorization process for activities that result in no more than minimal individual and cumulative adverse environmental effects. When section 404(e) of the Clean Water Act became law in 1977, lawmakers endorsed the general permit concept that was developed by the Corps in its 1975 and 1977 regulations (see 40 FR 31335 and 42 FR 37140, 37145 respectively). For the issuance or reissuance of NWPs and other general permits, the public involvement process occurs during the development of the general permit. If public notices were required to authorize specific activities after the NWP or other general permit was issued, it would not provide the streamlined process intended by Congress. Individual pipelines may be able to operate independently to transport substances from a point of origin to a terminal point, even though they may be part of a larger network of pipelines. The Corps may authorize these independent pipelines, if all crossings of waters of the United States involving regulated activities qualify for NWP authorization.

The Corps does not have the legal authority to regulate the burning of fossil fuels that are transported by pipelines where the Corps authorized crossings of waters of the United States by NWP 12, other general permits, or individual permits. Therefore, in its environmental documentation the Corps is not required to fully evaluate the burning of fossil fuels, except to respond to specific comments submitted in response to a proposed rule (in the case of these NWPs) or comments submitted in response to a public notice for an individual permit application.

Activities authorized by NWP 12 are currently playing, and will continue to play, and important role in helping the nation achieve goals regarding the increased reliance on clean energy projects to meet the energy needs of its populace, to help reduce emissions of greenhouse gases that contribute to climate change. Clean energy projects include the construction, operation, and maintenance of more efficient and cleaner fossil-fuel energy generation facilities, nuclear power plants, and renewable energy generation projects that use solar and wind energy. Natural gas and electricity transmission and distribution systems will also need to be constructed or upgraded to bring clean energy to consumers.

The utility line activities authorized by NWP 12 will continue to be needed by society, including the goods and services transported by those utility lines. In areas of increasing temperatures, there will be increased demand for air conditioning and the energy needed to run air conditioners. Some areas of the country will receive less precipitation, and their water needs may need to be fulfilled through the construction and operation of utility lines that carry water to those areas that need additional water.

One commenter said that for any oil pipeline that affects aboriginal, historic treaty or reservation lands of an Indian tribe, the terms of NWP 12 should require consultation with all affected tribes and that any permit decision protect the full range of tribal rights

under federal law. Two commenters stated that all NWP 12 activities should require pre-construction notification to ensure that consultation occurs with tribes on any utility line that may affect protected tribal resources, tribal rights, or Indian lands. One of these commenters said that general condition 17 in effect delegates the Corps' tribal trust responsibility to project proponents, and that the vast majority of impacts to waters of the United States can occur without notification to the Corps.

Activities authorized by NWP 12 must comply with general condition 17, tribal rights, and general condition 20, historic properties. We have modified general condition 17 to more effectively address the Corps' responsibilities regarding tribal rights (including treaty rights), protected tribal resources, and tribal lands. For the 2017 NWPs, district engineers have been consulting with tribes to identify regional conditions that will facilitate compliance with general conditions 17 and 20. As a result of this consultation, district engineers can establish coordination procedures to identify utility line activities that require government-to-government consultation to protect tribal trust resources and tribal treaty rights. These consultations will be done in accordance with the Corps' tribal policy principles. Further information on the Corps' tribal policy principles is available at: *http://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/.* In fulfilling its trust responsibilities to tribes, the Corps follows the Department of Defense American Indian and Alaska Native Policy. The Corps' tribal trust responsibilities apply to the activities regulated by the Corps, and do not extend to associated activities that the Corps does not have the authority to regulate, such as activities in upland areas outside of the Corps' legal control and responsibility.

The consultation between Corps districts and tribes that has been conducted for these NWPs can result in additional procedures or regional conditions to protect tribal trust resources. District engineers will work to establish procedures with interested tribes to coordinate on specific NWP 12 activities to assist the Corps in executing its tribal trust responsibilities, or add mitigation requirements that the district engineer determines are necessary to ensure that the verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects. Division engineers will, as necessary, impose regional conditions on this NWP, including requiring more activities to require pre-construction notification, to ensure that these activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. When a Corps district receives a pre-construction notification that triggers a need to consult with one or more tribes, that consultation will be completed before the district engineer makes his or her decision on whether to issue the NWP verification. Regional conditions and coordination procedures can help ensure compliance with general condition 17. The Corps does not, and cannot, delegate its tribal trust responsibilities to permit applicants.

One commenter said that NWP 12 should prohibit construction in waters of the United States until all other federal and state permits are issued for pipelines. One commenter suggested adding language that allows temporary impacts for repair of a utility line parallel a bank, which is not a ''crossing.'' Several commenters stated that this NWP should not authorize activities in regions in Appalachia because it is not possible to mitigate impacts in those mountainous areas. Two commenters said this NWP should require the use of best management practices to control release of sediments during construction.

Paragraph 2 of Section E, ''Further Information,'' states that the NWPs do not remove the need to obtain other required federal, state, or local authorizations as required by law. The NWPs have a 45-day review period (with some exceptions), so district engineers cannot wait for all other federal, state, or local authorizations to be issued. Otherwise, the proposed NWP activity would be authorized after the 45-day period passed with no response from the Corps. The default NWP authorization would not have any activity-specific conditions, such as mitigation requirements, to ensure that the adverse environmental effects are no more than minimal. This NWP authorizes temporary fills to construct a utility line. Concerns about the use of this NWP in Appalachia are more appropriately addressed by the appropriate division engineer, who has the authority to modify, suspend, or revoke the NWP in a specific region. General condition 12 requires the use of soil and erosion controls to ensure that sediments associated with an NWP activity are not released downstream.

Several commenters suggested changing the acreage limit from ½-acre to 1 acre. Some commenters said the ½-acre limit is too high, and some commenters stated that the ½-acre limit is appropriate. A number of commenters recommended imposing an acreage limit that would place a cap on losses of waters of the United States for the entire utility line. A few commenters recommended reducing the ½-acre limit to ¼-acre. One commenter said the ½-acre limit should apply to the entire utility line, not to each separate and distant crossing. One commenter recommended establishing an acreage limit based on a county or state. Another commenter suggested applying the acreage limit to a waterbody. One commenter stated that this NWP should not authorize waivers of the ½-acre limit. Two commenters said that stream impacts should be limited to 300 linear feet, especially in headwater streams.

We are retaining the ½-acre limit for this NWP because we believe it is an appropriate limit for authorizing most utility line activities that have no more than minimal individual and cumulative adverse environmental effects. Division engineers can modify this NWP on a regional level to reduce the acreage limit if necessary to ensure that no more than minimal adverse environmental effects occur in that region. We do not agree that the acreage limit should apply to the entire utility line because the separate and distant crossings of waters of the United States are usually at separate waterbodies scattered along the length of the utility line, and are often in different watersheds especially for utility lines that run through multiple counties, states, or Corps districts. For utility lines that cross the same waterbody (*e.g.,* a river or stream) at separate and distant locations, the distance between those crossings will usually dissipate the direct and indirect adverse environmental effects so that the cumulative adverse environmental effects are no more than minimal. If the district engineer determines after reviewing the PCN that the cumulative adverse environmental effects are more than minimal, after considering a mitigation proposal provided by the project proponent, he or she will exercise discretionary authority and require an individual permit.

The ½-acre limit cannot be waived. We do not believe it is necessary to impose a 300 linear foot limit for the loss of stream bed because most utility line crossings are constructed perpendicular, or nearly perpendicular, to the stream. In addition, most utility line crossings consist of temporary impacts. This NWP requires PCNs for proposed utility lines constructed parallel to, or along, a stream bed, and the district engineer will evaluate the adverse environmental effects and

determine whether NWP authorization is appropriate.

Several commenters said this NWP does not authorize oil pipelines. One commenter said that the requirement that utility lines result in ''no change in pre-construction contours'' will not prevent changes in habitats or physical features in some streams, and utility lines may become exposed over time. One commenter objected to the requirement that there must be no change in pre-construction contours, because it is a new requirement and would require the permittee to complete a pre- and post- construction survey. One commenter said this NWP should not authorize mechanized landclearing in forested wetlands or scrub-shrub wetlands. Two commenters supported the addition of ''internet'' to the list of examples of utility lines. One commenter recommended removal of the reference to ''telegraph lines'' from the list of types of utility lines covered by this NWP.

This NWP authorizes crossings of waters of the United States that are part of utility lines used to transport any ''gaseous, liquid, liquescent, or slurry substance'' which includes oil. We acknowledge that the construction and maintenance of utility lines in jurisdictional waters and wetlands will result in some changes to the structure of waters and wetlands and to the ecological functions and services provided by those waters and wetlands. There is often conversion of wetland types within utility line rights-of-way and those conversions often need to be permanently maintained while the utility line is operational. Periodic maintenance may be necessary to respond to erosion exposing utility lines that were buried when they were constructed. The requirement to ensure that there are no changes in pre-construction contours of waters of the United States does not mandate pre- and post-construction surveys. Compliance with this requirement can usually be accomplished by examining the nearby landscape to determine if there has been a change in pre-construction contours. The NWP requires PCNs for mechanized landclearing in the utility line right-of-way so that district engineers can evaluate those proposed activities and determine whether they qualify for NWP authorization and whether compensatory mitigation is necessary to ensure no more than minimal adverse environmental effects in accordance with general condition 23, mitigation. We have retained the internet as a form of communication that may be transmitted by utility lines. We do not see the need to remove ''telegraph messages'' from the type of communications that may be conveyed by utility lines because there may be some use of telegraph messages by historic societies or other entities. Some of the existing utility lines that previously conveyed telegraph messages may now carry other forms of communication.

One commenter recommended modifying NWP 12 to authorize activities associated with wireless communication facilities, because these facilities could be considered substations. Two commenters said that NWP 12 should not authorize the construction or expansion of utility line substations because these facilities should not be located in waters of the United States. Several commenters said that utility line substations and access roads should not be limited to non-tidal waters of the United States to allow them to be constructed in all waters of the United States.

The substations authorized by this NWP must be associated with utility lines. With wireless telecommunication facilities, there are no utility lines connecting the various facilities because they transmit their information via electromagnetic waves traveling through the atmosphere. The construction of wireless communication facilities that involves discharges of dredged or fill material into waters of the United States may be authorized by NWP 39 or other NWPs. For some utility lines, it may not be practicable or feasible to locate a substation outside of waters of the United States. As long as the construction or expansion of the proposed utility line substation results in no more than minimal adverse environmental effects, it can be authorized by this NWP. We believe that it is necessary to limit the construction of utility line substations and access roads to non-tidal wetlands (except for non-tidal wetlands adjacent to tidal waters) to ensure that NWP 12 only authorizes activities that result in no more than minimal adverse environmental effects. Conducting those activities in tidal waters and wetlands, and in non-tidal wetlands adjacent to tidal waters is more likely to result in more than minimal adverse environmental effects.

One commenter expressed opposition to moving the provisions authorizing access roads to NWPs 14 and 33. One commenter said that this NWP should not authorize access roads, because those roads can cause fragmentation of the landscape.

We did not propose to move the provisions authorizing the construction of utility line access roads to NWPs 14 and 33. We have retained the access road provision in this NWP. The Corps only regulates those portions of access roads that require DA authorization because they involve regulated activities in jurisdictional waters and wetlands. The Corps does not regulate access roads constructed in upland areas that, in many areas of the country, are more likely to result in substantial habitat fragmentation. In those areas of the country where much of the landscape is comprised of wetlands, utility line access roads are more likely to exceed the ½-acre limit and thus require individual permits. District engineers will review PCNs with proposed access roads and determine whether the proposed activities will have more than minimal adverse environmental effects on wetland functions, including habitat connectivity.

In the June 1, 2016, proposed rule, we proposed to add a paragraph to NWP 12 to authorize, to the extent that DA authorization is required, discharges of dredged or fill material into waters of the United States, and structures and work in navigable waters, necessary to remediate inadvertent returns of drilling fluids that can occur during horizontal directional drilling operations to install utility lines below jurisdictional waters and wetlands. An inadvertent return occurs when drilling fluids are released through fractures in the bedrock and flow to the surface, and possibly into a river, stream, wetland, or other type of waterbody. For NWP 12 activities where there is the possibility of such inadvertent returns, district engineers may add conditions to the NWP 12 verification requiring activity-specific remediation plans to address these situations, should they occur during the installation or maintenance of the utility line.

The fluids used for directional drilling operations consist of a water-bentonite slurry and is not a material that can be considered ''fill material'' under 33 CFR 323.2(e). This water-bentonite mixture is not a toxic or hazardous substance, but it can adversely affect aquatic organisms if released into bodies of water. Because these drilling fluids are not fill material, inadvertent returns of these drilling fluids are not regulated under section 404 of the Clean Water Act. However, activities necessary to contain and clean up these drilling fluids may require DA authorization (*e.g.,* temporary fills in waters of the United States, or fills to repair a fracture in a stream bed).

Several commenters expressed support for adding the paragraph on remediation of inadvertent returns of drilling fluids from directional drilling

activities. A few commenters said that the term ''frac-out'' should not be used when referring to inadvertent returns of drilling fluids during horizontal directional drilling operations. A commenter recommended replacing the term ''sub-soil'' with ''subsurface.'' One commenter objected to the proposed addition, stating that these inadvertent returns of drilling fluids occur too frequently. One commenter asked for a definition of ''inadvertent return'' and said the NWP should explain that inadvertent returns of drilling fluids during horizontal directional drilling activities may require a Clean Water Act section 402 permit. One commenter requested clarification that activities which remediate inadvertent returns of drilling fluids minimize environmental impacts. One commenter agreed that inadvertent returns of drilling fluids that occur during horizontal directional drilling activities are not discharges of dredged or fill material into waters of the United States. One commenter said that for horizontal directional drilling activities, the NWP should require entry and exit 50 feet from the stream bank, and sufficient depths prevent inadvertent returns of drilling fluids. One commenter said that the NWP should require upland containment of drilling fluids. One commenter requested that this paragraph distinguish between horizontal directional drilling for the purposes of utility line installation or replacement, and directional drilling for oil and gas extraction.

Horizontal directional drilling for utility line installation and replacement is an important technique for avoiding and minimizing adverse effects to jurisdictional waters and wetlands during the construction of utility lines. We believe that modifying NWP 12 to authorize remediation activities that involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States and are necessary to address these inadvertent returns to protect the aquatic environment is a prudent course of action. We have removed the term ''frac-out'' from the text of this NWP, and replaced the term ''mud'' with ''fluid.'' We have also replaced the term ''sub-soil'' with ''subsurface'' because horizontal directional drilling activities usually occur well below the soil. District engineers may add conditions to NWP verifications to require activity-specific remediation plans to address potential inadvertent returns that might occur during the construction of the utility line.

If the horizontal directional drilling activities require DA authorization, the district engineer may add conditions to the NWP authorization to specify entry and exit points for the drilling equipment. If the drilling fluids return to the surface and are not considered to be discharges of dredged or fill material regulated under section 404 of the Clean Water Act, then the Corps cannot require those drilling fluids to be contained in an upland area. The text of this paragraph of NWP 12 specifically refers to horizontal directional drilling for utility line installation or replacement, but we have revised the text of this paragraph to specify that these activities are being ''conducted for the purpose of installing or replacing utility lines.''

Several commenters said that for utility lines involving horizontal directional drilling, the PCN should require drilling plans and site-specific spill detection and remediation measures. One commenter stated that mitigation should be required for the remediation of inadvertent returns of drilling fluids. Two commenters recommended adding a requirement that remediation of inadvertent returns of drilling fluids must be based on contingency plans submitted in advance of conducting horizontal directional drilling. One commenter said that PCNs should be required for these remediation activities and agency coordination should be conducted. Another commenter said that water quality certification agencies should be involved in the review and approval of these remediation plans.

If the horizontal directional drilling involves activities that require authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act, the PCN should describe those activities and their environmental effects. The PCN should also describe mitigation measures that will be used to ensure compliance with the terms and conditions of the NWP. We believe that remediating the inadvertent returns of drilling fluids and restoring, to the maximum extent practicable, the affected jurisdictional waters and wetlands is sufficient mitigation. District engineers can add conditions to the NWP authorization to require contingency plans for utility line activities that require DA authorization. We do not agree that it is necessary to require PCNs for inadvertent returns of drilling fluids or to conduct agency coordination. Through this provision of NWP 12, we are trying to encourage timely remediation of these inadvertent returns of drilling fluids to protect the aquatic environment. States can determine whether water quality certification is required for activities conducted to remediate inadvertent returns of drilling fluids. States can require water quality certification for any discharge into jurisdictional waters and wetlands, not just discharges of dredged or fill material.

Several commenters said they support the addition of temporary mats to minimize impacts of utility line activities. Two commenters requested clarification that not all uses of temporary mats in jurisdictional waters and wetlands results in a regulated activity. One commenter recommended adding language to this paragraph to include other measures that distribute the weight of construction equipment to minimize soil disturbance. Another commenter stated that this paragraph should require best management practices, such as low pressure equipment, wide tires, and varying travel paths, to minimize the adverse environmental effects of NWP 12 activities. One commenter suggested inserting the word ''promptly'' between the words ''be removed'' to require the prompt removal of all temporary fills.

District engineers will determine on a case-by-case basis whether the use of timber mats in jurisdictional waters and wetlands requires DA authorization. We believe that the proposed language in this paragraph allows for a variety of temporary structures, fills, and work necessary to construct, maintain, or repair a utility line, substation, foundation for overhead utility lines, or access road. We do not believe it is necessary to provide, for NWP 12 activities, a comprehensive list of techniques to minimize soil disturbance and minimize the impacts of construction equipment. We also do not agree with the proposed addition of ''promptly'' because it may be more protective of the environment to keep temporary fills in place until post-construction restoration activities or permanent fills have had time to stabilize.

One commenter stated that the PCN thresholds for NWP 12 should not be changed. One commenter said that PCNs should be required for all NWP 12 activities. Several commenters suggested increasing the 1/10-acre PCN threshold (item 5 in the ''Notification'' paragraph) to 1/2-acre. One commenter asked the Corps to remove the PCN requirement for the maintenance of aerial crossings of section 10 waters that do not include installation of new structures. One commenter opposed replacing the current PCN thresholds with a single 1/10-acre PCN threshold. One commenter requested clarification

of the PCN threshold for proposed NWP 12 activities that run parallel to a stream bed (item 4 in the ''Notification'' paragraph). One commenter said that PCNs should be required for utility line crossings of streams inhabited by species listed under the Endangered Species Act.

We have not made any changes to the PCN thresholds for this NWP. We do not agree that PCNs should be required for all activities authorized by this NWP because the current PCN thresholds have been effective in identifying proposed NWP 12 activities that should be reviewed by district engineers on a case-by-case basis to ensure that they result in only minimal individual and cumulative adverse environmental effects. In addition, paragraph (b)(4) of general condition 32 requires that NWP 12 PCNs (and PCNs for other NWPs) also include information on other crossings of waters of the United States for the linear project that will use NWP 12 authorizations but do not require PCNs. This requirement is also explained in Note 8 of NWP 12.

All NWP 12 activities that require authorization under section 10 of the Rivers and Harbors Act of 1899 require PCNs to ensure that these utility lines will have no more than minimal adverse effects on navigation. This includes the maintenance of aerial crossings of navigable waters. We agree that the current PCN thresholds should be maintained instead of simplifying the PCN thresholds to a single PCN threshold for the loss of greater than 1/10-acre of waters of the United States. Item 4 of the ''Notification'' paragraph requires pre-construction notification for utility lines placed in jurisdictional waters and wetlands if the proposed utility line runs parallel to, or along, a stream bed. These activities require PCNs to allow district engineers to evaluate potential impacts to the stream. General condition 18, endangered species, requires PCNs for all NWP activities to be conducted by non-federal permittees that might affect listed species or critical habitat (see paragraph (c) of general condition 18).

Several commenters expressed agreement with adding the proposed Note 2, and some of those commenters requested clarification of the use of the term ''independent utility'' in the proposed note. Several commenters objected to the proposed Note 2, stating that only the crossings of waters of the United States that do not qualify for NWP authorization should be evaluated through the individual permit process, allowing the remaining crossings to be authorized by NWP 12. Several commenters said that the second sentence of Note 2 should be removed. Several commenters requested clarification that the phrase ''independent utility'' in 33 CFR 330.6(d) does not affect the current practice for linear projects found in 33 CFR 330.2(i) and in the NWP definition of ''single and complete linear project'' in which separate and distant crossings of waters of the United States can qualify for separate NWP authorization. Several commenters asked for thresholds for determining when utility line crossings are ''separate and distant.''

Note 2 is based on the NWP regulations that were published in the **Federal Register** on November 22, 1991 (56 FR 59110), and represent long-standing practices in the NWP program. Those regulations include the definition of ''single and complete project'' at 33 CFR 330.2(i) and the provision on combining NWPs with individual permits at 33 CFR 330.6(d). We have removed the phrase ''with independent utility'' from the second sentence of Note 2. We believe that the second sentence, with this modification, needs to be retained to remind users of NWP 12 of the requirements in the regulations at 33 CFR 330.6(d). This will help ensure that the project proponent submits the appropriate request for authorization, specifically an individual permit application or NWP PCN.

If one or more crossings of waters of the United States for a proposed utility line do not qualify for authorization by NWP, then the utility line would require an individual permit because of 33 CFR 330.6(d). An exception would be if a regional general permit is available to authorize the crossing or crossings that do not qualify for NWP authorization. In these circumstances, the project proponent also has the option of relocating or redesigning the crossings of waters of the United States that does not qualify for NWP authorization so that all of the utility line crossings could qualify for NWP authorization.

There is no conflict between 33 CFR 330.6(d) and 33 CFR 330.2(i). In addition, these regulations do not conflict with the NWP definition of ''single and complete linear project'' in Section F of these NWPs. It should be noted that both 33 CFR 330.2(i) and the NWP definition of ''single and complete linear project'' do not discuss the concept of ''independent utility.'' We cannot establish national thresholds for determining when crossings of waters of the United States are ''separate and distant'' because a variety of factors should be considered by district engineers when making those decisions, such as topography, geology, hydrology, soils, and the characteristics of wetlands, streams, and other aquatic resources. Corps districts may establish local guidelines for identifying ''separate and distant'' crossings.

One commenter said that Note 2 uses the phrase ''utility lines with independent utility'' and observes that the definition of ''independent utility'' in the ''Definitions'' section of the NWPs states that independent utility is a test for ''a single and complete non-linear project.'' This commenter said that this inconsistent wording causes confusion. One commenter stated that the difference between ''stand-alone'' activities and ''segments'' is unclear. One commenter recommended removing the second sentence of Note 2. One commenter requested a definition of ''stand-alone linear project.''

As stated above, we have removed the phrase ''with independent utility'' from the second sentence of Note 2. District engineers will apply the concept of independent utility in 33 CFR 330.6(d) to determine when NWP authorizations can be combined with individual permit authorizations, or whether an individual permit is required for the regulated activities. Therefore, there is no need to further explain the concept of ''stand-alone'' activities or ''stand-alone linear project.'' Note 2 covers linear projects, not single and complete non-linear projects, so Note 2 should not be applied to non-linear projects. There are separate definitions of ''single and complete linear project'' and ''single and complete non-linear project'' in the Definitions section of these NWPs because these are different concepts for the NWP program.

Several commenters opposed Note 2, stating that it would allow utility line proponents to break up large utility lines into separate projects and prevent them from being evaluated under the individual permit process. One commenter requested clarification whether the permittee can identify to the district engineer the origin and terminal point for each utility line that has independent utility (*i.e.,* each stand-alone utility line).

The purpose of Note 2 is to prevent the situations the commenters opposing the proposed note are concerned about, to ensure that utility lines with one or more crossings that do not qualify for NWP authorization are evaluated under the individual permit process. To assist district engineers in applying 33 CFR 330.6(d), in an individual permit application or a PCN, the project proponent can identify the point of origin and terminal point of the utility line that could function independently of a larger overall utility line project.

The objective of Note 2 is to improve consistency in implementation of the NWP program, especially the application of 33 CFR 330.6(d). Project proponents usually design their utility lines to reduce their impacts to waters of the United States to qualify for NWP authorization. That avoidance and minimization is a benefit of the NWP program. In addition, most of the crossings of waters of the United States for utility lines result in temporary impacts to those jurisdictional waters and wetlands. The use of the term ''separate and distant'' in Note 2 is the same as its use in 33 CFR 330.2(i) and the definition of ''single and complete linear project'' in the ''Definitions'' section of the NWPs (Section F).

A few commenters asserted that proposed Note 2 does not comply with NEPA or the National Historic Preservation Act (NHPA) because the Corps should view an entire oil pipeline as a single and complete project. These commenters objected to the Corps' practice of authorizing each separate and distant crossing by NWP.

The Advisory Council on Historic Preservation's regulations for implementing NHPA section 106 define the term ''undertaking'' as: ''a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.'' (See 36 CFR 800.16(y).) It should be noted that the Advisory Council's definition of ''undertaking'' refers not only to projects, but also to activities. Their definition of ''undertaking'' recognizes that federal agencies may not regulate or permit entire projects, and that a federal agency might only have the authority to authorize an activity or a number of activities that is a component or are components of a larger overall project.

For oil pipelines and other utility lines, the activities that are subject to the Corps' regulatory authorities and require DA authorization are crossings of jurisdictional waters and wetlands, as well as utility line substations, foundations for overhead utility lines, and access roads, that involve discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Segments of an oil pipeline or other utility line in upland areas outside of the Corps' jurisdiction, or attendant features constructed in upland areas, do not require DA authorization and therefore are not, for the purposes of the Corps' compliance with section 106 of the NHPA, ''undertakings.'' The Corps does not have direct or indirect jurisdiction over pipeline segments in upland areas. The Corps does not regulate oil pipelines, or other utility lines per se; we only regulate those components of oil pipelines or other utility lines, that involve activities regulated under our authorities (*i.e.,* section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899).

The activities regulated by the Corps, as well as the Corps' analysis of direct and indirect effects caused by those regulated activities, are the same regardless of whether the Corps processes an individual permit application or uses NWPs or other general permits to authorize the regulated activities. Likewise, for the consideration of cumulative effects, the incremental contribution of regulated activities to cumulative effects is the same regardless of the type of DA authorization. That incremental contribution consists of the direct and indirect effects of the activities that require DA authorization.

One commenter supported the addition of Note 3. One commenter requested that this Note clarify that the term ''navigable waters of the United States'' refers to the waters defined at 33 CFR part 329. We have added a reference to 33 CFR part 329 to Note 3.

One commenter agreed with the proposed addition of Note 6. Several commenters said the word ''that'' should be added before the phrase ''do not qualify.'' One commenter stated that the phrase ''or another applicable 404(f) exemption'' should be added to Note 6 because a project proponent may use other Clean Water Act section 404(f) exemptions, such as the exemptions for ditch maintenance and the construction of temporary sedimentation basins. One commenter requested confirmation that the Clean Water Act section 404(f) exemptions that are applicable to currently serviceable structures used for transportation have not been changed. Another commenter requested examples of activities that do not qualify for the Clean Water Act section 404(f) exemptions, such as mechanized landclearing outside previously authorized right-of-ways.

We have added the word ''that'' after ''activities'' to correct the error in the proposed Note 6. Note 6 does not preclude project proponents from utilizing other Clean Water Act section 404(f) exemptions that are applicable to activities that may be related to utility lines. Note 6 refers to the maintenance exemption because NWP 12 explicitly refers to maintenance activities, which may require Clean Water Act section 404 authorization if the maintenance activity does not qualify for the section 404(f) maintenance exemption. Note 6 does not affect the application of the maintenance exemption to fill structures used for transportation. It is beyond the scope of Note 6 to discuss activities related to utility lines that do not qualify for any of the Clean Water Act section 404(f) exemptions.

One commenter pointed out that Note 8 was not discussed in the preamble of the June 1, 2016, proposed rule. One commenter asked the Corps to explain why it proposed to add Note 8. Another commenter requested clarification of whether Note 8 would affect utility lines that have stormwater outfalls.

The lack of discussion of Note 8 in the preamble to the proposed rule was an error. As stated on page 35197 of the proposed rule, we solicited comments on all of the NWPs, general conditions, definitions, and all NWP application procedures presented in the proposed rule. The purpose of Note 8 is to remind users of the NWPs that if a utility line includes crossings of waters of the United States that are authorized by NWP but do not require PCNs, and one or more crossings of waters of the United States requires pre-construction notification, then the PCN must include those non-PCN crossings, in accordance with the requirements of paragraph (b)(4) of general condition 32 . The requirements in Note 8 may apply to outfalls for utility lines and outfalls for stormwater management facilities, depending on the case-specific characteristics of the utility line, outfall, and stormwater management facility.

Several commenters said that Corps districts should be prohibited from suspending or revoking NWP 12 and using RGPs for utility lines that cross state or district boundaries. One commenter recommended that NWP 12 include prescriptive national standard best management practices (BMPs) and provide notifications to stakeholders when pipelines, cables, and utility lines are proposed to be constructed in marine transportation routes. These notifications would also be provided to the U.S. Coast Guard and the National Marine Fisheries Service. A few commenters said that the mitigation process for NWP 12 is not in compliance with the National Environmental Policy Act (NEPA) because the public is not provided with an opportunity to comment on requests for NWP verifications. A few commenters also stated that reliance on a district engineer's compensatory mitigation requirement for an NWP 12 verification is inadequate to support a

finding of no significant impact under an environmental assessment prepared to satisfy NEPA requirements.

For utility lines that cross Corps district boundaries, each Corps district may process the NWP 12 PCNs for crossings located in its district, or the Corps districts may designate a lead district to provide a single response to the NWP 12 PCNs. If a Corps district has had NWP 12 suspended or revoked by the division engineer to use a regional general permit or state programmatic general permit instead of NWP 12, it can use that regional or programmatic general permit to authorize utility line activities. We believe that it would be more appropriate to have district engineers determine which BMPs should be applied to the construction, maintenance, or repair of utility lines in their geographic areas of responsibility, as those BMPs may vary by region and utility sector. If the U.S. Coast Guard has a role in regulating utility lines in marine transportation routes, the U.S. Coast Guard can take its own actions under its authorities to ensure compliance with its requirements. We will continue to provide NWP verifications to the National Ocean Service for the charting of utility lines in navigable waters of the United States.

The decision document for this NWP includes an environmental assessment with a mitigated finding of no significant impact. Mitigation measures are discussed throughout the combined decision document, which includes the environmental assessment, public interest review, and 404(b)(1) Guidelines analysis. Other mitigation measures may be required by district engineers through conditions added to activity-specific NWP verifications. The mitigation measures discussed in the national decision documents include the NWP general conditions, which help ensure that NWP activities result in no more than minimal adverse environmental effects.

The draft decision document for NWP 12 was made available for public review and comment concurrent with the proposed rule that was published in the **Federal Register** on June 1, 2016. The decision document describes, in general terms, mitigation that helps ensure that NWP 12 activities result in no more than minimal adverse environmental effects. Mitigation requirements, including compensatory mitigation requirements, will be determined by district engineers for activity-specific NWP verifications. Compliance with NEPA is accomplished when the NWP is issued by Corps Headquarters, with its decision document. Individual NWP 12 verifications do not require NEPA documentation, nor do they require an opportunity for public comment. The public comment process occurs during the rulemaking procedures to issue or reissue an NWP. A public notice and comment process for NWP verifications would not be consistent with the Congressional intent of section 404(e) of the Clean Water Act, which envisions a streamlined authorization process for activities that result in no more than minimal individual and cumulative adverse environmental effects.

One commenter said that utility lines constructed parallel to the stream gradient should have the minimum number of crossings, and those crossings should intersect the stream as close to 90 degrees to the stream centerline as possible. That commenter also stated that trench plugs should be no more than 200 feet apart, and plugs must be used on either side of the stream crossing. One commenter recommended adding a permit condition to prevent utility lines from creating new drainage paths away from a waterbody.

Paragraph (a) of general condition 23, mitigation, requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site. For the purposes of NWP 12, this means that the project proponent should design the utility line to minimize the number of crossings of waters of the United States. The use of trench plugs will be determined on a case-by-case basis by district engineers when processing NWP 12 PCNs or voluntary requests for NWP verification. District engineers may also impose activity-specific conditions on NWP 12 authorizations to minimize draining of waters of the United States.

One commenter said that compensatory mitigation should be required for the permanent conversion of forested wetlands to scrub-shrub wetlands for utility line rights-of-way. Two commenters stated that this NWP should not authorize sidecasting of excavated material into waters of the United States because the sidecast material will be dispersed by currents or rainfall. One commenter requested clarification of a statement made in the preamble to the proposed rule that some excavation activities do not require Clean Water Act section 404 authorization. Two commenters said that if Corps districts consider separate and distant crossings of waters of the United States to qualify for separate NWP authorization, how are cumulative impacts considered in accordance with Section D, District Engineer's Decision?

District engineers have the discretion to require compensatory mitigation for the permanent conversion of forested wetlands to scrub-shrub wetlands, if that permanent conversion is conducted as a result of activities that require DA authorization (see paragraph (i) of general condition 23, mitigation). General condition 12, soil erosion and sediment controls, requires permittees to stabilize exposed soils and fills at the earliest practicable date, to minimize dispersion by currents, rainfall, or other erosive forces. Excavation activities require Clean Water Act section 404 authorization if they result in regulated discharges of dredged or fill material into waters of the United States (see the definitions at 33 CFR 323.2).

Paragraph 1 of Section D, District Engineer's Decision, requires district engineers to consider the cumulative effects of all crossings of waters of the United States for a single and complete linear project that is authorized by NWP, including those crossings that require DA authorization but do not otherwise require pre-construction notification. A complete PCN requires the project proponent to identify, in addition to the NWP 12 activities that require PCNs, the NWP 12 activities that do not require PCNs (see paragraph (b)(4) of general condition 32 and Note 8). The information regarding the cumulative effects of all of the utility line activities authorized by NWP 12 will be considered by the district engineer in his or her decision-making process for an NWP 12 verification.

A number of commenters asserted that the issuance of NWP 12 requires an environmental impact statement. A few commenters stated that the cumulative effects analysis for NWP 12 in the draft decision document was insufficient. A few commenters said that the cumulative effects analysis for NWP 12 in the draft decision document was properly done. One commenter indicated that the Corps improperly deferred the requirement to do a NEPA cumulative effects analysis to the district engineer's NWP verification decision. One commenter opined that the Corps defers its NEPA review for later stages in the permitting process and that NWP 12 provides no guarantee that the Corps district will conduct a NEPA analysis for the NWP verification. One commenter said that Corps districts should prepare supplemental environmental impact statements for NWP 12 verifications. One commenter stated that the decision document should discuss NWP 12 activities and their effects on climate change. Many commenters remarked that the Corps should not issue permits for pipelines

because the burning of fossil fuels contributes greenhouse gases that cause climate change.

For the issuance or reissuance of an NWP, including NWP 12, the Corps complies with NEPA when Corps Headquarters issues or reissues the NWP with its decision document. The decision document issued by Corps Headquarters includes an environmental assessment and a finding of no significant impact, which concludes the NEPA process. The finding of no significant impact is reached because of the terms and conditions of the NWP and the mitigation measures (*e.g.,* general conditions and other mitigation measures) for NWP 12 activities that are discussed throughout the decision document. Therefore, an environmental impact statement is not required for the issuance or reissuance of NWP 12. When a district engineer issues an NWP 12 verification, he or she is confirming that the proposed NWP 12 activity complies with the terms and conditions of the NWP, including any regional and activity-specific conditions, and will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer requires activity-specific mitigation measures, he or she will require those mitigation measures through conditions added to the NWP authorization.

To issue an NWP verification the district engineer does not need to prepare a NEPA document because the requirements for NEPA were fulfilled when Corps Headquarters issued the national decision document for the NWP. Since NEPA compliance is achieved by Corps Headquarters through the preparation of a combined decision document that includes an environmental assessment and finding of no significant impact, Corps districts do not need to prepare supplemental environmental impact statements for NWP verifications. If a proposed NWP activity will result in more than minimal individual and cumulative adverse environmental effects after considering the mitigation proposal submitted by the prospective permittee, the district engineer will assert discretionary authority and require an individual permit if the adverse environmental effects will be more than minimal. During the individual permit process, the district engineer will prepare the appropriate NEPA documentation.

The NEPA cumulative effects analysis in the NWP 12 decision document was prepared in accordance with the Council of Environmental Quality's definition of ''cumulative impact'' at 40 CFR 1508.7, and utilizes concepts presented in CEQ's 1997 and 2005 guidance on conducting cumulative impact analyses. The NEPA cumulative effects analysis examines cumulative effects on various resources of concern, including wetlands, rivers and streams, coastal areas, and endangered and threatened species. Our NEPA cumulative effects analysis examines past, present, and reasonably foreseeable future actions that affect those resources of concern, including federal, non-federal, and private actions. Because the decision document is national in scope it is a general cumulative effects analysis.

We also conducted a cumulative effects analysis in accordance with the 404(b)(1) Guidelines because this NWP authorizes discharges of dredged or fill material into waters of the United States. The Corps does not defer the NEPA cumulative effects analysis to the NWP verification stage of the authorization process. Corps Headquarters conducts the required NEPA analyses when it issues or reissues the NWP. The final national decision document includes a discussion of NWP 12 activities and climate change. Activities authorized by NWP will result in small incremental contributions to greenhouse gas emissions during construction periods, if the equipment used to construct the crossings of waters of the United States, utility line substations, footings for overhead utility lines, or access roads in waters of the United States consumes fossil fuels. The Corps does not have the authority to regulate the burning of fossil fuels that may be transported by utility lines. The Corps does not have the legal authority to regulate emissions of greenhouse gases during the operation and maintenance of the utility line activities, if those operations and maintenance activities do not involve activities that require DA authorization.

A number of commenters said the draft decision document for NWP 12 is inadequate, especially in its evaluation of the risks and impacts of oil spills, gas pipeline leaks, and inadvertent returns of drilling fluids from horizontal directional drilling activities. One commenter stated that with respect to the discussion of Subpart G (Evaluation and Testing) in the draft decision document, that voluntary compliance is rarely as effective as monitored compliance. Another commenter objected to the statement that ''this NWP will encourage applicants to design their projects within the scope of the NWP'' because the commenter believes that the NWP encourages massive cross-country pipeline projects. One commenter said the decision document must address impacts to forested wetlands caused by NWP 12 activities.

The decision document for NWP 12 treats oil spills and gas pipeline leaks as reasonably foreseeable future actions in the NEPA cumulative impact analysis section. The decision document also discusses the potential for inadvertent returns of drilling fluids to occur during horizontal directional drilling activities used to install or replace utility lines. As discussed above, the Corps does not regulate the operation of oil or gas pipelines, or leaks that might occur. In addition, the Corps does not regulate inadvertent returns of drilling fluids that might occur as a result of subsurface fractures during horizontal directional drilling activities. Oil spills and gas leaks are addressed by other federal agencies under other federal laws.

As discussed in the proposed rule, it is our position that inadvertent returns of drilling fluids from horizontal directional drilling are not discharges regulated under section 404 of the Clean Water Act, under the current definitions of ''discharge of dredged material'' and ''discharge of fill material'' at 33 CFR 323.2. We have added provisions to NWP 12 to authorize discharges of dredged or fill material into waters of the United States and/or structure or work in navigable waters of the United States to remediate inadvertent returns of drilling fluids if they occur, to minimize the adverse environmental effects of those inadvertent returns of drilling fluids.

For those NWP 12 activities that do not require PCNs, voluntary compliance is an appropriate means of compliance. District engineers will take appropriate action if they discover cases of non-compliance with the terms and conditions of NWP 12. For utility lines, this NWP only authorizes crossings of waters of the United States that involve activities regulated under the Corps' authorities. It does not authorize segments of utility lines constructed in uplands because those segments do not require DA authorization. It does not authorize the entire utility line unless the entire utility line is constructed in jurisdictional waters and wetlands and involves activities that require DA authorization. For the crossings of waters of the United States authorized by NWP 12, the terms and conditions of this NWP encourage the project proponent to minimize adverse effects to jurisdictional waters and wetlands to qualify for NWP authorization, instead

of having to apply for an individual permit.

For utility lines that cross state and/or Corps district boundaries, district engineers will consider the cumulative impacts of those NWP 12 activities when determining whether to issue NWP 12 verifications. The national decision document for NWP 12 discusses, in general terms, the impacts that NWP 12 activities have on wetlands of all types, including forested wetlands. For some utility lines, forested wetlands may be permanently converted to scrub-shrub or emergent wetlands to construct a right-of-way.

A few commenters said this NWP should not authorize utility lines in drinking water source areas. One commenter stated that this NWP should not authorize pipelines under rivers or near the ocean because those pipelines could leak and threaten water supplies. Many commenters said that the Corps should consider the environmental effects of the entire pipeline, including potential impacts to water supplies, to not just the specific activities authorized by NWP 12 or other DA permits.

General condition 7, water supply intakes, prohibits NWP activities in proximity of public water supply intakes except under specific circumstances. General condition 14, proper maintenance, requires NWP activities to be maintained to ensure public safety. For NWP 12 activities, this includes maintaining the utility line so that it does not leak. The Corps does not regulate the operation and maintenance of pipelines, if those activities do not include activities that require DA authorization. As discussed above, there are other federal agencies that have legal responsibility for addressing the operation of pipelines and responding to leaks or spills that may occur. Concerns regarding pipeline leaks or spills should be brought to the attention of those federal agencies.

One commenter expressed concern regarding the effects of dispersants on public health and the environment. One commenter said that in the draft decision document the projected amount of compensatory mitigation required for NWP 12 activities is far less than the projected authorized impacts, and that difference results in inadequate mitigation. One commenter said that the draft NWP 12 decision document fails to acknowledge that water quality standards will be violated in some cases.

The Corps does not have the legal authority to regulate the use of dispersants. Other federal or state agencies may have that responsibility. Many of the activities authorized by NWP 12 result in temporary impacts to jurisdictional waters and wetlands, and often district engineers do not require compensatory mitigation to offset those temporary impacts because those waters and wetlands continue to provide ecological functions and services. The estimated impacts in the draft decision document include both permanent and temporary impacts to jurisdictional waters and wetlands. For discharges into waters of the United States, general condition 25 requires certification that an NWP activity complies with applicable water quality standards unless a waiver of the Clean Water Act section 401 water quality certification requirement occurs. The district engineer has discretion to take action to ensure compliance with the water quality certification issued by the state, tribe, or U.S. EPA. The section 401 certifying authority also has the authority to enforce the terms and conditions of its water quality certification.

This NWP is reissued with the modifications discussed above.

NWP 13. *Bank Stabilization.* We proposed to modify the first paragraph of this NWP to clarify that it authorizes a wide variety of bank stabilization measures. In addition, we proposed to modify paragraph (c) to clarify that the quantity of the dredged or fill material discharged into waters of the United States must not exceed one cubic yard per running foot below the plane of the ordinary high water mark or the high tide line, as measured along the bank.

Many commenters supported the reissuance of this NWP, including many of the proposed changes. Many commenters objected to the reissuance of this NWP. Several commenters said that all bank stabilization activities should require individual permits. One commenter asserted that this NWP should not authorize new bank stabilization activities. One commenter stated that NWP 13 should not be used to create more land. One commenter opined that the use of NWP 13 is contrary to the public interest because the only positive value of a bulkhead is limited to the landowner, and bulkheads have adverse impacts that affect society as a whole. One commenter said that this NWP should not be reissued because it does not comply with the requirements of section 404 of the Clean Water Act.

We are reissuing this NWP, with some changes made in response to comments that are discussed below. Many bank stabilization activities have no more than minimal individual and cumulative adverse environmental effects and are appropriate for NWP authorization. The Corps' regulations recognize that landowners have the general right to protect their property from erosion (33 CFR 320.4(g)(2)). The terms and conditions of this NWP provide a means of implementing this provision of the Corps' regulations by authorizing bank stabilization activities that can be conducted with minimal amounts of dredged or fill material being discharged into waters of the United States.

We acknowledge that bank stabilization will have indirect adverse effects on streams, rivers, lakes, estuaries, and oceans. In coastal waters, bank stabilization structures change natural shoreline processes and alter habitats (Nordstrom 2014). Bank stabilization structures in coastal waters create barriers to animal movements between habitats, cause the loss of some habitat, reduce or eliminate intertidal habitats, and alter species richness and abundance (Nordstrom 2014). Gittman et al. (2016) concluded after conducting a meta-analysis of coastal shore protection measures that a 23 percent decline in biodiversity and a 45 percent decline in organism abundance occurred near bulkheads and seawalls. Stone revetments, sills, and breakwaters exhibited little or no difference in biodiversity and organism abundance compared to natural shorelines (Gittman et al. 2016). In rivers and streams, bank stabilization measures such as riprap affect riverine processes including sediment transport, hydrodynamics, water levels, sediment input, sediment characteristics of the river or stream bed, and wood input (Reid and Church 2015). Riprap to stabilize river and stream banks also alters habitat quality and vertebrate and invertebrate populations (Reid and Church 2015).

We believe that in most cases, the indirect adverse environmental effects caused by bank stabilization authorized by NWP 13 are no more than minimal. While bank stabilization may result in some losses of waters of the United States along the stream or river bank or along the shore, the waterbody itself is not lost and that waterbody continues to provide ecological functions and services. For those activities that require PCNs, district engineers will review those activities and their direct and indirect adverse environmental effects. If a proposed bank stabilization activity will result in more than minimal individual and cumulative adverse environmental effects after the district engineer considers the applicant's mitigation proposal, he or she will exercise discretionary authority and require an individual permit. This NWP authorizes new bank stabilization

activities and the modification, repair, or replacement of existing bank stabilization activities as long as those activities comply with the terms and conditions of the NWP.

Paragraph (a) of this NWP requires that the amount of material placed in jurisdictional waters and wetlands for the bank stabilization activity must be the minimum necessary for erosion protection. Therefore, this NWP does not authorize activities that create more land for property owner or the reclamation of previously lost lands. Bank stabilization activities authorized by this NWP, including bulkheads, revetments, and other erosion control approaches, are conducted not only for private property, but for public property as well. Therefore, it cannot be stated that NWP 13 activities only benefit private landowners; the NWP can also benefit larger communities especially at waterfront parks and other public spaces along shorelines that are eroding. In the national decision document, we have completed a 404(b)(1) Guidelines analysis and determined that the reissuance of this NWP complies with the Guidelines.

Many commenters stated that the construction of bulkheads, seawalls, revetments, and other shoreline hardening structures should not be authorized by this NWP, and they should require individual permits. One commenter said that gabion baskets, sills, and stream barbs should not be authorized by NWP 13. Two commenters suggested replacing the words ''such as'' with ''including, but not limited to'' to the list of examples of activities authorized by this NWP to clarify that the list is not an all-inclusive list. Several commenters expressed their support of including hybrid bank stabilization activities that combine vegetated slope protection and riprap protection.

In the June 1, 2016, proposed rule, we proposed to modify the text of this NWP to make it clear that NWP 13 authorizes a variety of bank stabilization activities, not just the construction and maintenance of bulkheads, seawalls, revetments, gabion baskets, and other shoreline hardening structures. The construction and maintenance of bulkheads, seawalls, revetments, gabion baskets, etc. has, especially in waterbodies in urban areas, no more than minimal adverse environmental effects. This NWP can be used to authorize vegetative stabilization and bioengineering to reduce erosion, as well as other bank stabilization techniques. Stream barbs can be effective at reducing bank erosion and can have fewer adverse effects to streams and their banks than armoring the stream bank. Sills have been authorized by NWP 13 in the past and help protect existing fringe marshes from erosion. The use of the phrase ''such as'' in the first paragraph of NWP 13 makes it clear that the list of bank stabilization activities is not an exhaustive list. Other types of bank stabilization activities can be authorized by NWP 13 as long as those activities comply with the terms and conditions of this NWP.

One commenter stated that NWP 13 should be modified to prohibit hard bank stabilization structures landward of, or directly adjacent to, tidal marshes, mangroves, or submerged aquatic vegetation. One commenter stated that this NWP should not authorize bank stabilization activities in coastal estuaries. One commenter suggested adding a provision to NWP 13 to encourage the use of living shorelines as bank stabilization and erosion prevention methods. Several commenters voiced their support that NWP 13 not specify a preference for one bank stabilization approach over another approach.

This NWP requires PCNs for any proposed activities that involve discharges of dredged or fill material into special aquatic sites, including wetlands and vegetated shallows. Constructing bank stabilization activities, including bulkheads and revetments, landward of tidal marshes, mangroves, or submerged aquatic vegetation is a means of complying with paragraph (a) of general condition 23, mitigation, by minimizing adverse effects to those special aquatic sites. If the bank stabilization activity is constructed landward of the high tide line and there are no jurisdictional wetlands or waters at the proposed site for the bank stabilization activity, then DA authorization is not required. Many areas of coastal estuaries are subject to strong wave energies and other erosive forces (*e.g.,* large vessel wakes) where the construction of seawalls, bulkheads, or revetments is the only effective and sustainable bank stabilization technique.

We are issuing a separate NWP to authorize discharges of dredged or fill material into waters of the United States and structure or work in navigable waters of the United States for the construction and maintenance of living shorelines. That new NWP gives coastal landowners another option to protect their property from erosion. We agree that the NWPs should not establish a preference for one approach to bank stabilization over other approaches. The science surrounding living shorelines is relatively new and their long-term effectiveness compared to other bank stabilization methods has not been well studied (Saleh and Weinstein 2016). Therefore, at this time it would be premature to establish a regulatory preference for living shorelines.

Landowners can seek advice from consultants regarding which bank stabilization approach will be suitable and sustainable under the conditions at a particular site. District engineers will evaluate NWP PCNs and voluntary requests for NWP verification to determine whether the proposed bank stabilization activity qualifies for NWP authorization. Corps district staff cannot design bank stabilization activities for landowners because it would create liability for the federal government. Some general advice can be offered to landowners, but it is up to the landowner to decide how he or she wants to protect his or her property from erosion. Corps district staff can only evaluate the applicant's proposal and determine whether it qualifies for NWP or regional general permit authorization or requires an individual permit.

Several commenters stated that NWP 13 should not be reissued because too much shoreline has been armored by bank stabilization activities. These commenters cited a study that determined that 14 percent of the coastal shorelines along the Atlantic and Pacific Oceans and the Gulf of Mexico have been altered by the construction of bulkheads, seawalls, jetties, and groins (Gittman et al. 2015). One commenter said stated that NWP 13 should not authorize hard bank stabilization structures on public beaches. Another commenter expressed the opinion that hardened bank stabilization projects should only be authorized in cases where public safety is at risk. One commenter said bank stabilization fills or structures that prevent the establishment of rooted vegetation should only be authorized in limited circumstances, specifically in areas with excessive and active shoreline erosion, areas with highly erodible soils, and shorelines exposed to frequent flux and wave action. This commenter also stated that hard bank stabilization structures should be limited to areas with critical public infrastructure where other bank stabilization approaches could not be done.

According to the National Oceanic and Atmospheric Administration's report entitled: ''National Coastal Population Report: Population Trends from 1970 to 2020,'' 39 percent of the population of the United States (123.3 million people) lives in coastal

shoreline counties. Approximately 52 percent of the nation's population lives in coastal watersheds (NOAA and U.S. Census Bureau 2013). That report defines ''coastal shoreline counties'' as counties that are ''directly adjacent to the open ocean, major estuaries, and the Great Lakes.'' These coastal shoreline counties experience most of the direct effects of coastal hazards, and therefore people living in these areas need bank stabilization activities to protect their property and infrastructure. As long as the entities responsible for land use planning and zoning (primarily local and state governments) continue to allow development in coastal areas, there will be a need for bank stabilization activities as people living in areas determine a need to take action to protect their property.

Although according to the study mentioned above (Gittman et al. 2015), an estimated 14 percent of coastal shoreline in the United States estimated has been altered by hard bank stabilization such as bulkheads, seawalls, jetties, and groins, it is important to consider how much of that hardened shoreline is located in coastal environments subject to higher energy erosive forces where bulkheads, seawalls, jetties, breakwaters, or revetments are necessary to control erosion and protect existing buildings and infrastructure. The percentage of shore estimated to be hardened by bank stabilization structures should also be considered in the overall context of the large number of people that live in coastal areas of the United States and the extensive proportion of land area in coastal zones that people have altered for their use. The 52 percent of the nation's population that lives in coastal watersheds has a large impact on the ecological condition of coastal waters because of the cumulative effects of human activities in those coastal zones. Those cumulative impacts to coastal ecosystems are caused by: Pollution from land, rivers, and oceans; overharvesting fishery resources; habitat loss; species introductions; nutrient inputs; activities that reduce sediment inputs necessary to maintain coastal ecosystems; land use changes that convert coastal habitats such as forests, wetlands to urban, industrial, and recreational developments; the construction and operation of ports and other facilities; transportation projects; dredging; aquaculture activities; and shore protection structures (MEA 2005a). In summary, there are many other categories of activities in coastal areas besides bank stabilization activities that adversely affect coastal waters and their associated ecosystems and eliminate or diminish the ecological functions and services those waters and ecosystems provide.

Humans have long had substantial impacts on ecosystems and the ecological functions and services they provide (Ellis et al. 2010). Over 75 percent of the ice-free land on Earth has been altered by human occupation and use (Ellis and Ramankutty 2008). Approximately 33 percent of the Earth's ice-free land consists of lands heavily used by people: Urban areas, villages, lands used to produce crops, and occupied rangelands (Ellis and Ramankutty 2008). Human population density is a good indicator of the relative effect that people have had on local ecosystems, with lower population densities causing smaller impacts to ecosystems and higher population densities having larger impacts on ecosystems (Ellis and Ramankutty 2008). According to NOAA and the U.S. Census Bureau (2013), in 2010 U.S. coastal shoreline counties had an average density of 446 people per square mile and U.S. coastal watershed counties had an average density of 319 people per square mile. Both of these densities are considered high population densities under the classification system used by Ellis and Ramankutty 2008). Human activities such as urbanization, agriculture, and forestry alter ecosystem structure and function by changing their interactions with other ecosystems, their biogeochemical cycles, and their species composition (Vitousek et al. 1997).

Given the relatively high percentage of the United States population that lives in coastal shoreline counties, and the fact that many coastal shoreline counties have been long been significantly altered by human activities, the estimated percentage of hardened shoreline should be considered in the context of the cumulative impacts that have occurred in coastal shoreline counties or coastal watersheds. As explained above, there is a wide variety of activities that contribute to cumulative effects to coastal waters (also see MEA 2005b). Bank stabilization activities are a small subset of human activities that adversely affect coastal waters and wetlands.

It is also important to consider that a large number of waterfront property owners will want to protect their property with bank stabilization structures, such as bulkheads, seawalls, and revetments. Some waterfront property owners have taken different approaches (*e.g.,* vegetative stabilization, bioengineering, living shorelines) to control erosion of their lands. Those landowners that perceive that erosion is not a problem will choose not to install any erosion control measures. Landowners will choose erosion control methods they believe will protect their property over a long term. They may have property fronted by tidal fringe wetlands that already protects their property. Gittman et al. (2015) estimated that only 1 percent of the United States coastline with tidal marsh has been armored by seawalls, bulkheads, revetments, or other hard structures, and those erosion control structures were often constructed landward of the tidal marsh. Gittman et al. (2015) does not indicate what proportion of those erosion control structures were constructed outside of the Corps' jurisdiction (*e.g.,* landward of the high tide line and jurisdictional wetlands) and which proportion were authorized by DA permits, including NWPs. Areas defined by Gittman et al. (2015) as ''sheltered shorelines'' (*i.e.,* shorelines located in bays, sounds, lagoons, or tidally influenced rivers) may not have site characteristics where living shorelines or vegetative stabilization might be appropriate and effective in controlling erosion. Some of these sheltered shorelines have larger fetches and be regularly exposed to higher energy waves and therefore require hard bank stabilization approaches to effectively protect coastal property and infrastructure. In general, living shorelines are limited to shores with gentle slopes and small fetches that are subject to low- to mid-energy waves.

The entity responsible for managing a public beach is responsible for proposing an appropriate bank stabilization activity and the Corps will evaluate the proposal if it requires DA authorization. Bank stabilization measures are being used by people that want to protect their property, and by federal, tribal, state, and local governments as well as private entities that want to protect their infrastructure and other facilities. Vegetative stabilization is only effective in certain coastal areas where erosive forces (*e.g.,* waves, currents, boat wakes) are low or moderate. The need to implement erosion control measures is a reaction to a perceived erosion problem that occurs after waterfront property has been developed. The responsibility for land use planning and zoning, including land use in coastal zones, generally falls on state and local governments.

We recognize that in coastal waters bulkheads, seawalls, and revetments have adverse effects on the structure, function, and dynamics of coastal ecosystems (*e.g.,* Nordstrom et al. 2014;

Gittman et al. 2016). We also recognize that other approaches to bank stabilization, such as living shorelines, also have some adverse effects on coastal ecosystems, such as habitat conversions (*e.g.,* Bilkovic et al. 2016; Sutton-Grier et al. 2015). As discussed above, bank stabilization activities are not the only activities in coastal areas that adversely affect the structure, function, and dynamics of coastal waters and wetlands. The cumulative effects of large number of people living in these coastal areas over the centuries has altered the structure, function, and dynamics of coastal ecosystems.

Three commenters said this NWP should be modified to increase its limits to encourage vegetative stabilization or bioengineering. Two commenters stated that they support the Corps' encouragement of bioengineering, but that there should be a limitation as to how much fill is authorized within a floodplain for bioengineered projects. Two commenters requested that NWP 13 clearly state that vegetative bank stabilization will not be required by the Corps at any particular site.

The NWP currently provides sufficient flexibility to landowners, public works agencies, and other entities to use a wide range of options to stabilize banks. The Corps does not regulate fills in floodplains unless there are discharges of dredged or fill material into waters of the United States. The Corps regulatory program does not regulate activities in floodplains per se; we only regulate activities in floodplains that require authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. Corps districts cannot mandate the use of a particular bank stabilization approach, such as vegetative stabilization, because district engineers can only provide advice on a landowner's proposed bank stabilization activity (see 33 CFR 320.4(g)(2)). The district engineer will evaluate the proposed activity, and if he or she determines the proposed activity will result in more than minimal adverse environmental effects, he or she will exercise discretionary authority and require an individual permit.

One commenter said that proposed paragraph (a) allows cumulative impacts to fish. Cumulative impacts to fish are caused not only by the placement of material into jurisdictional waters and wetlands to stabilize banks, but also by a wide variety of other activities that the Corps does not have the legal authority to regulate. Examples of other contributors to cumulative impacts to fish include: Point source discharges of pollutants authorized by Clean Water Act section 402 permits, non-point sources of pollution, habitat loss and alterations that do not involve activities regulated by the Corps under its authorities, overharvesting of fish, climate change, land use/land cover changes in the watershed draining to the waterbodies inhabited by those fish, and resource extraction activities, such as water withdrawals.

Two commenters stated that the 500 linear foot limit is too high, and two commenters said the 500 linear foot limit should be removed because it is arbitrary. Another commenter said that the 500 linear foot limit encourages bank armoring. One commenter stated that the linear foot limit for bank stabilization by hard armoring should be 300 linear feet. Three commenters expressed concern that there is no linear foot limit for non-bioengineered bank stabilization projects and they recommend a limit of 500 linear feet for those projects. Two commenters recommended increasing the linear foot limit to 1,000 feet. One commenter stated that 500 linear foot bank stabilization activities should only be authorized by NWP on large rivers. One commenter said that a 500-foot bulkhead cannot have more than minimal adverse environmental effects. Another commenter remarked that NWP 13 activities should be limited to 300 linear feet in non-tidal waters inhabited by state or federally listed threatened or endangered freshwater mussel species. One commenter suggested changing the linear foot limits for stream bank stabilization authorized by NWP 13 to 500 linear feet for hard armoring and 200 linear feet for scour protection.

The 500 linear foot limit was established to help ensure that NWP 13 activities result in no more than minimal individual and cumulative adverse environmental effects. Division engineers can modify this NWP through regional conditions to reduce the 500 linear foot limit if there are regional concerns regarding the potential for more than minimal adverse environmental effects to occur. The district engineer can waive the 500 linear foot limit on a case-by-case basis if he or she makes a written determination, after conducting agency coordination that the proposed activity will result in only minimal individual and cumulative adverse environmental effects. However, to address concerns about the adverse effects of bulkheads on coastal ecosystems, we have imposed a 1,000 linear foot limit on waivers for bulkheads. For proposed bulkheads that are 501 to 1,000 feet in length, district engineers can waive the 500 linear foot limit if they make written determinations after agency coordination that the proposed bulkheads will result in no more than minimal adverse environmental effects.

We are only applying the 1,000 linear foot cap to bulkheads because bulkheads have the potential, in some circumstances, to cause more severe adverse environmental effects than other bank stabilization techniques, such as bioengineering, vegetative stabilization, sills, rip rap, revetment, and stream barbs. Bulkheads constructed in estuaries cause losses of intertidal habitat through erosion caused by reflection of wave energy, changes in sediment transport, and inhibiting migration of the shoreline in response to sea level change (Dugan et al. 2011; Bilkovic and Mitchell 2013). In a recent meta-analysis, Gittman et al. (2016) found that species diversity and abundance near bulkheads are substantially lower compared to natural shorelines, and in general species diversity and abundance near shorelines protected by riprap or revetments do not differ from natural shorelines. Our decision to cap bulkheads at 1,000 linear feet is based on our experience and judgment to provide additional assurance that NWP 13 only authorizes those bank stabilization activities that have no more than minimal individual and cumulative adverse environmental effects. Project proponents that want to construct bulkheads longer than 1,000 linear feet along the shore can seek Department of the Army authorization by applying for an individual permit. Other bank stabilization techniques (*e.g.,* bioengineering, vegetative stabilization, riprap) are not subject to this 1,000 linear foot cap, but for those proposed activities that exceed 500 linear feet in length along the shore, to be authorized by NWP 13 the district engineer must issue a written waiver of the 500 linear foot limit. That waiver must be based on a written determination made by the district engineer that the proposed activity results in only minimal adverse environmental effects.

The flexibility provided in the waiver process precludes the need to consider higher linear foot limits for this NWP. The 500 linear foot limit does not drive the decision whether the proposed bank stabilization activity should be a bulkhead or other hard structure; that is the decision of the landowner, public works department, or other responsible entity. The selected bank stabilization approach is mostly dependent on site conditions, and the likely effectiveness of that approach in controlling erosion. Any NWP 13 activity proposed by a non-federal permittee that might affect

federally-listed endangered or threatened species or designated critical habitat, is in the vicinity of those listed species or critical habitat, or is located in critical habitat, requires a PCN (see paragraph (c) of general condition 18, endangered species). For proposed NWP 13 activities that the district engineer determines ''may affect'' listed species or critical habitat, he or she will conduct formal or informal ESA section 7 consultation. Impacts to state-listed species are more appropriately addressed by state laws and regulations. The 500 linear foot limit should be the same for hardened stream bank stabilization and scour protection because they are both bank stabilization approaches.

Two commenters supported the proposed modification of paragraph (c) of this NWP, and recommended adding ''or as needed for a stable maintainable side slope.'' Two commenters stated that NWP 13 should not authorize stabilization or fill placement below the ordinary high water mark or mean high water line. One commenter said that the one cubic yard per running foot limit is arbitrary and should be removed. Another commenter remarked that allowing discharges of one cubic yard per running foot for bulkheads below the ordinary high water mark or mean high water line frequently leads to scouring of the shore in front of the bulkhead. One commenter stated that this NWP should clarify that buried bank stabilization measures are not included in the quantity or length limits. One commenter suggested replacing the terms ''high tide line'' and ''ordinary high water mark'' in paragraph (c) with ''high astronomical tide,'' except for the Great Lakes where ''ordinary high water mark'' would continue to be used.

We believe that the proposed text of paragraph (c) is sufficient to ensure that these activities result in no more than minimal adverse environmental effects. We do not believe it is necessary to add a requirement to establish a ''stable maintainable side slope.'' If more than one cubic yard per running foot in waters of the United States is needed to make a suitable side slope, then the project proponent can request a waiver from the district engineer. Prohibiting discharges of dredged or fill material into waters of the United States below the ordinary high water mark or mean high water line would result in most bank stabilization activities requiring individual permits, even though they would have no more than minimal adverse environmental effects. If the bank stabilization activity is not properly integrated into the bottom of the waterbody, the bank stabilization activity is likely to collapse as erosion undercuts the bank stabilization measure.

The one cubic yard per running foot limit is intended to limit fills to ensure that NWP 13 activities result in only minimal adverse environmental effects. District engineers can issue written waivers of this one cubic yard per running foot limit, if they determine after conducting agency coordination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. In some situations, the placement of riprap at the bottom of the bulkhead is necessary to prevent scouring and undercutting of the bulkhead. Any discharges of dredged or fill material below the plane of the ordinary high water mark or high tide line are counted towards the one cubic yard per running foot limit, even if those fills are keyed into the bottom of the waterbody to reduce the potential for undercutting of the bank stabilization activity. The term ''high tide line'' is provided in the ''Definitions'' section of these NWPs (Section F), and is to be used for these NWPs, is identical to the definition at 33 CFR 328.3(d) that was published in the Corps' final rule issued on November 13, 1986 (51 FR 41251).

Two commenters said the placement of fill within special aquatic sites for bank stabilization should be prohibited. The placement of fill in special aquatic sites for the purposes of bank stabilization can have no more than minimal adverse environmental effects. A proposed discharge of dredged or fill material into a special aquatic site requires the submission of a PCN to the district engineer and a request for a waiver of that prohibition. The district engineer will coordinate the PCN with the other agencies, in accordance with paragraph (d) of general condition 32. To waive that prohibition, the district engineer must issue a written waiver with a finding of no more than minimal adverse environmental effects. A waiver might require mitigation to ensure that the authorized activity results in no more than minimal adverse environmental effects.

One commenter supported the proposed modification stating that NWP 13 authorizes the maintenance and repair of existing bank stabilization features. A few commenters said this paragraph should be changed to limit maintenance and repair activities to previously authorized bank stabilization activities. One commenter objected to proposed paragraph (h), stating that it requires maintenance of a bank stabilization project in perpetuity. This commenter said the NWP should specify a period of time for the bank stabilization activity to become established.

We have concluded that it is not necessary to limit this provision to the maintenance and repair of previously authorized bank stabilization activities. Such a requirement would discourage the maintenance and repair of bank stabilization activities that have deteriorated over time and may be allowing sediments and other materials to enter the waterbody, adversely affecting water quality. In addition, there may be older bank stabilization activities that did not require DA authorization at the time they were constructed but changing environmental conditions makes their maintenance and repair subject to DA permit requirements. Paragraph (h) does not require a landowner or other entity to maintain a bank stabilization activity in perpetuity. The landowner or other entity also has the option of removing that bank stabilization activity and restoring the affected area to the extent practical. We do not believe it would be appropriate or practical to establish a period of time for a bank stabilization activity to become established because bioengineering or vegetative stabilization activities generally require more time than bulkheads or revetments. There are also a variety of other factors that affect the functional lifespan of a bank stabilization activity.

One commenter suggested adding timber mats to the paragraph authorizing temporary structures and fills, to minimize construction impacts. One commenter suggested that the word ''promptly'' be inserted before ''removed'' in the fourth sentence of this paragraph so that the temporary structures or fills are quickly removed after the work is completed.

We have added temporary mats, including timber mats, to this paragraph, consistent with the corresponding paragraphs proposed in NWPs 3 and 12. We do not agree that the word ''promptly'' should be added to that sentence because it may be necessary and environmentally beneficial to allow temporary fills to remain in place while the permanent fills settle and stabilize.

One commenter suggested allowing the use of non-native plants for bioengineering or vegetative bank stabilization in situations when native species are not as well-suited for a given project. Another commenter recommended adding ''where practicable'' to this provision to allow for flexibility.

To make the requirement to use native plants more visible in the text of this NWP, we have moved it to a new paragraph (g). If native plants cannot be used for a bioengineering or vegetative bank stabilization activity, perhaps bioengineering or vegetative stabilization is not an appropriate option. There should be native plant species available for those activities. Contractors that rely on non-native plant species for their bioengineering or vegetative stabilization projects should seek sources of native plants that can serve those purposes.

Many commenters said that all NWP 13 activities should require PCNs. One commenter asserted that no NWP 13 activities should require PCNs. Some commenters stated that PCNs should be required for all NWP 13 activities involving bank or shoreline hardening. One commenter asserted that the terms and conditions of this NWP could not be enforced if PCNs are not required for all activities. Several commenters stated that the Corps could not track cumulative impacts unless PCNs are required for all activities. Some commenters remarked that the Corps could not ensure compliance with the Endangered Species Act or National Historic Preservation Act if PCNs are not required for all activities. Many commenters stated that if all proposed NWP B activities require PCNs, then all NWP 13 activities should require PCNs to provide more equivalency to those NWPs. Some of these commenters said that if not all NWP 13 activities require PCNs, then the NWP program would continue to have a bias towards bank stabilization activities that harden shorelines.

We do not believe that all NWP 13 activities, including all hard structures such as seawalls, bulkheads, revetments, and riprap, should require PCNs because they can often be constructed with only relatively small amounts of fill in jurisdictional waters. In shorelines or banks where there are strong erosive forces, hard bank stabilization structures are likely to be the only feasible options to protect property and infrastructure, and they will result in only minimal adverse environmental effects. The current PCN thresholds and the PCN requirements of certain general conditions (*e.g.,* general condition 18, endangered species, and general condition 20, historic properties) are sufficient to ensure that NWP 13 activities result in no more than minimal individual and cumulative adverse environmental effects. Division engineers may modify this NWP to impose regional conditions that require PCNs for more activities authorized by this NWP. In our automated information system, we track NWP 13 activities that require PCNs as well as those NWP 13 activities where project proponents request NWP verifications even though they are not required to submit PCNs. Those reported activities, as well as estimates of NWP 13 activities that occurred without the requirement to submit PCNs, are considered in the Corps' cumulative effects analyses presented in the national decision document.

General condition 18, endangered species, requires non-federal permittees to submit PCNs for any proposed NWP activity that might affect ESA-listed species or designated critical habitat, is in the vicinity of listed species or designated critical habitat, or is in designated critical habitat. A similar requirement applies to general condition 20, historic properties. General condition 20 requires non-federal permittees to submit PCNs for any proposed NWP activity that may have the potential to cause effects to historic properties. If a non-federal project proponent does not comply with general conditions 18 and 20 and does not submit the required PCNs under the circumstances identified in paragraph (c) of those general conditions, the activity is not authorized by NWP and is an unauthorized activity.

The PCN thresholds for NWPs 13 and the new NWP 54 (proposed NWP B) differ because the living shorelines authorized by NWP 54 typically involve greater amounts of fill into jurisdictional waters and wetlands, as well as fills and structures that typically extend a distance into subtidal or shallow waters. In other words, NWP 13 activities and NWP 54 activities, as a general rule, are not equivalent in terms of the amounts of fill that are typically discharged into jurisdictional waters and wetlands to conduct those activities, and the amount of encroachment into the waterbody. Nationwide permit 54 does not have a cubic yard limit on the amount of fill that can be discharged below the plane of the high tide line or ordinary high water mark. Bank stabilization activities authorized by NWP 13 often have small footprints in jurisdictional waters and wetlands and small encroachments into waterbodies because of the characteristics of the authorized activities. For example, seawalls and bulkheads that may be authorized by NWP 13 consist of vertical walls, perhaps with some backfilling behind the wall structure. Riprap, stone revetments, and gabions can be constructed close to the existing bank, with minor amounts of encroachment into the waterbody. Vegetative stabilization and bioengineering can also be constructed close to the existing bank with minimal encroachment into the waterbody. General condition 23, mitigation, requires the adverse effects of NWP activities to be avoided and minimized to the maximum extent practicable on the project site.

This NWP requires a PCN for any proposed activity that involves a discharge of dredged or fill material that exceeds an average of one cubic yard per running foot as measured along the length of the treated bank. The district engineer can waive this one cubic yard per running foot limit after conducting agency coordination under paragraph (d) of general condition 32 and making a written determination that the proposed activity will result in no more than minimal adverse environmental effects.

As discussed above, the activities authorized by new NWP 54 usually involve larger fills distributed over broader areas of waters to achieve the necessary marsh establishment area and/or molluscan reef structures to control erosion. If, instead of issuing a new NWP to authorize the construction and maintenance of living shorelines, we proposed to modify NWP 13 to authorize these activities, the vast majority of living shorelines would require PCNs and waivers of the one cubic yard per running foot limit. In addition, activities authorized by NWP 54 are more likely to encroach into state-owned lands in navigable waters that are held in trust for the benefit of the public. Because of those likely encroachments into navigable waters, NWP 54 construction activities will be reviewed on a case-by-case basis to ensure that those activities have no more than minimal adverse effects on navigation. Therefore, the activities typically authorized by NWPs 13 and 54 have some fundamental differences in fill quantities and encroachment into waters, and potential impacts to navigation and trust resources that warrant different PCN thresholds.

Many commenters said the 500 linear foot PCN threshold is too high, and the linear foot threshold should be reduced so that the Corps would be required to review more NWP 13 activities to make sure they result in no more than minimal adverse environmental effects. One commenter recommended requiring PCNs for any bank stabilization activity that requires mechanical equipment to be used in aquatic resources to construct that bank stabilization activity.

We believe the 500 linear foot PCN threshold, as well as the other PCN thresholds, is sufficient to require PCNs for any proposed NWP 13 activity that

might have the potential to result in more than minimal adverse environmental effects. Division engineers can modify this NWP on a regional basis to lower that PCN threshold by imposing regional conditions. By requiring more PCNs for NWP 13 activities, and thus more activity- and site-specific evaluations, division engineers can provide greater assurance that on a regional basis those activities will result in no more than minimal individual and cumulative adverse environmental effects.

In many circumstances, mechanical equipment used to construct or maintain bank stabilization activities authorized by NWP 13 can be operated from uplands or from barges or types of other work vessels to minimize their impacts on the aquatic environment. Division engineers can regionally condition this NWP to require PCNs for the use of mechanical equipment, if they have identified specific regional concerns regarding their use and its effect on aquatic resources. The current PCN thresholds, along with the additional PCNs required through regional conditions, are sufficient to ensure that NWP 13 activities result in no more than minimal individual and cumulative adverse environmental effects.

Several comments regarding the proposed PCN form were received, some of which addressed the proposed questions described in the June 1, 2016, proposed rule. One commenter suggested that questions relating to bank stabilization for the proposed PCN form should be addressed instead through general condition 32, pre-construction notification. Two commenters said that asking if there are qualified professionals in the area that construct living shorelines would discourage the use of living shorelines. One of these commenters suggested changing the question to directly ask whether a living shoreline can be used instead of a hardened bank stabilization activity. These two commenters also said that the term ''qualified'' needs to be defined and suggested that the question distinguish between the concepts of design and construction because one person might be qualified to construct a living shoreline but not to design it. One commenter said that it should not be necessary that the qualified consultant or engineer be a local person. One commenter stated that the Corps should provide information on methods for protecting and conserving shorelines, instead of asking the applicants through the PCN form.

The purpose of the information requirements in general condition 32 is to provide the district engineer with information on a specific proposed NWP activity, to help the district engineer determine whether the proposed activity qualifies for NWP authorization. The intent of the questions on the proposed PCN form is to gather information to inform future rulemaking efforts, not to evaluate specific NWP activities or potential alternatives. Comments on the proposed questions on the PCN form will be responded to in the documentation for the PCN form, if the form is approved. Alternatives analyses are not required for NWP PCNs. The suite of appropriate options for bank stabilization approach is highly site-specific. In addition, there are different approaches for living shorelines, so asking whether a living shoreline ''could'' be used will not provide much useful information. District engineers can only provide general information to landowners regarding bank stabilization options. District engineers cannot design a landowner's bank stabilization activity. They can only evaluate the landowner's proposal to determine whether it qualifies for general permit authorization or whether an individual permit is required.

Two commenters stated that PCNs for NWP 13 should discuss whether the project site is in an area designated as suitable for living shoreline approaches based on a regional or state-level living shoreline analysis. They said that the Corps should consider the state's determination and apply it to the NWP verification decision. Another commenter said that NWP 13 PCNs should include a statement whether the proposed activity is consistent with regional policy and standards. Several commenters said that NWP 13 PCNs should include a statement explaining why a living shoreline is not appropriate for the project site, if a living shoreline is not being proposed.

If regional or state living shoreline analyses have been done, and those analyses are available to the public, then landowners can use those analyses to help evaluate bank stabilization options to protect their property. Because we are not establishing a preference for a particular approach to bank stabilization or erosion control, we do not believe that PCNs should require information on regional or state living shoreline analyses. If the state regulates shore erosion control activities, the state's regulations or permit decisions will influence or dictate the shore erosion approach proposed by the landowner. If that shore erosion activity requires DA authorization, then the state's regulations or permit decision will influence the landowner's permit application or PCN (if a PCN is required for an NWP activity). Living shorelines are feasible and effective in limited circumstances in coastal waters, so we do not agree that a statement regarding the appropriateness of living shorelines should be required as a standard statement in NWP 13 PCNs.

One commenter stated that, for proposed maintenance activities, the NWP 13 PCN should include evidence that the bank stabilization structure had been previously authorized. Several commenters said that project proponents submitting NWP 13 PCNs should clearly demonstrate that there are erosion risks, to justify the proposed bank stabilization activities. One commenter requested that NWP 13 PCNs include detailed information on the shoreline type and the status of adjacent properties, the water quality status of adjacent waters, a description of site conditions that demonstrate that it is necessary to do a bank stabilization activity rather than taking no action or constructing a living shoreline, and a written justification for proposing a hardened bank stabilization activity. Two commenters recommended using a public database for the collection of NWP 13 PCN information.

We do not believe it is necessary to demonstrate that the bank stabilization activity was previously authorized. It may have been authorized by a non-reporting NWP or other general permit and there might not be a written verification that shows what was previously authorized. It is also possible it did not require DA authorization at the time it was constructed. Erosion is a natural process. Therefore, wherever land and flowing water interact with each other, there will be erosion. Requiring permit applicants to demonstrate that erosion is occurring would not add value to the PCN process. In general, a landowner is not going to expend the time and expense to submit a PCN or hire a consultant or contractor to prepare a PCN and construct the bank stabilization activity if there is not an erosion problem at his or her property. Most landowners will only incur the expenses to construct bank stabilization activities if they believe that there is an erosion problem that needs to be addressed.

Landowners or their consultants, when preparing PCNs for NWP 13 activities, may include information beyond the requirements of paragraph (b) of general condition 32, to assist the district engineer in his or her decision-making process. Such information can include the shoreline type and the types of bank stabilization (if any) already

present at adjacent properties. The applicant may also describe site conditions to support his or her desired approach to bank stabilization (*e.g.,* revetment, vegetative stabilization). The applicant does not need to demonstrate that a living shoreline is not practical or feasible at the site of the proposed NWP 13 activity, or provide a written justification for a hard bank stabilization approach. All NWP 13 verifications are tracked in our automated information system (ORM2), but that information is not publicly available on a Web site. As discussed above, we will develop quarterly reports that show overall summary statistics pertaining to the use of each NWP, aggregated per Corps District, and display it on our Web site. Some statistics that may be reported regarding the NWPs may include number of verifications provided per quarter, acres of waters of the United States permanently lost, as well as including summary information on the use of waivers during the previous quarter. All data provided will be aggregated by NWP and all information on waivers will pertain only to those NWPs that include a waiver provision.

Several commenters stated that no waivers should be granted for NWP 13 activities. A number of commenters supported the waiver provisions for NWP 13. One commenter said that the use of waivers violates the Clean Water Act, and another commenter asserted that waivers allow more than minimal impacts to occur. One commenter stated that waivers should not be issued for bulkheads, revetments, and other bank hardening projects. A few commenters said there should be no caps on waivers.

We are retaining the proposed waiver provisions for NWP 13. Waivers are an important tool for providing flexibility in the NWP program, and for authorizing activities that have only minimal adverse environmental effects. Waivers also allow the Corps to focus its limited resources on proposed activities that require DA authorization and have substantial impacts on the aquatic environment. The use of waivers in the NWP program is not contrary to the Clean Water Act because all waivers require a written determination by the district engineer that the authorized NWP activity will have no more than minimal individual and cumulative adverse environmental effects, consistent with the requirements of section 404(e) of the Clean Water Act. No waiver of an NWP limit can occur without a written determination by the district engineer, and the issuance of an NWP verification letter by that district engineer. Waivers can be issued for bulkheads, revetments, and other hard bank stabilization activities that the district engineer determines will result in only minimal adverse environmental effects. All requests for waivers under NWP 13 will be coordinated with the appropriate resource agencies, in accordance with paragraph (d) of general condition 32, to assist with the district engineer's evaluation. We agree that there does not need to be caps on waivers because all waivers must be granted in writing by district engineers, after making a finding of ''no more than minimal adverse environmental effects.''

One commenter stated that no waivers should be granted to exceed the 500-foot limit. Another commenter said that waivers should not be granted for discharges of dredged or fill material into special aquatic sites. One commenter stated that there should be no limit to waivers because most bank stabilization projects are beneficial to streams. One commenter recommended allowing waivers for fills in perennial streams. One commenter said that if an NWP 13 activity exceeds a limit, the applicant should be required to develop a restoration plan to address the causes of the erosion problem. A commenter stated that mitigation should be required for all waivers of the linear foot limit.

All requests for waivers of the 500 linear foot limit or the prohibition against discharges of dredged or fill material into special aquatic sites require site-specific evaluations by district engineers as well as agency coordination. The district engineer will evaluate the information in the PCN and comments received from the resource agencies before making his or her decision whether to grant the waiver. The waiver requires a written determination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. We agree that waivers may be appropriate to manage erosion in streams where streams may be impaired by excessive erosion, and the bank stabilization activity will result in no more than minimal adverse environmental effects. For NWP 13, waivers can be issued for bank stabilization activities in perennial streams. We do not agree that restoration (or any other form of compensatory mitigation) should be required for all NWP 13 activities requiring waivers. The district engineer will determine when compensatory mitigation should be required for a specific NWP activity, in accordance with 33 CFR 330.1(e)(3), to ensure that the authorized impacts are no more than minimal.

Several commenters suggested adding a provision to NWP 13 that requires a determination that the proposed bank stabilization activity is the least environmentally damaging practicable alternative because a living shoreline is not practicable because of site conditions such as excessive erosion, high energy conditions, excessive water depths, or navigation concerns. Many commenters expressed their position that NWP 13 must not be reissued because it violates the Clean Water Act. They said that proposed NWP B should be used in place of NWP 13. They assert that activities authorized by NWP 13 result in more than minimal individual and cumulative adverse environmental effects because hardened shorelines provide less habitat than natural shorelines. Two commenters stated that applicants requesting NWP 13 authorization for bulkheads need to demonstrate that a living shoreline is not feasible. One commenter suggested modifying NWP 13 to authorize living shorelines instead of proposed NWP B.

Activities authorized by NWP do not require a 404(b)(1) Guidelines alternatives analysis, including the identification of the least environmentally damaging practicable alternative (see 40 CFR 230.7(b)(1)). As discussed in its decision document, especially the 404(b)(1) Guidelines analysis, the reissuance of NWP 13 fully complies with the Clean Water Act. A decrease in the amount or quality of habitat along a shoreline does not necessarily mean that the adverse environmental effects are more than minimal, individual or cumulatively. Discharges of dredged or fill material into waters of the United States, and structures or work in navigable waters of the United States, for activities authorized by NWP 13 and NWP 54 will have no more than minimal adverse environmental effects as long as the project proponent complies with all applicable terms and conditions of these NWPs, including the PCN requirements. All forms of bank stabilization, including living shorelines, have some adverse environmental effects because they directly and indirectly alter nearshore aquatic habitats, including animal and plant communities. As long as those adverse environmental effects are no more than minimal, they can be authorized by NWP. We do not agree that NWP 13 should include a requirement for the permittee to demonstrate that living shorelines are not feasible. Living shorelines are limited to coastal waters, including the Great Lakes, while NWP 13 activities can be conducted in a wide range of

waters, from small streams to ocean waters. We believe that a separate NWP should be issued to authorize living shorelines, because of the limited circumstances in which living shorelines are an effective means of erosion control and the limited waters in which they can be used (*i.e.,* shorelines in coastal waters with gentle slopes, low fetch, and low- to mid-energy waves).

One commenter stated that living shorelines are a practicable alternative to shoreline armoring because they are less expensive to construct and maintain. A number of commenters expressed the view that NWP 13 should establish a hierarchy for evaluating erosion control options to authorize the alternative that would result in the least environmentally damaging practicable alternative. Many commenters said that landowners should be allowed to select the bank stabilization technique used to protect their property from erosion, and that the final NWPs should not establish a preference for living shorelines over the bank stabilization techniques authorized by NWP 13. These commenters emphasized that landowners should be allowed to propose their preferred bank stabilization technique from a suite of available techniques.

We agree that, in certain circumstances, living shorelines are a feasible alternative to bulkheads, seawalls, and revetments. We also agree that landowners should be able to propose their preferred approach to bank stabilization, which may be based on guidance provided by any contractors or consultants they hire. Corps districts will evaluate the PCNs for proposed bank stabilization activities and determine whether they qualify for NWP authorization. We believe that it is not appropriate to establish a preference hierarchy for bank stabilization techniques because the appropriate bank stabilization approach for a particular site is highly dependent on site characteristics and the types of aquatic resources (*e.g.,* streams, rivers, lakes, estuaries, oceans) in which the bank stabilization techniques will occur. In addition, there are regional differences among bank stabilization practices that cannot be addressed through a national rule such as the NWPs.

One commenter said that the requirements of general condition 3, spawning areas, when applied to NWP 13 activities would place an increased burden on road stabilization activities near tidal waters and may make those activities economically infeasible. Two commenters stated that bank armoring activities should require mitigation. One commenter said that undeveloped ocean shorelines should not be altered except when bank stabilization is justified to prevent or reduce threats to adjacent developed areas.

General condition 3 requires that NWP activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. The qualifier ''to the maximum extent practicable'' gives some flexibility to NWP 13 activities for roads near tidal waters that may need to be stabilized quickly to prevent them from eroding away. While there may be circumstances in which bank armoring activities warrant mitigation to ensure that the adverse environmental effects are no more than minimal, such decisions are made by the district engineer after evaluating a PCN. We do not agree that mitigation should be required for all bank armoring activities authorized by NWP 13. If a parcel of land with an ocean shoreline is undeveloped, but one or both adjacent properties are developed (and may be protected by bank stabilization structures), the owner of the undeveloped parcel should be allowed to protect that bank if the bank will erode and the erosion is likely to encroach into the adjacent properties.

One commenter objected to the statement in the preamble to the proposed rule that said there are different PCN thresholds for NWPs 13 and 54 because living shorelines require substantial amounts of fill material. This commenter's objection was based on the assertion that living shorelines control erosion by planting vegetation or using a combination of vegetation and technical structures, not by the introduction of fill material.

For most living shorelines, it is necessary to discharge fill along the shoreline to achieve the proper grade for dissipating wave energy and protecting the bank from erosion and undercutting. These fills are planted with vegetation to hold the fill in place, and the plant stems also help dissipate wave energy. Sills, breakwaters, and other structures may also be necessary to reduce the energy of water reaching the shore to reduce erosion and protect fringe wetlands. If we had proposed to modify NWP 13 to authorize the construction and maintenance of living shorelines instead of proposing a new NWP, a large majority of proposed living shorelines would require PCNs. This is because they would exceed the cubic yard limit in paragraph (c) and require a written waiver from the district engineer because of the amount of fill required to provide the proper grade for wave energy dissipation and vegetation plantings, and stone sills or breakwaters or other fill structures. Under NWP 54, waivers are not required unless the proposed living shoreline impacts exceed the waivable limits in that NWP. One of the waivable limits in NWP 54 is for structures and fills encroaching into waters up to 30 feet from the mean low water line is not included in NWP 13 because of the differences between living shorelines and the forms of bank stabilization authorized by NWP 13.

The construction of living shorelines does have some adverse effects on the waters and special aquatic sites affected by these projects, including the organisms that inhabit those areas. Living shorelines do not produce the same degree of ecological functions and services as natural shorelines (Pilkey et al. 2012). With living shorelines, there are trade-offs in ecological functions and services as fills convert subtidal waters to intertidal waters. Under the 404(b)(1) Guidelines, discharges of dredged or fill material into waters of the United States are to be avoided and minimized to the maximum extent practicable (see also paragraph (a) of general condition 23, mitigation).

One commenter stated that this NWP should have conditions requiring final bank elevations to be no higher than the bank that existed prior to the bank stabilization activity. This commenter said that a floodway analysis should be conducted to demonstrate that there would be no increase in flood elevation as a result of the bank stabilization activity. Two commenters recommended adding provisions to this NWP that require the use of best management practices to minimize downstream impacts, such as instream sediment booms and oil booms. One commenter stated that there should be restrictions imposed on bank stabilization activities to protect forage fish spawning areas and critical habitat, channel migration zones, and habitat for ESA-listed species.

District engineers, when evaluating PCNs, can impose activity-specific conditions regarding final bank elevations to be established at the site after the NWP 13 activity is completed. The requirement to conduct a floodway analysis is more appropriately addressed through state and local floodplain management authorities. Activities authorized by NWP 13 and other NWPs must comply with general condition 10, fills within 100-year floodplains. The use of best management practices to minimize downstream impacts is more appropriately addressed by district engineers through activity-specific

conditions imposed on NWP authorizations, taking into account the site-specific characteristics of the proposed activity. General condition 3 requires measures to minimize adverse effects to fish spawning areas during spawning seasons. General condition 18, endangered species, establishes procedures for complying with the requirements of section 7 of the Endangered Species Act (ESA). District engineers will conduct ESA section 7 consultations for any proposed NWP 13 activities that they determine, after reviewing PCNs, may affect listed species or designated critical habitat.

Several commenters objected to the following sentence, which appeared in the preamble to the proposed rule (81 FR 35200): ''Many landowners prefer bulkheads and revetments because well-constructed bulkheads last approximately 20 years and revetments can last up to 50 years (NRC 2007).'' These commenters said this statement was not a conclusion of the committee that wrote the 2007 NRC report entitled ''Mitigating Shore Erosion along Sheltered Coasts.'' These commenters asserted that the 2007 NRC report concluded that prior regulatory practices and local marine contractors are the main reason why landowners choose bulkheads and revetments. They said that in many cases landowners are not informed that there are other alternatives to erosion control. These commenters also expressed the opinion that the decisions of landowners are not driven by the lifespans of bulkheads and revetments. They said that it is a lack of understanding of alternative approaches to shore protection and institutional bias that causes the continued use of seawalls, bulkheads, and revetments.

The sentence on page 35,200 of the proposed rule should have been written as follows, to avoid misrepresenting the 2007 NRC report: ''Well-constructed bulkheads last approximately 20 years and revetments can last up to 50 years (NRC 2007). Many landowners may prefer bulkheads and revetments because of the longevity of those structural measures to control erosion and protect their properties.''

The section of the 2007 NRC report (pages 73–76) that discusses landowner options for addressing bank erosion presents a number of hypothetical scenarios to illustrate those options. If the life expectancies of bulkheads or stone revetments are irrelevant to the landowner's decision-making process, why were those life expectancies discussed in the bulkhead or stone revetment options? That section of the 2007 NRC report provides no information on how long marsh plantings or marsh plantings combined with stone sills will effectively control erosion, other than to say that a planted marsh fringe will require on-going maintenance and some maintenance will likely be required for the stone sill and marsh plantings after they are exposed to storm events. The landowner is a critical part of the decision-making process, because his or her property is at risk. Some landowners prefer bulkheads and revetments because they make them feel more secure (Popkin 2015). It should be noted that in response to the proposal to issue a new NWP to authorize the construction and maintenance of living shorelines, we received many comments opposing the issuance of the new NWP 54. Many of those commenters expressed concern that they would be required to use living shorelines, instead of being able to use other approaches to erosion control.

In many coastal areas, hard bank stabilization measures are the only effective option in coastal environments where high energy erosive forces are present. A landowner may prefer a bank stabilization approach that he or she views as being more durable and requires less maintenance. Current regulatory frameworks and contractor preferences are only part of the decision-making process. The landowner makes the final decision unless the regulatory agency (federal, state, or local) decides to deny the landowner's permit application. Since the options (#2a and #2b) in that section of the 2007 NRC report include two living shoreline options, the report's discussion of the various options could be interpreted as including consideration of the expected longevities of those shore erosion control options, as well as their maintenance requirements. Living shorelines are relatively new, and there is much to be learned about their effectiveness over the long term, and in different areas of the country. As discussed above, many commenters stated that landowners and other entities should be allowed to choose how they protect their waterfront properties and their infrastructure. Those comments indicate that landowners are informed about various erosion control approaches and are not passively deferring to the contractors and consultants they hire to provide advice, design, and planning services, and to construct the authorized activities.

One commenter said that due to the increasing risks and costs of protecting ocean shorelines, applicants should be required to share substantially in the costs and responsibilities of implementing shoreline stabilization projects authorized by NWP 13. One commenter stated that the Corps needs to provide advance and meaningful notice to tribes to avoid unresolved impacts to tribal treaty natural resources and cultural resources. A couple of commenters asked how the Corps will enforce the terms and conditions of NWP 13 for bank stabilization activities. One commenter stated that the proposed changes to NWP 13 will cause an unfair burden to local agencies when they try to determine whether bank stabilization projects are authorized and whether pre-construction notification is required.

Landowners pay for the bank stabilization activities authorized by NWP 13 that they construct to protect their property. For the 2017 NWPs, the Corps districts consulted with interested tribes to identify regional conditions to protect tribal resources, including natural and cultural resources retained by, or reserved by or for, tribes through treaties. District engineers can also establish coordination procedures with interested tribes to coordinate proposed NWP 13 activities to help ensure that these activities do not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. Corps districts will enforce NWP 13 activities in the same manner as they enforce all individual permits and general permit authorizations, which is through the procedures described in the Corps' regulations at 33 CFR part 326 and relevant guidance and policy documents. Local agencies that are unsure whether their proposed bank stabilization activities qualify for NWP 13 authorization are encouraged to contact the appropriate Corps district to seek their advice on whether the proposed activity might qualify for NWP 13 or a different general permit or whether an individual permit would be needed.

One commenter requested that the Corps evaluate regional impacts to local governments caused by division engineers adding regional conditions to this NWP and lengthening the time it takes to receive NWP verifications. Two commenters stated that NWP 13 activities should require a professional engineer's certification that the proposed bank stabilization activity will not exacerbate any upstream or downstream flooding problems.

Division engineers impose regional conditions on the NWPs to ensure that those NWPs comply with section 404(e) of the Clean Water Act and that authorized activities result in no more than minimal individual and

cumulative adverse environmental effects. The regional conditioning process is a key tool for addressing regional differences in aquatic resources, as well as the ecological functions and services they provide. Regional conditions also facilitate compliance with other federal laws, such as section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act, as well as the Corps' tribal trust responsibilities. District engineers are required to respond to NWP PCNs within 45 days of receipt of a complete PCN, regardless of whether division engineers have imposed regional conditions on the NWPs. There are some exceptions to the 45-day response requirement, such as PCNs that require ESA section 7 and/or NHPA section 106 consultations and PCNs for activities authorized by NWPs 21, 49, and 50. Establishing requirements for a professional engineer's certification of bank stabilization activities and effects on upstream and downstream flooding are more appropriately addressed by state and local governments that have the authority to manage flooding risks. The Corps Regulatory Program does not have this authority.

Two commenters said that an environmental impact statement must be prepared for the reissuance of NWP 13. One commenter said that the reissuance of NWP 13 requires an environmental impact statement because of impacts to ESA-listed species. One commenter stated that the draft decision document failed to take into account the direct, indirect, and cumulative effects of NWP 13 activities. A few commenters asserted that the reissuance of NWP 13 requires ESA section 7 consultation.

For the reissuance of this NWP, Corps Headquarters complied with the requirements of the National Environmental Policy Act (NEPA) by preparing an environmental assessment with a finding of no significant impact. The environmental assessment describes, in general terms, the mitigation measures (including the requirements of NWP general conditions) that ensure that activities authorized by NWP result in no more than minimal individual and cumulative adverse environmental effects. Certain NWP 13 activities require pre-construction notification, another mechanism that helps ensure that NWP activities cause no more than minimal adverse environmental effects. The national decision document also generally describes compensatory mitigation practices that may be required by district engineers for specific NWP activities to ensure that those activities have no more than minimal adverse environmental effects. Compliance with the requirements in 33 CFR part 332, and activity-specific compensatory mitigation requirements, will help ensure that compensatory mitigation required by district engineers will offset the authorized impacts to jurisdictional waters and wetlands.

The decision document prepared for this NWP describes, in general, the direct, indirect, and cumulative impacts of these activities. The direct and indirect effects caused by NWP 13 activities are described throughout the decision document. These direct and indirect effects are described in general terms because the decision to reissue this NWP is made prior to the NWP going into effect and authorizing specific activities at specific project sites. We prepared a NEPA cumulative effects analysis based on the Council on Environmental Quality's definition of ''cumulative impact'' at 40 CFR 1508.7, as well as a 404(b)(1) Guidelines cumulative effects analysis based on the requirements of 40 CFR 230.7(b)(3).

The decision document issued by Corps Headquarters discusses compliance with section 7 of the ESA, including the ''no effect'' determination Corps Headquarters made for the reissuance of this NWP. Our ''no effect'' determination is also presented in this final rule. The decision document discusses the processes and tools that the Corps uses to comply with ESA section 7, to ensure that this NWP is not likely to jeopardize the continued existence of listed species, or adversely modify or destroy critical habitat that has been designated for those listed species. The reissuance of NWP 13 has ''no effect'' on listed species or critical habitat because of the requirements of general condition 18, endangered species, and 33 CFR 330.4(f). For any proposed NWP activity that might affect listed species or designated critical habitat, is in the vicinity of listed species or designated critical habitat, or is located in designated critical habitat, the project proponent must submit a PCN, and the district engineer will evaluate that PCN to determine whether ESA section 7 consultation is required. If the district engineer makes a ''may affect'' determination for a proposed NWP activity, that activity is not authorized by NWP until after ESA section 7 consultation is completed.

The Corps has determined that the reissuance of this NWP does not result in a significant impact on the human environment that warrants the preparation of an environmental impact statement. This is because of the various protections in the NWP program that are applied to ESA-listed species and designated critical habitat and the fact that an NWP can only authorize activities that have no more than minimal adverse environmental effects.

A few commenters said that the proposed reissuance of NWP 13 is contrary to Executive Order 13653, Preparing the United States for the Impacts of Climate Change, which requires federal agencies to consider the challenges that climate change add to their programs, policies, rules, and operations, to ensure that those items continue to be effective as the climate changes. These commenters also stated that the Corps failed to consider the October 7, 2015, Presidential Memorandum entitled ''Incorporating Natural Infrastructure and Ecosystem Services in Federal Decision-Making.'' These commenters indicated that the proposed rule also did not consider current Corps policies concerning climate change and sea level rise.

The activities authorized by NWP 13 are an important tool for landowners and communities to adapt to the effects caused by climate change, especially sea level rise and increases in the frequency of severe storm events. As sea level changes at a particular site, the landowner may need to conduct new or modified bank stabilization activities to protect his or her property. Nature-based infrastructure approaches such as living shorelines may not be feasible or effective in higher energy coastlines subject to sea level rise. Existing buildings and other infrastructure may prevent inland migration of wetlands (Enwright et al. 2016). Public works agencies and utility companies may need to use NWP 13 activities to protect roads and utility lines from damage caused by erosion. In sum, NWP 13 activities will help landowners, public agencies, and other respond to sea level rise and other effects of climate change. This NWP authorizes bank stabilization activities undertaken by private landowners, who are not subject to the policies the Corps developed for the federal water resource projects it designs and implements.

Several commenters said that the Corps, in its draft decision document, did not demonstrate that NWP 13 will result in no more than minimal impacts, because that draft decision document only provides an estimate of impacts that will be authorized over a 5-year period. They also stated that the draft decision document ignores cumulative impacts, fails to account for climate change, and fails to assess impacts on ESA-listed species. One commenter said that the cumulative impact analysis

within the draft decision document is impermissibly narrow and improperly delegates the cumulative impact analysis to specific projects. This commenter stated that if the Corps cannot conduct an adequate cumulative impact at the national level, it should not reissue NWP 13. One commenter asserted that the draft decision document did not evaluate the secondary impacts of bulkheads, because secondary effects are not discussed anywhere in that document. One commenter stated that NWP 13 violates the 404(b)(1) Guidelines because it causes significant degradation of waters of the United States.

Because the NWPs are issued before they go into effect and will be used over the next five years (unless they are modified, suspended, or revoked before the expiration date) to authorize specific activities being conducted by project proponents, the estimate of permitted impacts is a forward-looking estimate. In addition, the approach used in the decision document is fully consistent with the requirements of the 404(b)(1) Guidelines at 40 CFR 230.7(b)(3). The decision document includes two cumulative effects analyses: One to satisfy the requirements of NEPA, using the definition of ''cumulative impact'' at 40 CFR 1508.7. The other cumulative effects analysis satisfies the requirements of the 404(b)(1) Guidelines at 40 CFR 230.7(b)(3). The final decision document has been revised to discuss climate change. The decision document also discusses compliance with the Endangered Species Act, as well as cumulative effects to ESA-listed species (see the NEPA cumulative effects analysis, which includes ESA-listed species as a one of the ''resources of concern'' discussed in that analysis).

The cumulative effects analyses in the decision document prepared by Corps Headquarters satisfies the requirements of NEPA and the 404(b)(1) Guidelines and does not defer the cumulative impact analyses to district engineers who evaluate PCNs for specific activities. When evaluating an NWP PCN or a voluntary request for NWP verification, the district engineer will consider cumulative impacts when determining whether the proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects. The district engineer's consideration of cumulative impacts does not need to be an extensive analysis because he or she is simply verifying whether NWP authorization is appropriate. The district engineer is not considering whether the issuance of the NWP is appropriate, that is the decision that is being made by Corps Headquarters when it issues this rule, along with the more extensive cumulative effects analysis.

The draft decision document, as well as the final decision document, discusses in general terms the direct and indirect effects of NWP 13 activities on the environment. Secondary effects are analogous to indirect effects, and therefore do not warrant separate consideration in the decision document. The final decision document also concluded that the reissuance of this NWP complies with the 404(b)(1) Guidelines. Section 7.1.3 of the decision document discusses our determination that the reissuance of this NWP will not cause significant degradation of waters of the United States.

Three commenters expressed concern with the apparent overlap of authorization of bank stabilization projects using NWPs 13 and 27, and the proposed NWP B. These commenters pointed out that there are different limits for these NWPs and believe those differences encourage applicants to request authorization under the NWP that has the least restrictions or requirements. These commenters recommended clarifying the purposes of each of these NWPs so that project proponents apply for authorization under the most appropriate NWP. One commenter recommended that the NWPs provide incentives for landowners to retrofit existing seawalls with bioengineered methods. This commenter said that a streamlined process for retrofitting bank stabilization projects will encourage property owners to do these types of projects, instead of replacing an old seawall with a new seawall.

We have made changes to NWP 27 to limit it to aquatic habitat restoration, enhancement, and establishment activities so that it should no longer be used to authorize bank stabilization activities. We have also modified the definition of ''living shoreline'' in new NWP 54 to clarify that living shorelines are limited to coastal waters. We have also added a Note to NWP 54 to point prospective permittees to NWP 13 if they want to use an NWP to authorize vegetative stabilization activities or bioengineering activities in inland waters, such lakes other than the Great Lakes, and inland rivers and streams.

We cannot require landowners to retrofit existing seawalls with bioengineering, but landowners may propose to do those types of retrofits. Since we have clarified that NWP 13 authorizes bioengineering approaches to bank stabilization, in addition to seawalls, bulkheads, and revetments, project proponents may seek authorization for such retrofits through this NWP, if those retrofits require DA authorization.

Several commenters objected to the proposal to reissue NWP 13, stating that armoring shorelines with bulkheads and revetment prevent wetlands from migrating inland in response to sea level rise or land subsidence.

There are a number of reasons why coastal wetlands might not be able to migrate inland as sea level rises. Wetland migration may be impeded by natural and man-made impediments. Natural impediments include topography, such as steep coastal bluffs (Enwright et al. 2016). Man-made impediments include coastal urbanization and levees constructed to protect developed and agricultural areas (Enwright et al. 2016). Inland migration of wetlands is usually limited to undeveloped coasts and protected areas (*e.g.,* wildlife refuges) with low, gentle slopes (Enwright et al. 2016). Other factors that affect inland wetland migration are: Erosion, subsidence, sedimentation, hydrologic alterations, water management. Inland migration in abandoned urban areas is likely to be limited to areas that have soil instead of asphalt or other hardened surfaces (Enwright et al. 2016). It should be noted that tidal wetlands have demonstrated strong resilience by being able to adjust to sea level rise by migrating vertically through accelerated soil buildup (Kirwan et al. 2016).

This NWP is reissued with the modifications discussed above.

NWP 14. *Linear Transportation Projects.* We proposed to add a note to this NWP similar to proposed Note 2 in NWP 12 to explain that separate and distant crossings of waters of the United States for linear projects may qualify for separate authorization by NWP.

Several commenters objected to the proposed reissuance of this NWP and several commenters supported reissuing this NWP. One commenter said that this NWP does not authorize activities that are similar in nature. Another commenter stated that individual permits should be required for these linear transportation projects. One commenter said that this NWP should authorize parking lots.

The category of activities authorized by this NWP, that is activities necessary for the construction, expansion, modification, or improvement of linear transportation projects, is a category of activities that are similar in nature because they are limited for use in transportation. The activities in jurisdictional waters and wetlands authorized by this NWP typically result

in no more than minimal adverse environmental effects and would generate little or no public comment if they were evaluated through the individual permit process. This NWP requires PCNs for activities that have the potential to result in more than minimal adverse environmental effects, so that district engineers can review those activities on a case-by-case basis and, after considering any mitigation proposed by applicants, assert discretionary authority for those activities determined to result in more than minimal adverse environmental effects.

The paragraph preceding the ''Notification'' paragraph states that NWP 14 does not authorize parking lots. In the preamble to the final 2012 NWPs, which was published in the February 21, 2012, issue of the **Federal Register**, we stated that NWP 14 authorized parking lots (see 77 FR 10200). That statement was an error. The construction of parking lots that involve discharges of dredged or fill material into waters of the United States may be authorized by other NWPs, if it meets the terms and conditions of an applicable NWP.

Several commenters stated that the acreage limits for this NWP should not be changed. Several commenters suggested increasing the acreage limits of this NWP, and a few of these commenters recommended a one-acre limit for individual crossings of waters of the United States. One commenter said the acreage limit for losses of non-tidal waters should be increased to 3 acres. One commenter stated that the acreage limit should be decreased to ¼-acre for both non-tidal waters and tidal waters, and another commenter said that the acreage limit should be ⅒-acre for losses of non-tidal and tidal waters. A number of commenters requested clarification in how the acreage limit is applied to each crossing of waters of the United States. One commenter recommended a stream impact limit of ⅒-acre. One commenter stated that the scientific rationale in the draft decision document is insufficient to justify the ½- and ⅓-acre limits.

In this NWP, we are retaining the ½-acre limit for losses of non-tidal waters of the United States and the ⅓-acre limit for losses of tidal waters of the United States. We believe these acreage limits, with the PCN requirements, are appropriate for ensuring that this NWP only authorizes activities that result in no more than minimal individual and cumulative adverse environmental effects. For those activities that require PCNs, district engineers will review those activities, and may impose conditions such as mitigation requirements, to provide assurance that the authorized activities will have no more than minimal individual and cumulative adverse environmental effects. In addition, division engineers have the authority to modify this NWP to reduce the acreage limits, if there are regional concerns for the environment that warrant changing the acreage limits. The acreage limit is applied to each single and complete crossing of waters of the United States (see the definition of ''single and complete linear project'' in the Definitions section of these NWPs). The acreage limits for this NWP and other NWPs are determined by our experience and judgment regarding regulated activities that typically result in no more than minimal individual and cumulative adverse environmental effects.

One commenter stated that use of this NWP for the expansion, modification, or improvement of previously authorized projects could result in cumulative impacts that exceed these acreage limits and that the impacts of previously authorized projects should count towards the acreage limit.

Division and district engineers will monitor the use of this NWP and if they determine that the activities authorized by this NWP may be resulting in more than minimal cumulative adverse environmental effects, they will modify, suspend, or revoke this NWP. In cases where the expansion, modification, or improvement of an existing NWP 14 activity will result in additional losses of waters of the United States, the district engineers will determine whether the expansion, modification, or improvement is part of the original single and complete project. If it is, then the district engineer will combine the original loss with the proposed loss to determine if the acreage limit has been exceeded.

A number of commenters stated that this NWP should not authorize discharges into wetlands or other special aquatic sites. Two commenters suggested adding a linear foot limit to this NWP to ensure that it only authorizes activities with minimal adverse effects on the aquatic environment. One commenter recommended adding a 200 linear foot limit either for individual or cumulative impacts. Three commenters recommended a stream impact limit of 300 linear feet.

This NWP requires PCNs for all discharges into wetlands and other special aquatic sites. The PCN review process is an important tool for ensuring that NWP 14 only authorize activities with no more than minimal adverse environmental effects to special aquatic sites. We do not agree that a 200 or 300 linear foot limit is necessary for this NWP, because most linear transportation projects cross jurisdictional streams either perpendicular, or nearly perpendicular to the centerline of the stream. The ½-acre and ⅓-acre limits, plus the PCN requirements, are sufficient to ensure that this NWP only authorizes activities that have no more than minimal individual and cumulative adverse environmental effects.

One commenter objected to allowing the district engineer to waive any of the limits of this NWP. One commenter recommended modifying this NWP to allow district engineers to waive certain limits. One commenter said that district engineers should be able to waive the limits of this NWP if the proposed activity would take place in low quality waters or wetlands.

This NWP does not include any provisions that allow district engineers to waive the acreage limits of this NWP. None of the NWPs allow waivers of acreage limits. This NWP does not have a 300 linear foot limit for losses of stream bed that is similar to the waivable 300 linear foot limit in NWPs 29 and 39 and a number of other NWPs.

Two commenters recommended that the paragraph authorizing temporary structures and fills include the language regarding the use of temporary mats similar to the proposed changes for NWPs 3 and 12. We have added temporary mats to this paragraph of NWP 14 to be consistent with NWPs 3, 12, and 13.

Several commenters said that PCNs should be required for all activities authorized by this NWP. A number of commenters stated that the PCN thresholds should not be changed for this NWP. A few commenters suggested increasing the PCN threshold to ½-acre if the acreage limit is increased to one acre. One commenter said that PCNs should not be required for all discharges into wetlands; instead the PCN threshold for losses of wetlands should be ⅒-acre. Another commenter asserted that the second PCN threshold should be eliminated and that PCNs should only be required for discharges resulting in the loss of greater than ⅒-acre of special aquatic sites.

We are retaining the current PCN thresholds for this NWP. We believe these PCN thresholds are necessary for providing opportunities for district engineers to review proposed NWP 14 activities that have potential for resulting in more than minimal adverse environmental effects. In response to a PCN, the district engineer can issue an

NWP verification, with or without permit conditions. The district engineer can also exercise discretionary authority to require an individual permit, if after considering the applicant's mitigation proposal, he or she determines that more than minimal adverse environmental effects will occur.

Several commenters supported the addition of Note 1 to explain that separate and distant crossings of waters of the United States for linear projects may qualify for separate authorization under NWP 14. Two commenters said that linear transportation projects should be reviewed in their entirety and not just at individual crossings. One commenter recommended deleting Note 1. One commenter objected to the addition of Note 1 because it could require more individual permits for railways. One commenter stated that the text of Note 1 does not clearly define when it is appropriate to combine this NWP with an individual permit. One commenter stated that an individual permit for the entire project is appropriate when the entire linear transportation project impacts more than ½-acre of jurisdictional waters and wetlands. Two commenters stated that an individual permit for the entire project is appropriate when one crossing does not qualify for authorization under NWP 14. One commenter said that the use of NWP 14 in combination with an individual permit should be at the discretion of the district engineer.

Consistent with Note 2 of NWP 12 and for the same reasons, we have modified Note 1 for NWP 14 by deleting the phrase ''with independent utility'' from the second sentence. The objective of the second sentence of this note is to serve as a reminder of 33 CFR 330.6(d), which addresses the combining of NWP authorizations with individual permit authorizations. Section 330.6(d) has been in effect since 1991, so the adoption of Note 1 should not result more individual permits for railways. District engineers will determine on a case-by-case basis when it is appropriate to combine for linear transportation projects NWP authorizations with individual permits, or whether all of the proposed activities require individual permit authorization.

Two commenters requested clarification regarding the difference between ''stand-alone'' projects and ''segments'' as described in the preamble to the June 1, 2016, proposed rule. Two commenters asked for a definition of independent utility and noted that the definition of ''single and complete linear project'' does not explicitly include the term ''independent utility.''

When evaluating individual permit applications and NWP PCNs, district engineers will use their judgment in applying 33 CFR 330.6(d) to determine when linear transportation projects can be authorized by combinations of NWPs and individual permits, or whether individual permits is required for all regulated activities for linear transportation projects that require DA authorization. The term ''independent utility'' is defined in the Definitions section of these NWPs (Section F). The definition of ''single and complete linear project'' does not include the term ''independent utility'' because each crossing of waters of the United States is needed for the single and complete linear project to fulfill its purpose of transporting people, goods, and services from the point of origin to the terminal point.

One commenter remarked that Note 3 is not a substantive change. Two commenters expressed concern that the requirements in Note 3 would result in district engineers requiring compensatory mitigation for cumulative impacts. One commenter supported the addition of Note 3 to explain that the district engineer may require mitigation to ensure the authorized activity causes no more than minimal individual and cumulative adverse environmental effects. One commenter stated that mitigation always should be required because the district engineer has too much discretion. One commenter asked if Note 3 is for multiple crossings that do not have independent utility. Two commenters said that the impacts of separate and distant crossings of waterbodies should be considered separately when determining mitigation requirements, instead of combining the impacts of separate and distant crossings.

Note 3 is not a substantive change from prior NWPs, but it is a clarification. The addition of Note 3 does not impose any new compensatory mitigation requirements on this NWP. The purpose of Note 3 is to remind users of the NWPs that if a linear transportation project includes crossings of waters of the United States that are authorized by NWP but do not require PCNs, and one or more crossings of waters of the United States requires pre-construction notification, then the PCN must include those non-PCN crossings, in accordance with the requirements of paragraph (b)(4) of general condition 32. The district engineer requires information on those non-PCN NWP 14 activities to make his or her determination whether the proposed activity will result in no more than minimal cumulative adverse environmental effects. Under 33 CFR 330.1(e)(3), which was promulgated in 1991, the district engineer has had the authority to require compensatory mitigation to ensure that the cumulative adverse environmental effects caused by NWP activities are no more than minimal.

When it is feasible, project proponents usually design their NWP activities so that they do not trigger compensatory mitigation requirements. According to the Corps' NWP regulations at 33 CFR 330.1(e)(3), compensatory mitigation is only required if district engineer first determines that the proposed NWP activity would result in more than minimal individual and cumulative adverse environmental effects, and then offers the applicant the opportunity to propose mitigation, including compensatory mitigation, to reduce the adverse environmental effects so that they are no more than minimal. If the adverse environmental effects cannot be reduced so that they are no more than minimal, the district engineer will exercise discretionary authority and require an individual permit for the proposed activity.

Note 3 does not address whether individual crossings of waters of the United States authorized by NWP have independent utility. That question is more appropriately addressed through implementation of 33 CFR 330.6(d), and case-by-case decisions made by district engineers. When determining compensatory mitigation requirements for linear projects authorized by NWPs, district engineers have the discretion to require compensatory mitigation at a single site (*e.g.,* an approved mitigation bank or a permittee-responsible mitigation project), or at multiple sites (*e.g.,* mitigation bank credits from different mitigation banks whose service areas are crossed by the linear project).

One commenter recommended adding a condition to NWP 14 that prohibits its use when linear transportation projects are likely to result in land use changes that will negatively impact the environment. Two commenters requested clarification of the phrase ''minimum necessary'' which is used in the last sentence of the first paragraph of this NWP, for stream channel modifications. One commenter stated that the ''minimum necessary'' phrase is ambiguous and should be quantified. Another commenter expressed support for the use of that phrase in the NWP.

Land use decisions are made primarily by state, tribal, and local governments, through their zoning programs and their other land use authorities (see 33 CFR 320.4(j)(2)). The

Corps does not have the authority to control land use changes that do not involve activities that require DA authorization. Application of the term ''minimum necessary'' is subject to the district engineer's discretion, and is highly dependent on site-specific and activity-specific circumstances. It is not possible to develop a quantifiable, defensible definition of the term ''minimum necessary.'' It is a judgment call that must be made by the district engineer when evaluating a PCN and the proposed activity's compliance with the terms and conditions of this NWP.

One commenter asked for clarification regarding whether a linear transportation project with multiple separate and distant crossings of waters of the United States that require pre-construction notification can be provided to the Corps district in one PCN, or if individual PCNs are required for each crossing that requires notification. Several commenters requested that the Corps define what a separate and distant location is. A couple of these commenters asked whether there is a minimum distance for two crossings of waterbodies to be considered separate and distant. One commenter said that the text of NWP 14 uses the terms ''separate and distinct'' and ''separate and distant.''

A permit application or PCN for a linear transportation projects should include all crossings of waters of the United States that require DA authorization. Whether proposed crossings of waters of the United States are to be considered together or as separate and distant is to be determined by district engineers on a case-by-case basis, after evaluating site and regional characteristics (*e.g.,* topography, geology, hydrology, climate). It is not possible to establish a specific distance that could be effectively applied across the country. Nowhere in the June 1, 2016, proposed rule is the term ''separate and distinct'' used. ''Distant'' is the key word in the phrase ''separate and distant'' because it is the distance between crossings of waters of the United States at reduces the potential for synergistic interactions among regulated activities and their impacts to occur. The greater the distance between crossings that are authorized by NWP 14, the more attenuated the adverse environmental effects of those crossings becomes, so that there is less likelihood of more than minimal adverse cumulative impacts occurring.

Three commenters recommended that the use of best management practices should be a specific requirement to minimize sediment loading and wetland disturbance. One commenter said that this NWP should require that riprap placed in the stream should be installed at grade with the existing stream substrate and mimic the existing contours of the stream channel. One commenter said that this NWP should prohibit the use of grout. One commenter stated that culvert bottoms should be installed in a manner to allow natural substrate to become reestablished. One commenter said that culvert installation should not result in over-widening of the stream channel.

Several NWP general conditions require practices to minimize adverse effects to jurisdictional waters and wetlands. For example, general condition 12, soil erosion and sediment controls, requires appropriate measures to minimize sediment inputs to waters and wetlands. General condition 13, removal of temporary fills, requires the permittee to remove temporary fills and restore affected areas, which may include wetlands. We do not agree that riprap should be required in all cases to be placed at grade of a stream. The use of grout is more appropriately determined on a case-by-case basis, if the use of grout is a component of a regulated activity. The appropriate approach for culvert installation is also a case-by-case determination and highly dependent on the characteristics of the stream, including its geomorphology. The effects of culvert installation on stream widening are also most appropriately evaluated on a case-by-case basis by district engineers.

One commenter stated that NWP 14 should authorize the removal of road crossings and require the affected areas to be restored using natural channel design principles. One commenter said that this NWP should require the evaluation of practicable alternatives. One commenter expressed concern that NWP 14 activities could result in indirect adverse environmental effects in areas distant from linear transportation projects. One commenter stated that this NWP should not authorize energy projects.

We do not believe it is necessary to modify NWP 14 to authorize the removal of road crossings. If the road crossing is temporary, the NWP 14 authorization should include conditions that apply to the removal of the temporary road crossing after it has fulfilled its intended purpose. If the road crossing is permanent, the removal of the road may be authorized by NWP 3 if the removal activity requires DA authorization. We do not think it is appropriate to prescribe, at a national level, a particular approach to restoring streams that were adversely affected by NWP activities. There are a number of different techniques that can be used to restore streams, and the appropriate approach is dependent on the objectives of the restoration activity, the site characteristics, and numerous other factors. Activities authorized by NWP 14 can have indirect adverse environmental effects, and when PCNs are required for those activities, district engineers will evaluate both the direct and indirect adverse environmental effects when determining if NWP authorization is appropriate. This NWP does not authorize energy projects per se, but it may authorize road crossings and other linear transportation projects associated with an energy facility, including renewable energy generation facilities.

One commenter stated that federal and state natural resource agency coordination should be required for any stream losses that exceed 300 linear feet or ½-acre. One commenter said that this NWP should not authorize activities that jeopardize ESA-listed species. One commenter suggested modifying this NWP by adding a limit for cumulative effects to protect endangered species in estuaries. One commenter said that this NWP should require linear transportation projects to be designed to maintain aquatic organism passage. One commenter stated that this NWP should require advanced notice to tribes to avoid impacts on tribal treaty natural resources and cultural resources.

This NWP does not have a 300 linear foot limit for losses of stream beds. The ½-acre limit for losses of non-tidal waters cannot be waived or exceeded. The NWPs cannot be used to authorize activities that jeopardize the continued existence of ESA-listed species or adversely modify or destroy critical habitat of those species (see paragraph (a) of general condition 18, endangered species, and 33 CFR 330.4(f)). Division engineers can modify, suspend, or revoke this NWP on a regional basis to protect ESA-listed species in specific regions or waterbodies. General condition 2, aquatic life movements, requires NWP activities to be designed and constructed so that they do not substantially disrupt the necessary life cycle movements of indigenous aquatic species, unless the primary purpose of the NWP activity is to impound water. For the 2017 NWPs, Corps districts initiated consultation with tribes to determine whether to develop regional conditions or coordination procedures to protect tribal trust resources, including natural and cultural resources. District engineers can establish procedures to coordinate with tribes to help ensure compliance with general condition 17, so that no NWP

activity will cause more than minimal adverse effects on reserved tribal rights, protected tribal resources, or tribal lands.

One commenter said that NWP 14 activities have the potential to cause significant direct and cumulative adverse environmental effects and that the reissuance of this NWP requires an environmental impact statement. Two commenters asked how the cumulative effect analysis for this NWP accounts for activities that do not require pre-construction notification.

The Corps complied with the requirements of NEPA by preparing an environmental assessment with a finding of no significant impact. The environmental assessment and finding of no significant impact are in the national decision document prepared for this NWP. Since NEPA compliance was accomplished through the preparation of an environmental assessment with a finding of no significant impact, an environmental impact statement is not required.

The decision document for this NWP that was prepared by Corps Headquarters analyzes, at a national level, the direct, indirect, and cumulative impacts caused by activities authorized by this NWP. The decision document includes a cumulative impact analysis prepared in accordance with the Council on Environmental Quality's NEPA definition of ''cumulative impact'' at 40 CFR 1508.7. We also prepared a cumulative effects assessment for the 404(b)(1) Guidelines compliance determination, as required by 40 CFR 230.7(b)(3). The cumulative effects analysis conducted for the 404(b)(1) Guidelines includes estimates of the number of non-PCN activities likely to occur during the five year period this NWP is in effect, as well as the estimated impacts of these non-PCN activities to jurisdictional waters and wetlands. Those estimated impacts include both temporary and permanent impacts.

This NWP is reissued, with the changes discussed above.

NWP 15. *U.S. Coast Guard Approved Bridges.* We did not propose any changes to this NWP and we did not receive any comments on this NWP. This NWP is reissued without change.

NWP 16. *Return Water From Upland Contained Disposal Areas.* We did not propose any changes to this NWP. One commenter stated that the proposed NWP did not include enough information for the state to make a decision on its Clean Water Act Section 401 water quality certification decision.

This NWP authorizes activities that will occur during the five year period the NWP is in effect. The issuance of this NWP is not associated with any specific dredging project or disposal site. States can choose to issue water quality certification for the NWP, or require individual water quality certifications for case-specific NWP 16 authorizations. For those states that choose to require individual water quality certifications for activities authorized by this NWP, they can require additional information from the project proponent to determine whether a proposed discharge from an upland contained dredged material disposal area complies with state water quality standards. This NWP is reissued without change.

NWP 17. *Hydropower Projects.* We did not propose any changes to this NWP. One commenter objected to the proposed reissuance of this NWP, stating that these activities should require individual permits. One commenter recommended increasing the generating capacity limit in item (a) of the NWP to 10,000 kilowatts.

The hydropower projects authorized by this NWP are subject to either licensing requirements or licensing exemptions from the Federal Energy Regulatory Commission (FERC), and the FERC's oversight of those projects warrants use of this NWP to avoid duplicative federal review that would occur during the Corps' evaluation of a standard individual permit application. We believe that the current generating capacity limit of 5,000 kilowatts is appropriate to ensure that associated discharges of dredged or fill material into waters of the United States authorized by this NWP are relatively small and result in no more than minimal adverse environmental effects.

This NWP is reissued without change.

NWP 18. *Minor Discharges.* We did not propose any changes to this NWP. Two commenters said these activities should require individual permits, instead of being authorized by NWP. Several commenters stated that this NWP should include a requirement for permittees to explicitly describe their avoidance and minimization efforts. One commenter remarked that this NWP should distinguish between dredging in open waters and excavation activities that occur in wetlands.

The activities authorized by this NWP involve only small discharges of dredged or fill material into jurisdictional waters and wetlands, and the PCN thresholds provide district engineers with opportunities to review proposed activities that have the potential to result in more than minimal adverse environmental effects. In response to a PCN, a district engineer may require mitigation to ensure the no more than minimal adverse environmental effects requirement for NWPs is satisfied. If mitigation cannot be used to ensure the adverse environmental effects are only minimal, the district engineer will exercise discretionary authority and require an individual permit (see 33 CFR 330.1(e)(3)). For those activities that require PCNs, the project proponent may describe minimization measures in the PCN (see paragraph (b)(4) of general condition 32) to assist the district engineer in his or her decision-making process. Paragraph (b) of the NWP applies to excavation activities in open waters and paragraph (c) applies to discharges of dredged or fill material in wetlands or waters that results in a loss of those wetlands or waters. Not all wetland excavation activities result in regulated discharges of dredged material (see 33 CFR 323.2(d)).

Several commenters said this NWP should limit its use to once per verification, instead of authorizing recurring maintenance activities. One commenter recommended increasing the 25 cubic yard limit for discharges that only take place in wetlands. Another commenter suggested increasing the cubic yard limit to 50 cubic yards. One commenter asked the Corps to increase the first PCN threshold to 25 cubic yards in ephemeral streams because these streams do not have flowing water on a regular basis, and they have no permanent fish populations.

If a district engineer determines that this NWP is being used too frequently for maintenance activities in the same location, he or she may talk with the project proponent to determine if measures can be taken to address the cause for the recurring maintenance. The 1/10-acre limit applies to losses of jurisdictional wetlands located above the plane of the ordinary high water mark or high tide line. The 25 cubic yard limit applies to discharges located below the plane of the ordinary high water mark or high tide line. We believe 25 cubic yards is the appropriate limit for ensuring that the activities authorized by this NWP result in only minimal individual and cumulative adverse environmental effects. In areas of the country where 50 cubic yards is an appropriate limit for general permit authorization of minor discharges, district engineers can issue regional general permits. We do not agree that there should be no PCNs for NWP 18 activities in ephemeral streams. Discharges of more than 10 cubic yards of dredged or fill material into ephemeral streams might result in more

than minimal adverse environmental effects in some cases. Therefore, PCNs should continue to be required for those activities. Increasing the PCN threshold to 25 cubic yards would eliminate that PCN threshold since this NWP has a limit of 25 cubic yards.

This NWP is reissued without change.

NWP 19. *Minor Dredging.* We proposed to add a sentence requiring the dredged material to be deposited and retained at an area that has no waters of the United States, unless the district engineer specifically authorizes the placement of that dredged material into jurisdictional waters and wetlands through a separate authorization.

Several commenters expressed their support for the proposed change to this NWP. Several commenters recommended modifying this NWP to authorize the placement of the dredged material into coastal waters below the mean high tide line to nourish the beach. One commenter said that requiring a separate authorization for placing the dredged material into jurisdictional waters and wetlands is redundant and counter to the purpose of a streamlined NWP program. Another commenter noted that NWP 18, another NWP, or a regional general permit could be used to authorize the placement of the dredged material into jurisdictional waters and wetlands. One commenter objected to the proposed reissuance of this NWP, and said these activities should require individual permits. One commenter said that clamshell bucket dredging does not result in only minimal adverse environmental effects.

If the project proponent wants to use the dredged material for beach nourishment, and the dredged material is to be placed in navigable waters of the United States (*i.e.,* RHA section 10 waters) or waters of the United States (*e.g.,* channelward of the high tide line), DA authorization is required. Depending on the quantity of dredged material and the amount of area to be filled by the dredged material that authorization may be provided through NWP 18, another NWP, a regional general permit, or an individual permit. The small amounts of dredging authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. However, division engineers can modify, suspend, or revoke this NWP if they are concerned that more than minimal adverse environmental effects will occur in a region. In addition, if a proposed NWP 19 activity requires pre-construction notification, the district engineer can assert discretionary and require an individual permit if he or she determines the proposed activity will, after considering mitigation, result in more than minimal adverse environmental effects. This NWP authorizes minor dredging regardless of the equipment used. Clamshell bucket dredging conducted in accordance with the terms and conditions of this NWP typically causes no more than minimal adverse environmental effects.

Several commenters stated there should be designation of strategic areas for the placement of dredged material to ensure that it is available for natural geomorphic processes to move that material to eroding shorelines or to ensure that it is available for other beneficial uses. One commenter suggested adding a requirement for agency coordination when the proposed dredging activity would occur in non-tidal waters where special status species are known to occur. Another commenter stated that this NWP should not be used in non-tidal waters inhabited by special status species. One commenter said that tribes should be provided with advance notice of these activities. Another commenter expressed concern that the dredged material may have sediments that are contaminated and harmful to aquatic organisms.

The designation of strategic areas of the placement of dredged material is beyond the scope of the NWP program. Those designations are more appropriately made by district engineers or addressed through other federal, tribal, state, and local programs. The requirements of general condition 18, endangered species, apply to this NWP and will address special status species that are listed as endangered or threatened under the federal Endangered Species Act, or proposed for listing under the ESA. Division engineers can impose regional conditions on this NWP to require coordination for proposed NWP 19 activities that may affect other types of special status species, or to prohibit its use in certain waters. For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions that protect tribal trust resources. Corps districts may also establish coordination procedures with tribes to ensure that NWP 19 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

This NWP is reissued as proposed.

NWP 20. *Response Operations for Oil or Hazardous Substances.* We did not propose any changes to this NWP, other than to change its title. We did not receive any comments on this NWP. This NWP is reissued without change.

NWP 21. *Surface Coal Mining Activities.* We proposed to remove paragraph (a) that was in the 2012 NWP 21. Many commenters objected to the proposed reissuance of this NWP. Several commenters stated that these activities should require individual permits because they result in more than minimal individual and cumulative adverse environmental effects. One commenter said that paragraph (a) should be deleted from this NWP. Several commenters stated that the Corps should be able to evaluate and make decisions on NWP 21 PCNs prior to the issuance of the Surface Mining Control and Reclamation Act (SMCRA) permit, regardless of whether the Office of Surface Mining or the state agency has an integrated permit processing procedure.

We removed paragraph (a) of the 2012 NWP 21 from this NWP. Surface coal mining activities that were authorized under paragraph (a) of the 2012 NWP 21, where the regulated activities in waters of the United States have not yet been completed will require individual permits if operators need more time to complete those regulated activities. Activities that were authorized under paragraph (a) of the 2012 NWP 21 may qualify for the one-year grandfather provision at 33 CFR 330.6(b) if the operator has commenced the authorized work or is under contract to do the authorized work before the 2012 NWP 21 expires on March 18, 2017.

All activities authorized by this NWP are subject to the ½-acre limit and all other terms and conditions of this NWP. The ½-acre and the 300 linear foot limits, as well as the PCN review process, will ensure that activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. Division engineers may modify, suspend, or revoke this NWP on a regional basis. Division engineers may also impose regional conditions to ensure that authorized activities result in no more than minimal adverse environmental effects.

Corps districts can review NWP 21 PCNs concurrent with the Office of Surface Mining's or the state's SMCRA review process. Since the Office of Surface Mining or the state has authority over the entire coal mining activity, and the Corps has jurisdiction only over activities that involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters, the project proponent cannot proceed with the surface coal mining activity until he or she has secured his or her SMCRA authorization. Therefore, the Corps' completion of its review of the NWP 21 PCN prior to the SMCRA

authorization decision would not benefit the project proponent. We have not made any changes to that provision.

One commenter said that the 1/2-acre limit should be used for all NWP 21 activities. One commenter stated that district engineers should not be able to waive the ½-acre limit. Several commenters requested removal of the provision that allows district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream beds. Many commenters said that the 300 linear foot limit should be decreased. Most of these commenters stated that if the waiver provision is retained, there should be a maximum waiver limit of 500 linear feet and compensatory mitigation should be required for losses of greater than 300 linear feet of intermittent and ephemeral stream bed. Many commenters supported the provision that does not authorize discharges of dredged or fill material into waters of the United States to construct valley fills.

For this NWP rulemaking effort, we believe that both the ½-acre and 300 linear foot limits are necessary to ensure that the activities authorized by this NWP cause no more than minimal individual and cumulative adverse environmental effects. This decision is independent of prior rulemakings for NWP 21. The waiver provision for the loss of intermittent and ephemeral stream bed gives district engineers flexibility to authorize, using NWP 21, surface coal mining activities that have no more than minimal adverse environmental effects. Each waiver request requires a written determination by the district engineer, as well as coordination with the resource agencies. During agency coordination, the resource agencies can provide their views on whether the proposed activity will or will not result in no more than minimal individual and cumulative adverse environmental effects. The district engineer will fully consider all agency comments when making his or her decision whether to issue the written waiver and issue an NWP verification letter to the applicant.

One commenter suggested requiring agency coordination for all NWP 21 PCNs for proposed activities that would impact pitcher plant bog wetlands or bald cypress/tupelo swamps. One commenter recommended increasing the limits for NWP 21 and creating a self-verification process to streamline the verification process.

Division engineers can modify this NWP to add regional conditions to protect specific types of wetlands, such as pitcher plant bogs or bald cypress/tupelo wetlands. They can restrict or prohibit the use of this NWP in certain types of wetlands. A regional condition may also require agency coordination for certain NWP 21 activities. The project proponent can provide additional information in the PCN to assist the district engineer in his or her decision-making process. A self-verification process will not make the district engineer's verification process more streamlined. The PCN process is necessary for all activities authorized by this NWP because of the potential for more than minimal adverse environmental effects to occur. The PCN process requires the district engineer to make an independent determination on whether the proposed activity will result in no more than minimal adverse environmental effects and whether NWP 21 authorization is appropriate.

This NWP is reissued as proposed.

NWP 22. *Removal of Vessels.* We proposed to modify Note 2 to refer to the possibility of shipwrecks being historic properties. We did not receive any comments on this NWP. This NWP is reissued without change.

NWP 23. *Approved Categorical Exclusions.* We proposed to modify this NWP by clarifying that environmental documentation may consist of either an environmental impact statement or an environmental assessment. Several commenters objected to the proposed reissuance of this NWP, stating that it does not authorize categories of activities that are similar in nature. Some of these commenters also said the NWP authorizes some activities with no limits on impacts to jurisdictional waters and wetlands. Several commenters requested that the Corps revise Regulatory Guidance Letter 05–07 to reflect the changes the Federal Highway Administration's list of approved categorical exclusions. One commenter said that tribes should receive advance notice of activities to be conducted under the authorization provided by this NWP.

This NWP authorizes categories of activities that are similar nature, in that those categories relate to the types of activities identified in the approved categorical exclusions. The authorized activities that have the potential to result in more than minimal individual and cumulative adverse environmental effects require PCNs. District engineers will review those PCNs and issue NWP verifications only for those activities they determine will cause no more than minimal adverse environmental effects.

The revision of RGL 05–07 to address the Federal Highway Administration's current categorical exclusions will be a separate future effort. We will publish a notice in the **Federal Register** to solicit comment on which of their revised categorical exclusions that involve activities regulated under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899 should be authorized by this NWP. As a result of the Corps districts' consultations with tribes on the 2017 NWPs, Corps districts may establish procedures to coordinating NWP 23 PCNs with interested tribes to ensure that the activities authorized by this NWP do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

This NWP is reissued without change.

NWP 24. *Indian Tribe or State Administered Section 404 Programs.* We did not propose any changes to this NWP and did not receive any comments. This NWP is reissued without change.

NWP 25. *Structural Discharges.* We did not propose any changes to this NWP. One commenter said that this NWP should require concrete to be cured for seven days before coming into contact with water. Requirements for curing of concrete used for structural discharges authorized by this NWP are more appropriately addressed through regional conditions imposed by division engineers or activity-specific conditions added to NWP verifications by district engineers. This NWP is reissued without change.

NWP 27. *Aquatic Habitat Restoration, Enhancement, and Establishment Activities.* In the June 1, 2016, proposed rule we did not propose any changes to this NWP. One commenter objected to the reissuance of this NWP, stating that the authorized activities do not produce benefits. Many commenters supported the reissuance of this NWP.

One of the basic requirements of this NWP is that the aquatic habitat restoration, enhancement, or establishment activity must result in a net gain in aquatic resource functions and services. It will take time for these increases in aquatic resource functions and services to occur, as the treated area undergoes ecosystem development processes after the restoration, enhancement, or establishment activity takes place.

A number of commenters said that there have been activities, such as bank stabilization activities and wetland or stream conversion activities that are not aquatic habitat restoration, enhancement, or establishment activities but that have been verified as being authorized by NWP 27. These commenters suggested modifying this NWP to make it clear that project proponents should seek DA authorization for those activities

through other NWPs, regional general permits, or individual permits instead of NWP 27. A few commenters said that this NWP should not authorize the conversion of wetlands, streams, or other aquatic resources to other aquatic resource types (*e.g.,* installing water control structures in headwater streams to construct wetland impoundments) to reduce sediments, nutrients, and other pollutants subject to Total Daily Maximum Loads (TMDLs) established under section 303(d) of the Clean Water Act. One commenter said that NWP 27 should not be used to authorize activities that are more appropriately authorized by NWPs 13 (bank stabilization) or 43 (stormwater management facilities).

To address those concerns, we have added a paragraph to NWP 27 to state that aquatic habitat restoration, enhancement, and establishment activities authorized by this NWP must be based on ecological references. This change makes it clear that NWP 27 does not authorize bank stabilization activities (including living shorelines to control erosion), stormwater management activities, and pollutant-reduction best management practice facilities constructed to meet TMDLs established under section 303(d) of the Clean Water Act. In coastal waters, living shorelines can be authorized by the new NWP 54. Living shorelines that use stone sills, breakwaters, or other types of structures do not resemble natural shorelines (Pilkey et al. 2012). In inland waters, vegetative or bioengineering bank stabilization activities may be authorized by NWP 13. We are modifying NWP 43 to authorize discharges of dredged or fill material into waters of the United States to construct and/or maintain pollutant reduction best management practice facilities that reduce inputs of pollutants to waterbodies to meet the TMDLs established for those waterbodies.

Ecological references are often used for aquatic habitat and riparian area restoration, enhancement, or establishment activities because they can provide templates for planning and designing those activities to resemble natural aquatic habitats or riparian areas (Smith et al. 2013, Society for Ecological Restoration (SER) 2004). Ecological references can help assess the naturalness of aquatic habitats and riparian areas and can take into account the direct and indirect effects of human disturbances and other activities on ecosystem structure, dynamics, and functions (Stoddard et al. 2006). There are a variety of approaches for using ecological references for planning, designing, and implementing ecological restoration activities (Clewell and Aronson 2013, chapter 7), including aquatic habitat restoration, enhancement, and establishment activities, as well as riparian area restoration and enhancement activities. Ecological references should take into account the range of variation exhibited by the target ecosystem type in the region (SER 2004).

For the purposes of this particular modification of NWP 27, we suggest a couple of approaches for using ecological references. Project proponents can use either of the suggested approaches or other ecological reference approaches. One suggested approach is to identify and use ecological references based on the structure, functions, and dynamics of aquatic habitats and riparian areas that currently exist in the region where the NWP 27 activity is proposed. The appropriate region can be determined through discussions with the district engineer. The ecological reference should be the same type (*e.g.,* forested wetland, emergent tidal wetland, forested riparian area) as the aquatic habitat or riparian area that is the outcome target of the proposed NWP 27 activity.

Another suggested approach is to construct an ecological reference based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the NWP 27 activity. The conceptual model can be simple, and consist of a mental picture of the structure, functions, and dynamics of the desired type of aquatic habitat or riparian area (Clewell and Aronson 2013). That mental picture can be based on various information sources (Clewell and Aronson 2013) and take into account the historic range of variation for the target habitat type (SER 2004). In other words, the conceptual model used as an ecological reference would be based on knowledge of the natural aquatic habitats or riparian areas of the same type that are, or were, found in the region.

One commenter requested that we modify NWP 27 to authorize certain activities identified in watershed implementation plans to meet TMDL requirements, such as activities to reduce sediment and nutrient inputs to waters. This commenter said that modifying NWP 27 to authorize these activities without an acreage limit would provide a streamlined authorization process for these TMDL-related restoration activities. This commenter asked that the Corps modify NWP 27 to allow conversions of one aquatic habitat type to another (*e.g.,* forested wetland to emergent wetland) as long as there will be a net increase in aquatic resource functions and services. This commenter pointed to the change in NWP 27 that was made in 2012 to allow changes in plant communities resulting from restoring wetland hydrology. This commenter also said that NWP 27 should authorize stream restoration activities that will reduce sediment and nutrient inputs to waters to meet TMDL requirements.

Aquatic habitat restoration, enhancement, and establishment activities can help reduce inputs of sediment, nutrients, and other pollutants to waterbodies, but they are only authorized by NWP 27 if they will result in net increases in aquatic resource functions and services, do not involve prohibited conversions, and resemble ecological references. For example, the re-establishment of upland or wetland riparian areas next to a stream can reduce inputs of sediment and nutrients to the stream by physical and biogeochemical processes, and can be authorized by NWP 27 if those activities involve discharges of dredged or fill material into jurisdictional waters and wetlands. In contrast, the constructing a dam or other structure across a headwater stream to establish a wetland that will trap sediments and transform nutrients is conversion of aquatic habitat type that is not authorized by NWP 27. The latter activity might be authorized by the reissuance and modified NWP 43.

There is likely to be differences in opinion in whether conversions of forested wetlands to emergent wetlands, other types of aquatic habitat conversions, or aquatic habitat enhancement activities will result in net increases in aquatic resource functions and services. The full suite of aquatic habitat functions and services must be considered when determining whether the net gains in aquatic resource functions and services required by this NWP will occur. When conducting these evaluations to determine NWP 27 eligibility, there should not be a focus on a specific aquatic resource function, or the ecological service(s) produced from that aquatic resource function. To assist district engineers in making these determinations, prospective permittees considering such activities should provide supporting information in their NWP 27 PCNs or reports to demonstrate net increases in aquatic resource functions and services.

The provision in the fourth paragraph of this NWP that states that changes in plant communities resulting from restoring wetland hydrology are

acceptable under this NWP was added to take into account the fact that restoring wetland hydrology has a high likelihood of changing the plant community, and such changes are usually an objective of those wetland restoration activities. A stream restoration activity that also helps reduce sediment, nutrient, and pollutant inputs to downstream waters and helps meet established TMDLs can be authorized by this NWP, as long as the restored stream will resemble an ecological reference for that stream type in the region.

Activities intended to address TMDLs for nutrients, sediment, and other pollutants that are not aquatic habitat or riparian restoration, enhancement, or establishment activities based on ecological references may be authorized by NWP 43, which has a ½-acre limit for losses of non-tidal waters of the United States. Activities in tidal waters and wetlands intended to address TMDLs that are not authorized by NWP 27 may be authorized by other NWPs, regional general permits, or individual permits.

One commenter asked for more specific examples of the types of projects that can be authorized by NWP 27. One commenter stated that this NWP should authorize the conversion of one wetland type to another type to support enhancement of a specific function. One commenter said that this NWP should be modified to allow sidecasting of material removed from a wetland into adjacent wetlands, if the affected area would still be a wetland. One commenter suggested adding low head dam removal to the types of activities authorized by this NWP. One commenter said this NWP should authorize the installation of riprap or other energy dissipation measures immediately adjacent to dikes, berms, and water control structures. One commenter requested that the Corps add ''the removal of stream barriers, such as undersized culverts, fords, and grade control structures'' to the list of examples of activities authorized by NWP 27.

This NWP already has a comprehensive list of examples of aquatic habitat restoration, enhancement, and establishment activities that can be authorized by this NWP. This NWP only authorizes the relocation of non-tidal waters, including non-tidal wetlands, on the project site. The enhancement of a specific wetland function may cause the loss of, or reduce, other wetland functions; to be authorized by this NWP an aquatic habitat enhancement activity must result in a net gain in aquatic resource functions and services. If the restoration of wetland hydrology results in a change in wetland plant community that resembles reference wetlands in the region that have that hydrologic regime, we do not consider that activity to be a conversion of wetland type. The sidecasting of excavated material into jurisdictional waters and wetlands as part of the wetland restoration, enhancement, or establishment activity is authorized by this NWP as long as the activity will result in a net increase in wetland functions and services.

The removal of low-head dams is authorized by NWP 53 (see below). The removal of small water control structures, dikes, and berms is still authorized by NWP 27, and these small structures will typically be found in headwater streams. The removal of low-head dams authorized by NWP 53 is not limited to headwater streams. This NWP can be used to authorize the placement of riprap in jurisdictional waters and wetlands as long as it is part of an aquatic habitat restoration, enhancement, or establishment activity that will result in net increases in aquatic resource functions and services. We have added ''the removal of stream barriers, such as undersized culverts, fords, and grade control structures'' to the list of examples of activities authorized by this NWP.

One commenter said this NWP should limit the linear feet of riprap placed for bank stabilization projects that also have a restoration purpose. If bank stabilization is the primary purpose of the proposed activity, then that activity should be considered for authorization by NWPs 13 or 54. Aquatic habitat restoration, enhancement, or establishment activities may require the placement of some riprap as part of the overall activity to increase aquatic resource functions and services. For NWP 27 activities, we do not believe that it is necessary to place a limit on the length of riprap placed in jurisdictional waters and wetlands. The appropriate amount will depend on the specific activity authorized by NWP 27.

One commenter said that all NWP 27 activities convert one wetland to another, and suggested revising this NWP by removing the language regarding aquatic habitat conversions and simply require a net increase in aquatic resource function and services, regardless of the impacts. Several commenters stated that this NWP should authorize conversions of streams to wetlands that diversify wetland habitats, with an acreage limit on those conversions. One commenter said this NWP should be modified to allow the conversion of forested wetlands to emergent wetlands. One commenter requested examples of when is it appropriate to use NWP 27 to authorizes the relocation of non-tidal waters.

Wetland restoration activities can involve conversions in wetland type, and those conversions are authorized by this NWP if they result from removing one or more impairments that are preventing the former wetland or degraded or disturbed wetland from returning to its pre-impairment structure, functions, and dynamics. Ecological restoration activities should result in a damaged or degraded wetland, stream, or riparian area resuming its historic ecological development trajectory under contemporary environmental conditions (SER 2004). The prohibition against conversions in the fourth paragraph of this NWP focuses on conversions of wetlands to streams or the conversions of natural wetlands to other aquatic habitat types. The prohibition against conversions of natural wetlands, and the general requirement that NWP 27 activities result in net increase in aquatic resource functions and services are intended to prohibit wetland enhancement activities that would improve one or two wetland functions but cause substantial declines in other wetland functions.

Streams perform a number of important ecological functions and services (*e.g.,* Fischenich 2006) and modifying this NWP to authorize the conversion of streams to wetlands would result in losses of those stream functions and services. Forested wetlands also perform a number of functions and services that differ substantially from those performed by emergent wetlands. Project proponents that believe that the ecological trade-offs that would occur as a result of converting streams to wetlands, or converting forested wetlands to emergent wetlands are desirable can seek DA authorization for those activities under another NWP, a regional general permit, or an individual permit. A project proponent who is uncertain whether proposed relocations of non-tidal wetlands on a site would qualify for NWP 27 authorization should contact the appropriate Corps district to schedule a pre-application consultation.

One commenter said that NWP 27 should not allow the reversion of enhanced wetlands if the wetland enhancement was done to fulfill compensatory mitigation requirements. This commenter also said that activities completed under this NWP should not be allowed to be filled at a later date. One commenter expressed concern about the that he reversion provision,

stating that it gives landowners a loophole to convert wetlands to other uses.

The reversion provision in this NWP only applies to the specific categories of agreements or activities listed in that paragraph. Those agreements or activities do not include compensatory mitigation projects required as conditions of DA permits. If there are jurisdictional waters and wetlands on the site after the authorized reversion is completed, then a separate DA authorization would be required if the project proponent wants to do activities that require authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. The reversion provision is not a loophole because it is intended to allow the affected land to revert to its prior condition when appropriate. Aquatic habitat restoration, enhancement, and establishment activities that are intended to be implemented only for a limited period of time still provide important ecosystem functions and services while they are in place.

Many commenters said there should be no changes to the PCN thresholds for this NWP. One commenter stated that the activities that require reporting should require PCNs instead. Two commenters recommended eliminating the PCN requirement for activities conducted on non-federal public and private lands in accordance with the terms and conditions of a binding restoration agreement between the U.S. Fish and Wildlife Service, Natural Resources Conservation Service, Farm Service Agency, National Marine Fisheries Service, National Ocean Service, U.S. Forest Service, or state agencies. One commenter said that if the PCN does not clearly state the purpose of the restoration project, the Corps should require a detailed explanation of the increases in aquatic resource functions and services that will be provided, and seek input from the public and interest groups.

We are not making any changes to the PCN thresholds or reporting requirements for this NWP. We believe the current PCN thresholds and reporting requirements are sufficient to provide assurance that proposed activities will comply with the terms and conditions of this NWP. The PCN and reporting requirements provide an important mechanism for ensuring that NWP 27 activities are aquatic habitat restoration, establishment, and enhancement activities that result in net increases in aquatic resource functions and services. As stated above, we received a number of comments expressing concern about the use of NWP 27 for activities that are not aquatic resource restoration, enhancement, or establishment activities but serve other intended purposes. Those concerns validate the need to continue the current PCN and reporting requirements. When a Corps district reviews a PCN or a report for a proposed NWP 27 activity, if the information in the PCN or report does not clearly show that the proposed activity will result in net increases in aquatic resource functions and services, the district can request additional information from the project proponent. For specific activities authorized by NWP 27 or any other NWP, the Corps does not issue public notices to solicit public comment. Public comment is sought during the rulemaking process to issue, reissue, or modify NWPs.

One commenter said that this NWP should require best management practices to avoid sediment loading and introduction of excess sediment into jurisdictional waters and wetlands. One commenter stated that this NWP should require an analysis of impacts to downstream communities, especially communities inhabited by threatened and endangered species. One commenter recommended adding a provision prohibiting activities that impact federally listed plant species.

Activities authorized by this NWP must comply with general condition 12, soil erosion and sediment controls, to ensure that there are not excessive amounts of sediment being released to jurisdictional waters and wetlands as a result of these activities. Any non-federal permittee proposing an NWP 27 activity that might affect ESA-listed species or designated critical habitat, is in the vicinity of listed species or designated critical habitat, or is in designated critical habitat must submit a PCN instead of a report. The ''might affect'' threshold in paragraph (c) of general condition 18, endangered species, includes direct and indirect effects anticipated to be caused by the NWP activity, including downstream indirect effects caused by the NWP activity. The requirements of general condition 18 apply to federally listed plant species under the ESA.

One asked why the Corps oversees NWP 27 activities because many other state agencies have stream restoration programs. One commenter asserted that NWP 27 should not be used to authorize mitigation banks. One commenter stated that requiring monitoring plans for NWP 27 activities places an undue burden on the applicant, especially if the intent was to restore a wetland. One commenter recommended adding to the text of this NWP an explanation of which aquatic habitat restoration, enhancement, or establishment activities may be eligible for Clean Water Act section 404(f) exemptions. One commenter asked if this NWP authorizes the removal of bulkheads, derelict structures, and piles.

We require PCNs or reporting for all NWP 27 activities to ensure the proposed activities comply with the terms and conditions of this permit, especially the requirement that authorized activities result in net increases in aquatic resource functions and services. While there are a number of states that implement stream restoration programs, there is still much debate over the most appropriate methods to use to restore streams. Therefore, the Corps' review is necessary to ensure that proposed stream restoration activities in jurisdictional waters and wetlands are authorized by this NWP. We will continue to use of NWP 27 to authorize regulated activities associated with the construction and management of approved mitigation banks. Nationwide permit 27 may also be used to authorize aquatic habitat restoration, enhancement, and establishment activities for in-lieu fee projects. Under the requirements of 33 CFR 332.8(d), all proposed mitigation banks and in-lieu fee programs must go through a public notice and comment process, as well as interagency review.

If NWP 27 is used to authorize discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States to conduct a compensatory mitigation project required as conditions of a DA permit, monitoring will be required (see 33 CFR 332.6). If an NWP 27 activity is not being conducted as compensatory mitigation to fulfill the requirements for a DA permit, then monitoring may or may not be required, depending on the activity-specific circumstances. Monitoring of NWP 27 activities can provide information useful to other practitioners of aquatic habitat restoration, enhancement, or establishment activities, but it is optional unless the district engineer imposes conditions in the NWP verification to require monitoring.

In general, the Clean Water Act section 404(f) exemptions do not have much applicability to NWP 27 activities, with the possible exception of maintenance activities. Therefore, we do not believe that there needs to be text added to this NWP to explain when the Clean Water Act section 404(f) exemptions might apply to aquatic

habitat restoration, enhancement, and establishment activities. The removal of bulkheads, derelict structures, and piles could be authorized by this NWP if that removal is a component of the aquatic habitat restoration or enhancement activity, such as a wetland restoration activity in estuarine waters. The removal of those structures may also be authorized by NWP 3.

This NWP is reissued with the modifications discussed above.

NWP 28. *Modifications of Existing Marinas.* We did not propose any changes to this NWP. One commenter asked whether modifications of existing marinas should not include overwater coverage, increases in slip size, or additional vessel moorage.

This NWP authorizes modifications of existing marinas, including changes to the arrangement of structures within the previously authorized marina boundaries. This NWP does not authorize structures in navigable waters outside of the boundaries of the authorized marina. The area occupied by the authorized marina cannot change but within that occupied area the permittee can increase slip size or decrease slip size. If slip size is increased to accommodate larger vessels, there will be fewer slips within the marina. If slip size is decreased to provide slips for smaller vessels, there will be more slips in the marina for those smaller vessels to use. This NWP is reissued without change.

NWP 29. *Residential Developments.* We proposed to modify the terms of this NWP to clarify that any loss of stream bed applies towards the 1/2-acre limit, and that 1/2-acre limit for all losses cannot be exceeded.

Several commenters objected to the proposed reissuance of this NWP, and some said that the activities authorized by this NWP result in more than minimal adverse environmental effects. One commenter said this NWP should not authorize residential developments in channel migration zones and floodplains where direct and indirect impacts to special status species could occur. Several commenters stated that NWP 29 should be limited to residential developments that use low-impact development construction practices, demonstrate avoidance and minimization of impacts, and do not involve channelization or relocation of perennial and intermittent streams. One commenter recommended limiting this NWP to single family homes.

The ½-acre limit, the requirement that all activities authorized by this NWP require PCNs, the general conditions that apply to these activities including mitigation requirements in those general conditions, and the district engineers' review of PCNs ensures that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse effects. Division engineers can modify, suspend, or revoke this NWP in geographic areas where there is potential for more than minimal individual and cumulative adverse environmental impacts to occur. Regional conditions can be added by division engineers to protect important regional resources by restricting or prohibiting impacts to those resources caused by discharges of dredged or fill material into jurisdictional waters and wetlands. Impacts to 100-year floodplains are minimized through the requirements general condition 10, fills in 100-year floodplains, which states that all NWP activities must comply with applicable FEMA-approved state or local floodplain management requirements. The protection of federally-listed threatened and endangered species is addressed through general condition 18, endangered species. District engineers will review PCNs and conduct ESA section 7 consultation for any proposed activity that may affect listed species or designated critical habitat. Other categories of special status species can be protected through regional conditions imposed by division engineers, or activity-specific conditions added to NWP authorizations by district engineers.

It is not necessary to limit NWP 29 to low-impact development activities because other types of residential development activities may also result in no more than minimal adverse environmental effects and thus qualify for NWP authorization. Paragraph (a) of general condition 23, mitigation, requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site. If the project proponent is proposing to channelize or relocate perennial or intermittent streams, the district engineer will evaluate the PCN and determine whether the proposed activity will result in only minimal adverse environmental effects. The district engineer may add conditions to the NWP authorization to require mitigation to reduce the adverse environmental effects so that they are no more than minimal. This NWP does not need to be limited to single family residences because the terms and conditions of the NWP, including the ''subdivisions'' paragraph, will ensure that multiple unit residential developments will result in no more than minimal individual and cumulative adverse environmental effects.

One commenter said the ½-acre limit should apply cumulatively to the original construction and to all subsequent phases of the residential development. One commenter recommended reducing the acreage limit to 1/10-acre. Another commenter stated that the acreage and linear foot limits of this NWP are too high and compensatory mitigation should be required for all impacts to wetlands and streams. One commenter said stream impacts authorized by this NWP should be limited to ephemeral streams.

The subdivision provision of this NWP, the requirements of general condition 15 (single and complete project), and the application of the definition of ''single and complete non-linear project'' will limit the environmental impacts of the phases of multi-unit residential developments so that they are no more than minimal. The ½-acre limit, plus the requirement that all activities require PCNs and thus get case-by-case review by district engineers, are sufficient to ensure that the NWP authorizes only those activities with no more than minimal adverse environmental effects, instead of reducing the acreage limit to 1/10-acre.

Compensatory mitigation requirements for activities authorized by this NWP are determined on a case-by-case basis by district engineers when they review PCNs, in accordance with 33 CFR 330.1(e)(3) and general condition 23. Compensatory mitigation is only required when the district engineer determines the proposed impacts are more than minimal and the project proponent submits a compensatory mitigation plan that the district engineer determines will ensure that the authorized activity will result in no more than minimal adverse environmental effects. When district engineers evaluate PCNs, they will evaluate any proposed impacts to perennial and intermittent streams, so we do not think it is necessary to limit this NWP to ephemeral streams. Division engineers can modify this NWP by adding regional conditions to restrict or prohibit its use in certain types of waters, such as perennial and intermittent streams.

Several commenters said that district engineers should not be allowed to waive the 300 linear foot limit for losses of stream bed. One commenter stated that resource agencies should review requests for waivers of the 300 linear foot limit.

All requests for waivers of the 300 linear foot require PCNs and those PCNs will be coordinated with the resource agencies in accordance with paragraph (d) of general condition 32. The district engineer will fully consider agency comments when making his or her decision whether to provide a written waiver of the 300 linear foot limit and issue the NWP verification. The district engineer's review process, including the agency coordination for waiver requests, will ensure that losses of stream bed authorized by this NWP will result in no more than minimal adverse environmental effects, individually and cumulatively.

This NWP is reissued as proposed.

NWP 30. *Moist Soil Management for Wildlife.* We did not propose any changes to this NWP. Several commenters requested clarification of the activities authorized by this NWP. Several commenters suggested imposing limits on this NWP. Several commenters said that PCNs should be required for NWP 30 activities.

This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States to manipulate wetland soils so that habitat and feeding areas can continue to support target wildlife populations. This NWP does not authorize the construction of new features on these wildlife management areas, and it does not authorize the conversion of wetlands to uplands or open waters. Because this NWP only authorizes on-going soil management activities and does not authorize any losses of jurisdictional wetlands, we do not think an acreage limit or a PCN requirement is necessary. Moist soil management activities conducted by non-federal permittees that might affect species listed under the Endangered Species Act, are in the vicinity of listed species or designated critical habitat, or are in designated critical habitat, require PCNs under general condition 18, endangered species.

This NWP is reissued without change.

NWP 31. *Maintenance of Existing Flood Control Facilities.* We did not propose any changes to this NWP. Several commenters objected to the proposed reissuance of this NWP. Several commenters recommended changing the definition of ''abandoned'' at the end of the second paragraph of this NWP. They said that the definition of ''abandoned'' should not include facilities where the owner or responsible party is making a good faith effort to secure the required approvals for maintenance activities. One commenter stated that the provisions regarding abandoned facilities should be removed. One commenter said that PCNs should be required for all NWP 31 activities.

We have added a sentence to the end of the second paragraph of this NWP to state that the Corps will not consider the flood control facility to be abandoned if the applicant is trying to obtain other authorizations or approvals that are required by other agencies to conduct the maintenance activities. We understand that there may be delays in obtaining authorizations or approvals from other government agencies. There may also be delays caused by the time it takes to complete Endangered Species Act section 7 consultations for the activities authorized by this NWP. Such delays should not cause these facilities to be considered ''abandoned'' as long as the entity responsible for these flood control facilities is making a good faith effort to obtain all required approvals and authorizations. We believe the abandonment provision should be retained because this NWP only authorizes maintenance activities, not the reconstruction of flood control facilities that have been abandoned long enough to require rebuilding those facilities. All activities authorized by this NWP already require PCNs, and the PCN may cover maintenance activities anticipated to take place during the 5 year period this NWP is in effect.

One commenter recommended modifying the last sentence of the first paragraph of this NWP to state that all dredged material must be placed outside of waters of the United States and the 100-year floodplain, and require the use of proper siltation controls. Several commenters suggested adding requirements for establishing the maintenance baseline, such as specifically identifying the responsible party, the completion deadline, and the approval authority. These commenters also said that the maintenance baseline should be reviewed and updated at prescribed intervals.

We have modified the last sentence of the first paragraph of this NWP to make it consistent with similar provisions in NWPs 19 and 35, and to make a separate sentence to address the need for sediment controls. In the final NWP, the second to the last sentence of the first paragraph reads as follows: ''All dredged and excavated material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.'' We have added ''and excavated'' after ''dredged'' to make it clear that the requirement in this sentence includes material removed by excavation activities that require Clean Water Act section 404 authorization. We have changed the word ''siltation'' to ''sediment'' so that the new last sentence of this paragraph is consistent with the terminology used in general condition 12, soil erosion and sediment controls, and to acknowledge that sediment is not limited to silt, but ranges in size from clay particles to boulders.

The Corps does not regulate activities in 100-year floodplains, unless they consist of discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. Therefore, we cannot require that materials dredged or excavated for flood control facility maintenance be placed outside of 100-year floodplains because in many areas of the country 100-year floodplains consist of large areas of uplands. We do not believe that the identification of the maintenance baseline requires identification of the responsible party, the completion deadline, or the approval authority. As already stated in the NWP, revocation or modification of the final determination of the maintenance baseline can only be done by following the procedures in 33 CFR 330.5. Since this NWP only authorizes maintenance activities relative to a prior constructed or approved capacity, maintenance baselines should not require periodic reviews or updates.

One commenter requested removal of the requirement for mitigation. A commenter said that recurring maintenance activities should not require mitigation, and that facilities constructed before the enactment of the Clean Water Act should not require mitigation. Several commenters recommended requiring mitigation for recurring maintenance activities. Another commenter stated that this NWP should require mitigation for habitat losses, impacts to anadromous fish, and impacts to special status species.

We are retaining the provisions that allow district engineers to impose one-time compensatory mitigation requirements after the maintenance baseline is established. We are providing additional guidance on applying the term ''one-time.'' We have added a Note to this NWP to clarify that the one-time compensatory mitigation requirement applies only once since NWP 31 was first issued in 1996 (61 FR 65873). Each subsequent reissuance of NWP 31 did not create an opportunity for district engineers to impose a new one-time compensatory mitigation requirement on activities authorized by previous versions of NWP 31, because

the activities authorized by NWP 31 are limited to maintenance activities. For example, if an entity responsible for an existing flood control facility established a maintenance baseline and received an NWP verification under the NWP 31 issued in 1996, and did one-time compensatory mitigation under that 1996 authorization, then that entity does not have to do compensatory mitigation for each subsequent reissuance of NWP 31 that authorizes maintenance back to the maintenance baseline established under the 1996 NWP 31 authorization.

We do not believe that compensatory mitigation under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899 should be required for recurring maintenance activities. For example, if the maintenance activities authorized by NWP 31 are determined by the district engineer to ''may affect'' listed species or critical habitat, ESA section 7 consultation is required (see general condition 18). There may be flood control maintenance activities where ESA section 7 compliance is accomplished through informal consultation and written concurrence from the U.S. Fish and Wildlife Service and/or National Marine Fisheries Services, with mitigation in the form of avoidance and minimization so that the flood control maintenance activity will have no adverse effects on listed species or critical habitat and will not result in incidental take of listed species. If formal ESA section 7 consultation is required for the NWP 31 activity, the biological opinion may include terms and conditions, including mitigation measures in the form of minimization, to minimize incidental take of listed species. Mitigation measures conducted for the purposes of ESA section 7 are not counted toward the one-time mitigation provision in the ''mitigation'' paragraph of this NWP.

This NWP is reissued with the modifications discussed above.

NWP 32. *Completed Enforcement Actions.* We proposed to modify paragraph (i)(a) of this NWP to clarify that the 5 acre and 1 acre limits apply to the areas adversely affected by the activities that remain after resolution has been achieved. Several commenters expressed their support for the proposed modification of this NWP. Several commenters recommended deleting paragraphs (a) and (b) of this NWP, saying there should be no acreage limits for this NWP or a requirement to provide environmental benefits.

We have adopted the proposed modification of this NWP. The acreage limits in paragraph (a)(i) of this NWP, as well as the requirement for net environmental benefits, are necessary to ensure that authorized activities result in no more than minimal individual and cumulative adverse environmental effects.

One commenter said that NWP 32 should be limited to formal enforcement actions for intentional and willing violations that warrant penalties, instead of after-the-fact authorizations. This commenter also stated that use of NWP 32 should not preclude a state's ability to pursue enforcement actions under applicable state laws and regulations. One commenter suggested deleting the second to last sentence of this NWP, which states that the NWP ''does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit.'' One commenter stated that the Corps should consult with affected tribes before administering any enforcement action. Another commenter said that NWP 32 should be modified to allow additional enforcement actions, such as assessment of civil penalties, if the permittee does not comply with the NWP 32 authorization.

We believe that this NWP should be available to authorize activities regulated by the Corps to complete the types of enforcement actions listed in the text of the NWP. The use of NWP 32 to complete enforcement actions only provides DA authorization for applicable activities. It does not affect a state's authority to conduct its own enforcement actions under applicable state laws and regulations. The second to last sentence of this NWP is an important limitation and we will not delete it. For the 2017 NWPs, Corps districts are consulting with tribes to identify regional conditions to protect tribal trust resources. Additionally, Corps districts can develop procedures to consult with tribes prior to conducting enforcement actions. We have modified the first sentence of the last paragraph of this NWP to state that non-compliance with the terms and conditions of an NWP 32 authorization may result in an additional enforcement action, such as a Class I civil administrative penalty under 33 CFR 326.6.

This NWP is reissued as proposed.

NWP 33. *Temporary Construction, Access, and Dewatering.* We proposed to modify this NWP to change the PCN threshold to require notification only for temporary construction, access, and dewatering activities in navigable waters of the United States (*i.e.,* waters subject to Section 10 of the Rivers and Harbors Act of 1899). Several commenters supported the proposed change to this NWP and several commenters opposed the proposed change. We have changed the ''Notification'' requirement to only require PCNs for activities in waters subject to section 10 of the Rivers and Harbors Act of 1899.

One commenter stated that this NWP should clarify that impact thresholds only apply to permanent, not temporary, losses of waters of the United States. One commenter recommended defining ''temporary.'' One commenter expressed support for reissuing this NWP, as long as it does not authorize permanent impacts. One commenter said that temporary fills should be authorized for a period of up to two years because temporary causeways and work pads are occasionally needed for projects that take multiple years to construct. One commenter recommended adding a ½-acre limit for losses of waters of the United States and a 300 linear foot limit for losses of stream bed.

This NWP only authorizes temporary impacts to jurisdictional waters and wetlands. Permanent impacts to jurisdictional waters and wetlands are not authorized by this NWP, and this NWP requires restoration of affected areas after completion of construction. Permanent impacts to jurisdictional waters and wetlands can be authorized by another NWP, a regional general permit, or an individual permit. Determining when activities regulated under the Corps' authorities result in temporary impacts to jurisdictional waters and wetlands versus permanent impacts to those waters and wetlands is at the discretion of the district engineer. Because this NWP only authorizes temporary impacts to jurisdictional waters and wetlands that must be restored upon completion of the work, we believe that it is not necessary to impose acreage or linear foot limits. For the NWPs, the acreage limits only apply to permanent adverse effects to waters of the United States (see the definition of ''loss of waters of the United States'' in Section F. The linear foot limits apply to losses of stream bed caused by filling or excavation.

One commenter said that NWP 33 should be revised to avoid conflicts with excavation activities that do not require Clean Water Act section 404 authorization, such as removal of accumulated sediment from a dry stream channel. In addition, this commenter stated that this NWP should not require the removed material be returned to its original location or that the excavated area be returned to pre-construction elevations. One commenter

suggested requiring PCNs and coordination with federal and state natural resource agencies when proposed activities occur in non-tidal waters in which federally- and/or state-listed endangered and threatened mussels are known to occur.

This NWP only authorizes temporary construction, access, and dewatering activities that require DA authorization. If an excavation activity does not involve regulated discharges of dredged or fill material into waters of the United States, then there is no conflict with the activities that require DA authorization and are covered by this NWP. This NWP requires waters of the United States that are temporarily filled as a result of regulated activities to be restored to pre-construction elevations. If a proposed activity might affect ESA-listed endangered or threatened species or designated critical habitat, such species are in the vicinity of the proposed activity, or if the proposed activity is in designated critical habitat, general condition 18 requires non-federal permittees to submit PCNs. The district engineer will review those PCNs and determine if ESA section 7 consultation is required because the proposed activity may affect listed species or designated critical habitat. If ESA section 7 consultation it is required, the district engineer will conduct formal or informal consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, as appropriate. Effects to state-listed endangered or threatened species are more appropriately addressed through state regulatory and non-regulatory programs.

Several commenters said that this NWP should require PCNs for all activities involving discharges of dredged or fill material into special aquatic sites. Two commenters stated that not requiring PCNs for all activities authorized by this NWP provides no assurance that the adverse environmental effects will be no more than minimal. One commenter asserted that PCNs are necessary to ensure that pre-construction contours and hydrology are restored and that affected areas are revegetated without invasive species. One commenter said that PCNs should be required for activities in non-tidal waters that are important tribal resources, so that tribes will have the opportunity to review and comment on those activities. One commenter stated that the proposed change to require PCNs only for activities in section 10 waters would result in degradation of the affected waterbodies, and dewatering activities are problematic in areas with methane.

We are retaining the proposed change to this NWP, which is to only require PCNs for activities in navigable waters subject to section 10 of the Rivers and Harbors Act of 1899. In waters subject only to section 404 of the Clean Water Act, PCNs will be required for any NWP 33 activity that triggers a PCN requirement under general condition 18, endangered species, and/or general condition 20, historic properties. For activities in designated critical resource waters and their adjacent wetlands, PCNs are required by general condition 22, designated critical resource waters. Division engineers can modify this NWP by adding regional conditions to require PCNs in waters subject only to Clean Water Act jurisdiction. The terms and conditions of this NWP, including regional conditions imposed by division engineers, will ensure that NWP 33 activities that do not require PCNs will result in no more than minimal adverse environmental effects, and that pre-construction contours and hydrology are restored after the temporary fills are removed. The terms of the NWP also require that affected areas are revegetated as appropriate. For the 2017 NWPs, Corps districts are consulting with tribes to identify regional conditions to protect tribal trust resources. Those regional conditions can require PCNs for those NWP 33 activities that have the potential to affect tribal trust resources, and district engineers can coordinate those PCNs with interested tribes. The terms and conditions of this NWP, plus the requirements of water quality certifications issued by states, tribes, or the U.S. EPA, will ensure that NWP 33 activities will have only minimal adverse effects on water quality. Concerns regarding methane emissions are more appropriately addressed by agencies that have regulatory authority over such emissions.

This NWP is reissued as proposed.

NWP 34. *Cranberry Production Activities.* We did not propose any changes to this NWP. One commenter objected to the reissuance of this NWP and said that these activities should require individual permits.

This NWP requires pre-construction notification for all activities, so that the district engineer can determine whether a specific cranberry production activity will result in no more than minimal adverse environmental effects. The district engineer will exercise discretionary authority and require an individual permit for a cranberry production activity that requires authorization under section 404 of the Clean Water Act and is determined, after considering the applicant's mitigation proposal, to result in more than minimal adverse environmental effects. Corps districts, through their division commanders, may also revoke this NWP and develop regional general permits with different terms and conditions to authorize these activities. This NWP is reissued as proposed.

NWP 35. *Maintenance Dredging of Existing Basins.* We proposed to modify this NWP to state that all dredged material must be placed in an area that has no waters of the United States, unless placement of the dredged material into waters of the United States is authorized by a separate DA authorization.

One commenter expressed support for the proposed modification. Another commenter objected to the proposed modification, stating that the NWP should authorize the placement of dredged material into jurisdictional waters. Another commenter objected to the reissuance of this NWP, saying that clamshell bucket dredging causes more than minimal adverse environmental effects.

The placement of the dredged material into jurisdictional waters and wetlands can be authorized by other NWPs, regional general permits, or individual permits. We have revised that sentence so that it is consistent with the text of NWP 19. Clamshell bucket dredging within existing basins will not cause more than minimal adverse environmental effects. Those existing basins are currently being used by vessels and the additional adverse effects resulting from dredging these disturbed basins will be no more than minimal. Also, the incidental soil movement that occurs during clamshell dredging for normal navigational dredging activities is not a regulated discharge under section 404 of the Clean Water Act (see 33 CFR 323.2(d)(3)(ii)).

One commenter remarked that beneficial use of dredged material may be a better alternative that disposal in upland areas, because beneficial use can improve aquatic habitat. One commenter suggested authorizing beneficial uses of dredged material after conducting coordination with federal and state natural resource agencies. One commenter said that this NWP should have a limit to the volume of material excavated from existing basins. Another commenter stated that this NWP should not authorize activities in waters with known or suspected sediment contamination at levels that would be harmful to aquatic organisms.

If the project proponent or other entity identifies beneficial uses for the material dredged from the basin, then he or she can seek DA authorization

through another NWP, a regional general permit, or an individual permit. If the proposed beneficial use is authorized by a general permit, then the project proponent may or may not have to submit a PCN to the district engineer, depending on the terms and conditions of the applicable general permit. If authorized by general permit, there may or may not be agency coordination depending on the procedures associated with that general permit. Beneficial uses of dredged material that require individual permits will public notices and coordination with federal and state natural resource agencies. Maintenance dredging activities in areas with known or suspected sediment contaminants can use best management practices and other techniques to minimize the adverse environmental effects that might be caused by exposure of those contaminants during dredging. Concerns regarding contaminants in existing basins will be considered by district engineers for those NWP 35 activities that require PCNs.

This NWP is reissued with the modifications discussed above.

NWP 36. *Boat Ramps.* We did not propose any changes to this NWP. One commenter objected to the proposed reissuance of this NWP and said that individual permits should be required for these activities. Several commenters recommended limiting fills in jurisdictional waters and wetlands to 25 cubic yards. One commenter suggested increasing the width limit from 20 to 30 feet and increasing the discharge limit to 100 cubic yards. Several commenters said that district engineers should not be authorized to issue waivers to allow permittees to exceed the cubic yard and width limits for this NWP.

Most boat ramps are constructed within the limits of this NWP and result in no more than minimal individual and cumulative adverse environmental effects. For those activities that have the potential to result in more than minimal adverse environmental effects, this NWP requires PCNs so that district engineers can evaluate those proposed activities to ensure that they result in no more than minimal adverse environmental effects. If the proposed boat ramp will result in more than minimal adverse environmental effects, the district engineer will ask the prospective permittee to submit a mitigation proposal. If the mitigation proposal will ensure the proposed boat ramp will result in no more than minimal adverse environmental effects, the district engineer will issue the NWP verification with conditions requiring the implementation of the mitigation. If the mitigation proposal is not sufficient to ensure no more than minimal adverse environmental effects, the district engineer will exercise discretionary authority and require an individual permit. These procedures also apply to PCNs requesting waivers of the 50 cubic yard limit and/or the 20-foot width limit.

We are retaining the 50 cubic yard limit and the width limit of 20 feet, as well as the waiver provisions for these limits. This is to provide flexibility so that district engineers can use NWP 36 to authorize those activities that they determine, after reviewing the PCNs, to result in no more than minimal individual and cumulative adverse environmental effects.

This NWP is reissued without change.

NWP 37. *Emergency Watershed Protection and Rehabilitation.* We did not propose any changes to this NWP and did not receive any comments. This NWP is reissued without change.

NWP 38. *Cleanup of Hazardous and Toxic Waste.* We did not propose any changes to this NWP, and no comments were received. This NWP is reissued without change.

NWP 39. *Commercial and Institutional Developments.* We proposed to modify this NWP to clarify that it authorizes discharges of dredged or fill material into waters of the United States to construct wastewater treatment facilities. We also proposed to modify the terms of this NWP to clarify that any loss of stream bed applies towards the ½-acre limit, and that ½-acre limit cannot be exceeded.

Several commenters objected to the proposed reissuance of this NWP, stating that commercial and institutional developments should be authorized by individual permits instead of NWPs because they result in more than minimal adverse environmental effects. Several commenters supported the proposed addition of wastewater treatment facilities to the list of examples of attendant features that may be authorized by this NWP. One commenter said that this NWP should not authorize oil and gas wells and their attendant infrastructure. This commenter also stated that NWP 39 should not authorize commercial and institutional developments in channel migration zones or floodplains critical to salmon populations.

The terms and conditions of this NWP, including the acreage and linear foot limits and the reviews of PCNs by district engineers, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. All activities authorized by this NWP require PCNs. The district engineer will exercise discretionary authority and require an individual permit for any proposed NWP 39 activity that he or she determines will result in more than minimal adverse environmental effects, after considering the mitigation proposal provided by the applicant. We have added wastewater treatment facilities as an example of attendant features authorized by this NWP. The construction of oils and gas wells that involves discharges of dredged or fill material into waters of the United States can be authorized by this NWP as long as the proposed activity complies with the terms and conditions of this NWP and the district engineer determines the proposed activity will result in only minimal adverse environmental effects.

The construction of commercial and institutional developments in jurisdictional waters and wetlands within floodplains must comply with general condition 10, fills in 100-year floodplains. All activities authorized by this NWP require PCNs and the district engineer will review the PCN to determine if the proposed activity may affect any ESA-listed endangered or threatened species, or their designated critical habitat. If the district engineer determines the proposed activity may affect listed species or designated critical habitat and the prospective permittee is a non-federal permittee, the district engineer will conduct formal or informal ESA section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service. If the project proponent is a non-federal permittee, the activity is not authorized by NWP until section 7 consultation is completed and the district engineer issues the NWP verification. Division engineers can add regional conditions to this NWP to restrict or prohibit its use in waters of the United States in channel migration zones. District engineers can add activity-specific conditions to NWP verifications to restrict its use in waters of the United States in channel migration zones.

One commenter recommended increasing the acreage limit to 1 acre, and the linear foot limit for losses of stream bed to 1,000 feet. Another commenter said that this NWP should have flexibility in authorizing losses of stream bed, and stated that there should not be a hard limit for losses of stream bed. One commenter said that there should only be limits for losses of ephemeral streams. One commenter suggested decreasing the acreage limit to 1/10-acre. One commenter stated that the limits in this NWP are too high and

compensatory mitigation should be required for all impacts to wetlands and streams.

We are retaining the ½-acre and 300 linear foot limits for this NWP, as well as the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed upon making a written determination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. All of the activities authorized by this NWP require PCNs, which provide case-by-case review to ensure that all authorized activities result in no more than minimal adverse environmental effects. To assist district engineers in making their written determinations for waiver requests, agency coordination is required for PCNs requesting waivers of the 300 linear foot limit (see paragraph (d) of general condition 32). The loss of stream bed is counted towards the ½-acre limit for this NWP, and that ½-acre limit cannot be exceeded under any circumstances. The limits for losses of stream bed apply to perennial, intermittent, and ephemeral streams. Reducing the acreage limit to 1/10-acre would result in commercial and institutional development activities that result in no more than minimal adverse environmental effects requiring individual permits. In accordance with 33 CFR 330.1(e)(3) and general condition 23, compensatory mitigation is only required when the district engineer determines that compensatory mitigation is necessary for a particular activity to ensure that that NWP activity results in only minimal individual and cumulative adverse environmental effects.

One commenter suggested changing the PCN threshold to losses of ½-acre of wetlands or open waters or losses of 300 linear feet of stream. The ½-acre PCN threshold would be used if the acreage limit for this NWP is increased to 1 acre. One commenter requested that the NWP clarify whether acreage limits apply cumulatively to the original construction and any subsequent expansion of the commercial or institutional development.

We believe that it is necessary to require PCNs for all NWP 39 activities to ensure they will cause only minimal individual and cumulative adverse environmental effects. The acreage limit applies to each single and complete project. See the definition of ''single and complete non-linear project'' which applies to most NWP 39 activities. There could be NWP 39 activities that are linear projects, but they are likely to be rare. If the expansion of a commercial or institutional development requires DA authorization and the expansion does not have independent utility from the existing commercial or institutional development, then the acreage limit applies to the original, existing commercial or institutional development (if it was originally authorized by NWP 39) and the proposed expansion.

We have modified the second sentence of the second paragraph of this NWP by replacing the word ''only'' with the phrase ''no more than'' to make this sentence consistent with the corresponding sentences in NWPs 29 and 43.

This NWP is reissued with the modification discussed above.

NWP 40. *Agricultural Activities.* In the June 1, 2016, proposed rule, we requested comments on whether any clarifications are needed for this NWP. We also proposed to modify the terms of this NWP to clarify that any loss of stream bed applies towards the ½-acre limit, and that ½-acre limit cannot be exceeded.

Many commenters expressed their support for the proposed reissuance of this NWP. A few commenters objected to the proposed reissuance of this NWP and said that individual permits should be required for these activities. One commenter asserted that NWP 40 should not be reissued because it authorizes a broad range of activities that are difficult to distinguish from commercial or residential developments. One commenter requested clarification of which activities are authorized by this NWP. Another commenter said that the Corps should consider the cumulative effects of all activities that were ever authorized by this NWP.

The terms and conditions of this NWP, including the ½-acre and 300 linear foot limits as well as the PCN requirements, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. All activities authorized by this NWP require PCNs, so all proposed activities are reviewed by district engineers. This NWP complies with section 404(e) of the Clean Water Act because it authorizes a distinct category of activities that is similar in nature, that is agricultural activities that involve discharges of dredged or fill material into waters of the United States. There may be some overlap with NWP 39, for people who consider farm buildings to be commercial buildings. There are a number of activities that may be authorized by more than one NWP, and such redundancy is not problematic because the statutory requirement for all NWPs and other general permits is the same: those general permits can only authorize activities that have no more than minimal individual and cumulative adverse environmental effects. We believe that the current list of examples of activities authorized by this NWP is sufficient. If a project proponent or concerned individual has questions about whether a particular activity is authorized by NWP 40, then he or she can contact the local Corps district office to ask those questions. In our NEPA cumulative effects analysis in the decision document for this NWP, we considered the aggregate impacts of activities authorized by past versions of NWP 40.

One commenter stated that the acreage limit for this NWP is too high, and that waivers of the 300 linear foot limit for losses of stream bed should not be authorized for impacts to streams inhabited by anadromous salmon. Another commenter opposed allowing district engineers to waive the 300 linear foot limit for losses of intermittent or ephemeral stream bed, while another commenter voiced support for that provision. One commenter said that district engineers should be allowed to waive the ½-acre limit. This commenter said that all NWP 40 activities should require mitigation. One commenter said the acreage limit should be reduced to 1/16-acre. One commenter asked for clarification of ''loss of stream bed'' as it applies to the 300 linear foot limit. One commenter said that impacts to intermittent streams should not be authorized by this NWP. Another commenter said that compensatory mitigation should not be required for activities authorized by this NWP.

The ½-acre limit, and the review of PCNs by district engineers, will ensure that activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. Proposed NWP 40 activities that might affect anadromous salmon that are listed under the Endangered Species Act, or their designated critical habitat, must comply with general condition 18, endangered species. District engineers will review PCNs and conduct ESA section 7 consultations for any proposed NWP 40 activities that will be conducted by non-federal permittees, when they determine that the proposed activities may affect listed species or designated critical habitat. In those cases, the activities are not authorized by NWP until ESA section 7 consultation is completed and the

district engineers issue the NWP verifications.

We are retaining the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. To be authorized by NWP 40, the district engineer must issue a written waiver after conducting agency coordination with a finding that the proposed activity will result in no more than minimal adverse environmental effects. We are retaining the ½-acre limit for this NWP and that ½-acre limit cannot be waived. Any loss of stream bed applies to that ½-acre limit. Agricultural activities resulting in the loss of greater than ½-acre of waters of the United States require authorization by individual permit, or if available, by regional general permit. Compensatory mitigation requirements are determined by district engineers on a case-by-case basis during the evaluation of PCNs. District engineers will apply 33 CFR 330.1(e)(3) and general condition 23 to determine when compensatory mitigation is to be required for NWP 40 activities. The definition of ''loss of waters of the United States'' in Section F explains how losses of stream bed are calculated for the purposes of the NWPs. The district engineer will evaluate proposed losses of intermittent streams and determine whether those losses qualify for NWP 40 authorization.

This NWP is reissued as proposed.

NWP 41. *Reshaping Existing Drainage Ditches.* In the June 1, 2016, proposal, we solicited comment on clarifications or changes to NWP 41 that might encourage more landowners to reshape their drainage ditches to help improve local water quality. We also requested suggestions for text to clarify the NWP for circumstances where original ditch configuration information is not available. We also proposed to remove the requirement to submit a PCN if more than 500 linear feet of ditch is to be reshaped.

One commenter expressed support for the reissuance of NWP 41. One commenter asked if this NWP applies to agricultural ditches. Several commenters suggested adding a list of ditch modifications that are authorized by NWP 41. Several commenters recommended removal of the prohibition against increasing the amount of land area drained by the ditch. One commenter said this NWP should authorize discharges for small berms or grade breaks to manage flows. Another commenter stated that this NWP should authorize minor ditch relocation and stabilization activities.

This NWP authorizes the reshaping of existing, currently serviceable drainage ditches constructed in waters of the United States that are used for any purpose, including agricultural ditches. We do not believe it is necessary to provide a list of ditch modifications authorized by this NWP because this NWP only authorizes modifications of the cross-sectional configuration of the ditch to improve water quality. Other types of ditch modifications require separate DA authorization if those activities involve discharges of dredged or fill material into waters of the United States. This NWP does not authorize ditch relocation activities; those activities may be authorized by NWPs 29, 39, or 40, or other NWPs, or may be authorized by regional general permits or individual permits. Bank stabilization activities may be authorized by NWP 13.

Several commenters said that NWP 41 should authorize standard ditch reshaping activities that have 1:6 front slopes and 1:4 back slopes, or require ditch reshaping activities to match adjoining ditch segments. Another commenter asserted that slope stability should be addressed by requiring, at a minimum, 2:1 ditch side slopes, prohibiting vertical side slopes, and conducting the ditch reshaping activity in a manner that prevents the release of excavated material into the water.

For this NWP, it would not be appropriate for us to prescribe specific side slopes for the reshaped ditches. The appropriate side slopes should be determined on a case-by-case basis by the project proponent, and that project proponent may want to consult with people that have expertise in modifying ditch configurations to improve water quality without changing the area drained by the ditch. Sediment erosion controls should be used when appropriate to minimize releases of excavated material into jurisdictional waters. See general condition 12, soil erosion and sediment controls, for additional information.

Many commenters supported removing the PCN requirement, and many commenters objected to removing the PCN requirement. One commenter stated that it is unclear how removing PCN requirements for NWP 41 would facilitate reshaping of drainage ditches. One commenter recommended requiring PCNs for all NWP 41 activities. One commenter stated that the Corps should accept electronic PCNs.

We have removed the PCN requirement for this NWP, but it should be noted that proposed NWP 41 activities must comply with general condition 18, endangered species, and general condition 20, historic properties. Those general conditions require non-federal permittees to submit PCNs when any proposed activity might affect ESA-listed species or designated critical habitat and/or may have has potential to cause effects to historic properties. See the text of those general conditions for more information. If PCNs are not required for the activities authorized by this NWP, potential project proponents may be less reluctant to pursue these activities. Paragraph (c) of general condition 32, pre-construction notification, allows district engineers to accept electronic copies of PCNs when district engineers have established mechanisms for accepting electronic documents.

Several commenters said that this NWP should require best management practices for NWP 41 activities. A few commenters suggested adding a requirement for excavated material to be placed in upland areas. One commenter asked for an explanation of how to determine whether a ditch is subject to Clean Water Act jurisdiction.

Division engineers can add regional conditions to this NWP to require regional best management practices associated with the reshaping of existing drainage ditches to improve water quality. Regional conditions are a more appropriate mechanism for ensuring that NWP 41 activities are consistent with regional water quality management approaches. Requiring excavated material to be placed in upland areas would prohibit using the excavated material to reshape the ditch, and be contrary to the objective of this NWP of providing a means of improving water quality by changing ditch configurations. The district engineer will apply the regulations and guidance that are in effect at the time he or she is processing a request for a jurisdictional determination for a ditch or ditches.

This NWP is reissued as proposed.

NWP 42. *Recreational Facilities.* We proposed to modify the terms of this NWP to clarify that any loss of stream bed applies towards the ½-acre limit, and that ½-acre limit cannot be exceeded. One commenter said that this NWP should not authorize recreational facilities in channel migration zones and floodplains where those facilities might have direct and indirect impacts to special status species or essential fish habitat. One commenter said that the ½-acre limit is too high. Another commenter stated that this NWP should not authorize activities in perennial and intermittent streams; it should only authorize activities in ephemeral streams.

Activities authorized by this NWP must comply with general condition 18, endangered species. All activities

authorized by this NWP require PCNs. District engineers will review these PCNs, and if the district engineer determines that a proposed activity that will be conducted by a non-federal permittee may affect listed species or designated critical habitat, the district engineer will conduct formal or informal ESA section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service. The proposed activity is not authorized by NWP until ESA section 7 consultation is completed.

Division engineers can impose regional conditions on this NWP to restrict or prohibit its use to protect other regionally important species. Activities authorized by NWP 42 that may adversely affect essential fish habitat require consultation with the appropriate office of the National Marine Fisheries Service. We believe that the ½-acre limit, along with the requirement that all NWP 42 activities require PCNs and thus activity-specific review by district engineers, will ensure that only those activities with no more than minimal adverse environmental effects are authorized by this NWP. The activity-specific review of PCNs by district engineers will ensure that the authorized activities will have no more than minimal adverse effects on perennial, intermittent, and ephemeral streams. Division engineers can add regional conditions to this NWP to restrict or prohibit its use in specific high-value rivers or streams.

This NWP is reissued without changes.

NWP 43. *Stormwater Management Facilities.* We proposed to modify the sentence that states that the maintenance of stormwater management facilities that are determined to be waste treatment systems under 33 CFR part 328.3(a)(8) generally does not require a section 404 permit. We also proposed to modify the terms of this NWP to clarify that any loss of stream bed applies towards the ½-acre limit for construction of stormwater management facilities, and that ½-acre limit cannot be exceeded.

We have removed the reference to 33 CFR 328.3(b)(6) from the last sentence of the second paragraph of this NWP, because the 2015 final rule defining ''waters of the United States'' is currently under a stay issued by the U.S. Court of Appeals for the Sixth Circuit. We have revised this sentence so that it simply states that the maintenance of stormwater management facilities that are not waters of the United States does not require a section 404 permit. We have retained the ½-acre limit for the construction of stormwater management facilities, and the statement that any losses of stream bed apply towards that ½-acre limit.

Several commenters said that the maintenance and expansion of existing stormwater management facilities in upland areas should be authorized without requiring PCNs. One commenter stated that stormwater management facilities should only be constructed in upland areas. One commenter said that only constructed wetlands should be used for stormwater detention or treatment. One commenter stated that NWP 43 should not be issued for developments that are proposed in channel migration zones and floodplains where direct and indirect impacts to special status species could occur.

If a stormwater management facility is expanded into an upland area, and that expansion does not involve discharges of dredged or fill material into waters of the United States, then that expansion does not require Clean Water Act section 404 authorization. It is not always possible or desirable to site stormwater management facilities in upland areas, and locating them in jurisdictional wetlands or other waters of the United States may be the only practicable option for effectively managing stormwater. This NWP authorizes the construction of these facilities in non-tidal jurisdictional wetlands and waters, as long as those activities result in no more than minimal individual and cumulative adverse environmental effects. Division engineers may add regional conditions to this NWP to protect other special status species. Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains.

We have retained the provision that prohibits discharges of dredged or fill material into waters of the United States for the construction of new stormwater management facilities in perennial streams. Stormwater management facilities may or may not include constructed wetlands, depending on the design decisions made by the project proponent. Activities authorized by this NWP must comply with general condition 18, endangered species. For the construction of new stormwater management facilities, or the expansion of existing stormwater management facilities, all activities require PCNs. District engineers will review those PCNs and will conduct ESA section 7 consultation for any proposed activity that may affect listed species or designated critical habitat. For the maintenance of stormwater management facilities, if proposed activities that require DA authorization might affect listed species or designated critical habitat, are in the vicinity of listed species or designated habitat, or are in designated critical habitat, non-federal permittees are required to submit PCNs. District engineers will review those PCNs and conduct ESA section 7 consultation for any proposed maintenance activity that may affect listed species or designated critical habitat.

One commenter recommended removing any references to waste treatment systems from the text of this NWP. Several commenters stated their support for clarifying language regarding application of the waste treatment system exclusion to the facilities covered by this NWP. These commenters recommended that the final NWP clarify that both the 1986 final rule (51 FR 41250–41251) and the 2015 final rule defining ''waters of the United States'' state that waste treatment systems designed to meet the requirements of the Clean Water Act are not subject to Clean Water Act section 404 jurisdiction. A few commenters requested clarification that, under NWP 43, PCNs are not required for stormwater management facilities constructed in upland areas and areas that are not waters of the United States.

As discussed above, we have removed the reference to 33 CFR 328.3(b)(6) from this NWP. The district engineer will determine whether a particular stormwater management facility is, or is not, a water of the United States by using the regulations and guidance for identifying waters of the United States that are in effect at the time the PCN is being evaluated. We do not believe it is necessary to cite specific regulations in the text of this NWP. Pre-construction notification is only required for the construction or expansion of new stormwater management facilities and pollutant load reduction best management practice facilities that involve discharges of dredged or fill material into waters of the United States. We have modified the first sentence of the ''Notification'' paragraph of this NWP to make it clear that PCNs are only required for certain regulated activities authorized by this NWP.

One commenter asserted that the ½-acre limit is too high. One commenter said that the provision allowing the district engineer to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed should be consistent with the provision in NWPs 29 and 39. Another commenter remarked that this NWP should not authorize losses of perennial and intermittent stream beds; authorized

losses of stream bed should be limited to ephemeral streams. A few commenters stated their support for allowing district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed when district engineers determine in writing that proposed activities will result in no more than minimal adverse environmental effects. A few commenters said there should be no caps on waivers.

The ½-acre limit and the PCN requirements, as well as the district engineer's review of activities that require PCNs, will ensure that the activities authorized by this NWP will result in no more than minimal adverse environmental effects. The second sentence of the third paragraph of this NWP is the same as the corresponding sentence in NWP 29. We have corrected the corresponding sentence in NWP 39 so that it is consistent with NWPs 29 and 43.

This NWP does not authorize discharges of dredged or fill material into waters of the United States for the construction of new stormwater management facilities in perennial streams. Maintenance activities in perennial steams are authorized, if such activities require authorization under section 404 of the Clean Water Act. This NWP also authorizes losses of stream bed for the construction and maintenance of pollutant reduction best management practice facilities and those losses are subject to the ½-acre and 300 linear foot limits. We are retaining the authority for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed if they make written determinations granting these waivers after reviewing PCNs and comments received during agency coordination. Under no circumstances may the ½-acre limit be exceeded for the losses of stream bed and other jurisdictional waters and wetlands.

In response to comments received on the proposal to reissue NWP 27, we are modifying NWP 43 to authorize the construction and maintenance of pollutant reduction green infrastructure features. Some commenters expressed concern about NWP 27 being used to authorize nutrient and sediment reduction features that are not aquatic habitat restoration or enhancement activities. Green infrastructure uses a combination of the natural environment and engineered features to help improve water quality and conserve ecosystem functions and services, to benefit people and wildlife.[1] The construction of these pollutant reduction green infrastructure features in jurisdictional waters and wetlands will be subject to the ½-acre limit in NWP 43. These pollutant reduction green infrastructure features may be constructed in jurisdictional waters and wetlands and involve discharges of dredged or fill material into those waters and wetlands. Those features may be constructed to reduce inputs of sediments, nutrients, and other pollutants into waterbodies to meet Total Daily Maximum Loads (TMDLs) established under the Clean Water Act. In cases where green infrastructure features do not resemble ecological references for aquatic habitats or riparian areas in the region, authorization by NWP 43 instead of NWP 27 is appropriate. District engineers will review PCNs for the construction of these proposed pollutant reduction green infrastructure features and determine whether they qualify for NWP 43 authorization. These features may also require periodic maintenance that involves discharges of dredged or fill material into jurisdictional waters and wetlands. These maintenance activities may also be authorized by NWP 43.

This NWP is reissued with the modifications discussed above.

NWP 44. *Mining Activities.* We proposed changes to the terms of this NWP to clarify the application of the ½-acre limit for losses of waters of the United States. In addition, we proposed to amend the text of this NWP to clarify that the loss of non-tidal waters of the United States, plus the loss of stream bed, cannot exceed ½-acre.

Several commenters said that mining activities result in more than minimal individual and cumulative adverse environmental effects, and should require individual permits. One commenter recommended that the Corps issue a separate NWP for aggregate mining activities with a higher acreage limit. A couple of commenters said that the limits for NWP 44 should be based on impacts instead of losses of waters of the United States. One commenter suggested reducing the acreage limit to 1/16-acre. One commenter stated that there is a difference in regulation of these activities under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899. Under Clean Water Act section 404, excavation activities that result in only incidental fallback are not regulated, but any dredging of navigable waters under section 10 of the Rivers and Harbors Act of 1899 requires DA authorization. One commenter said this NWP should prohibit discharges of processed materials created from mining activities into waters of the United States.

The terms and conditions of this NWP, including the ½-acre limit and the requirement that all activities require PCNs, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. District engineers will review these PCNs, and can add conditions to the NWP authorization, including mitigation requirements, to comply with the ''no more than minimal adverse environmental effects'' requirement for NWPs and other general permits. If a proposed activity will result in more than minimal adverse environmental effects, after considering the mitigation proposal provided by the prospective permittee, the district engineer will exercise discretionary authority and require an individual permit. Division engineers may also add regional conditions to this NWP to protect aquatic resources in certain regions or specific waterbodies. This NWP authorizes aggregate mining activities, and we do not believe a separate NWP for those activities is warranted.

Because of the types of waterbodies in which these activities are conducted (*i.e.,* open waters and wetlands), the acreage limits of this particular NWP are a hybrid of losses and impacts. There is a ½-acre limit for losses of non-tidal wetlands, and a ½-acre limit for impacts to open waters such as rivers and lakes. A mining activity that involves regulated activities in both non-tidal wetlands and non-tidal open waters is subject to an overall ½-acre limit. The ½-acre limit and the PCN requirements are sufficient to ensure that authorized activities result in no more than minimal individual and cumulative adverse environmental effects, so it is not necessary to reduce the acreage limit to 1/16-acre. The acreage limits only apply to regulated activities. Mining activities in waters subject only to Clean Water Act jurisdiction (*i.e.,* non-section 10 waters) that do not result in regulated discharges of dredged or fill material into waters of the United States are not counted towards the ½-acre limit. All mining activities in non-tidal waters subject to section 10 of the Rivers and Harbors Act of 1899 are subject to the ½-acre limit. Discharges of processed mine materials into waters of the United States may require authorization under section 402 of the Clean Water Act.

[1] *https://www.americanrivers.org/threats-solutions/clean-water/green-infrastructure/what-is-green-infrastructure/* (accessed December 9, 2016).

We have modified the fourth paragraph as follows, to be consistent with the other NWPs that have similar terms: ''The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects.''

This NWP is reissued with the modification discussed above.

NWP 45. *Repair of Uplands Damaged by Discrete Events.* To provide flexibility in the use of this NWP after major flood events or other natural disasters, we proposed to modify the PCN requirement to allow district engineers to waive the 12-month deadline for submitting PCNs.

One commenter said this NWP should not authorize restoration or repair activities involving structures waterward of the ordinary high water mark unless there is an immediate threat to the primary structure or associated infrastructure. One commenter recommended requiring the use of upland material to restore upland areas. One commenter asserted that the repair of upland areas damaged as a result of natural disasters should require individual permits. Another commenter stated that living shorelines should be encouraged as an alternative to restoring the affected upland areas and protecting them with hard bank stabilization techniques. One commenter said these activities should require advance notice to tribes. A commenter said that this NWP should state it does not authorize rerouting a stream to a historic course or alignment.

Any structures placed in navigable waters of the United States (*i.e.,* channelward of the ordinary high water mark or the mean high water in waters subject to section 10 of the Rivers and Harbors Act of 1899) require separate DA authorization. That authorization may be provided by another NWP, a regional general permit, or an individual permit. This NWP only authorizes restoration of the damaged upland areas up to the contours or ordinary high water mark that existed prior to the occurrence of the damage. It also authorizes bank stabilization activities, as long as those activities do not extend beyond the prior ordinary high water mark or contours. If the eroded material is still in the vicinity of the damaged upland areas, then that material can be used to repair those upland areas. The project proponent can use some material from the bottom of the waterbody, but cannot substantially alter the contours of the waterbody that existed before the damaging event occurred. The repair of upland areas damaged by discrete events is limited to the ordinary high water mark and contours that existed prior to that discrete event, so the adverse environmental effects will be no more than minimal unless the district engineer reviews the PCN and determines that the proposed activity will result in more than minimal adverse environmental effects and exercises discretionary authority.

As an alternative to using this NWP, the property owner can approach mitigating the damage done by the discrete event in a different way. He or she can propose to construct a living shoreline and submit a PCN for NWP 54 authorization. Alternatively, he or she can propose another method of bank stabilization that might be authorized by NWP 13. Corps districts have consulted with tribes on the 2017 NWPs. These consultations may result in regional conditions on this NWP or other NWPs that ensure that the NWPs do not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. These consultations may also result in coordination procedures to seek a tribe's views on a PCN for a proposed NWP 45 activity. This NWP only authorizes repair of upland areas damaged by storms, floods, or other discrete events. It does not authorize the relocation or rerouting of streams.

One commenter said that minor dredging should be limited to 25 cubic yards. Several commenters expressed support for the proposed modification that would allow district engineers to waive the 12-month deadline for submitting PCNs.

The NWP limits dredging to the minimum necessary to restore the damaged uplands and does not allow significant changes to the pre-event bottom contours of the waterbody. Limiting the dredging to 25 cubic yards could prevent removal of eroded material that would be used to restore the upland areas and restore the dimensions of the waterbody, if more than 25 cubic yards of material eroded ended up in the waterbody. We have adopted the proposed modification that allows the district engineer to waive the 12-month deadline.

This NWP is reissued as proposed.

NWP 46. *Discharges in Ditches.* We did not propose any changes to this NWP. One commenter requested that the acreage limit be reduced to 1/2-acre from the current 1 acre limit. This commenter also said that there should be no waivers of the acreage limit.

We have had a 1-acre limit for this NWP since it was first issued in 2007. This acreage limit differs from the 1/2-acre limit in a number of other NWPs because NWP 46 is limited to authorizing discharges of dredged or fill material into upland ditches that are determined to be waters of the United States. Pre-construction notification is required for all activities authorized by this NWP, to allow district engineers to evaluate the ecological functions and services being provided by specific ditches constructed in uplands and determine whether the adverse environmental effects caused by filling those ditches will be no more than minimal. When reviewing the PCN, the district engineer may also determine whether mitigation (*e.g.,* minimization) should be required to satisfy the terms and conditions of the NWP.

This NWP is reissued without change.

NWP 47. [Reserved].

NWP 48. *Commercial Shellfish Aquaculture Activities.* We proposed to modify this NWP to clarify that it authorizes new and continuing commercial shellfish aquaculture operations in authorized project areas. In addition, we proposed to define the project area as the area in which the operator is authorized to conduct commercial shellfish aquaculture activities during the period the NWP is in effect. Also, we proposed to define a ''new commercial shellfish aquaculture operation'' as an operation in a project area where commercial shellfish aquaculture activities have not been conducted during the past 100 years. We also proposed to modify the PCN thresholds and requirements and those proposed changes are more fully described in the June 1, 2016, proposed rule.

Several commenters expressed their support for the proposed reissuance of this NWP, including the proposed changes. Many commenters objected to the reissuance of this NWP, stating that it authorizes activities with substantial adverse environmental impacts. Several of these commenters said that commercial shellfish aquaculture activities should require individual permits. One commenter remarked that these activities should be authorized by regional general permits instead of an NWP, to take into account regional differences in aquaculture activities and the ecosystems in which they occur. Several commenters stated that NWP 48 does not authorize a category of activities that is similar in nature. Several commenters said that this NWP does not comply with section 404(e) of the Clean Water Act because it has no limits.

The terms and conditions of this NWP, including its PCN requirements, will ensure that commercial shellfish aquaculture activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. Any commercial shellfish aquaculture activity to be conducted by a non-federal permittee that might affect Endangered Species Act (ESA) listed species or designated critical habitat, or is located in designated critical habitat, requires a PCN under general condition 18, endangered species. The district engineer will evaluate the PCN, and if he or she determines the proposed activity may affect listed species or designated critical habitat, the district engineer will conduct ESA section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service. Division engineers may impose regional conditions to require PCNs for proposed NWP 48 activities that might affect treaty rights, tribal trust resources, submerged aquatic vegetation, or other concerns.

When reviewing a PCN, if the district engineer determines that the proposed activity, after considering mitigation proposed by the prospective permittee, will result in more than minimal individual and cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for that activity. Commercial shellfish aquaculture activities occur in various regions of the country, and NWP 48 has been used in Washington State, Alabama, California, Florida, New Jersey, New York, Oregon, and South Carolina. The availability of this NWP reduces the need for the Corps districts in those states to develop regional general permits, and an NWP can promote national consistency in the authorization of these activities.

This NWP only authorizes discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States associated with commercial shellfish aquaculture activities. That is a specific category of activities that is similar in nature. Section 404(e) of the Clean Water Act does not require that general permits, including NWPs, have acreage or other numeric limits. Section 404(e) only requires that general permits authorize categories of activities that are similar in nature that have no more than minimal individual and cumulative adverse environmental effects.

One commenter said that the Corps should clarify the scope of its authority under section 404 of the Clean Water Act as it applies to commercial shellfish aquaculture activities. This commenter expressed the position that these activities are not regulated under section 404. One commenter requested that the Corps add a new Note to NWP 48 that would state that commercial shellfish aquaculture activities are not regulated under section 404 of the Clean Water Act. This commenter said that the Clean Water Act exempts normal farming activities from the requirement to obtain section 404 permits, and that on-going commercial shellfish aquaculture operations are normal farming operations eligible for the Clean Water Act section 404(f)(1)(A) exemption. This commenter remarked that NWP 48 should clearly state that the farming exemption applies to any commercial shellfish aquaculture operation in a project area where those activities have occurred during the past 100 years. This commenter also stated that bottom culture and off-bottom culture shellfish farming activities do not involve regulated discharges of dredged or fill material. This commenter said that sediment movement during shellfish harvesting activities are *de minimis* and should not be regulated under section 404 of the Clean Water Act. This commenter stated that only concentrated aquatic animal production facilities are point source aquaculture operations under the U.S. EPA's National Pollutant Discharge Elimination System regulations issued pursuant to section 402 of the Clean Water Act, and that shellfish farms are not included in EPA's regulations because there is no feed added to the water.

Typical commercial shellfish aquaculture activities, including those described in the provisions of NWP 48, may involve discharges of dredged or fill material into waters of the United States. For example, mechanized harvesting activities typically involve a discharge of dredged or fill material, but the culture of oysters in bags suspended on long-lines, where there is no discharge of shell or gravel for bed preparation, typically does not result in a discharge of dredged or fill material and therefore does not require authorization under section 404 of the Clean Water Act. The term ''discharge of dredged material'' is defined at 33 CFR 323.2(d). The term ''discharge of fill material'' is defined at 33 CFR 323.3(f). The U.S. EPA has the authority to make the final determination as to which activities qualify for the exemptions in section 404(f) of the Clean Water Act. That authority is described in the 1989 ''Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act.''

Several commenters said that commercial shellfish aquaculture activities cause minimal adverse environmental effects and that they can have beneficial effects on aquatic habitat and water quality. Many commenters stated that commercial shellfish aquaculture activities cause adverse impacts to intertidal zones, submerged aquatic vegetation (especially eelgrass), community structure and function of intertidal and subtidal habitats, species composition, sediment and water chemistry, soil integrity, impediments to migration, exclusion or displacement of native species, endangered species, competition for food and space, fish spawning and migration areas, and aesthetics.

The effects of commercial shellfish aquaculture activities on the structure, dynamics, and functions of marine and estuarine waters are complicated, and there has been much discussion in the scientific literature on whether those effects are beneficial or adverse (*e.g.,* Dumbauld et al. 2009). Oysters are ecosystem engineers that have substantial impacts on coastal ecosystems by adding habitat for other species, altering ecological and biogeochemical processes, and filtering large volumes of water, thus providing a number of ecosystem goods and services (Ruesink et al. 2005). For example, in Willapa Bay, Washington, two introduced cultured bivalve species (*Crassostrea gigas* and *Ruditapes philippinarum*) have increased secondary production in the waterbody by approximately 2.5 times more than the peak historic secondary production of native oysters (*Ostreola conchaphila*) (Ruesink et al. 2006). Sites where Pacific oysters (*Crassostrea gigas*) are grown provide hard substrate used by fish, invertebrates, and macroalgae in estuaries where such substrate is rare because those estuaries have mostly soft bottom habitats (Ruesink et al. 2006). The scale at which impacts are evaluated is an important factor in determining whether impacts are positive or negative (Dumbauld and McCoy 2015). For example, at a small spatial scale (*e.g.,* the site directly impacted by a specific aquaculture activity) there will be an adverse effect, but at a landscape scale the adverse effects may be minor or there may be beneficial effects because of

management approaches and ecosystem resilience (Dumbauld and McCoy 2015).

While commercial shellfish aquaculture activities have some adverse effects on the biotic and abiotic components of coastal waters, including intertidal and subtidal areas, those adverse effects should to be considered in a cumulative effects context. Commercial shellfish aquaculture activities also provide some ecosystem functions and services, such as water filtration that removes plankton and particulates from the water column, secondary production that results in food, and habitat for other organisms in the waterbody including fish and invertebrates (Ruesink et al. 2005). Under the Council on Environmental Quality's definition of ''cumulative impact'' at 40 CFR 1508.7, cumulative impacts are due to the effects of past, present, and reasonably foreseeable future actions taken by federal, non-federal, and private entities. In 2010, over 123,000,000 people (39 percent of the population of the United States) were living in coastal counties (NOAA and U.S. Census Bureau 2013). Categories of activities that directly and indirectly affect coastal intertidal and subtidal habitats include land use/land cover changes in the watershed (*e.g.,* coastal development, agriculture), pollution from point and non-point sources throughout coastal watersheds, overexploitation of estuarine and marine resources including fish and shellfish, resource extraction, and human activities that contribute to climate change (MEA 2005b). Commercial shellfish aquaculture activities are a minor subset of human activities that affect coastal intertidal and subtidal habitats and contribute to cumulative effects to those coastal habitats.

Terrestrial areas, which include coastal lands, have been substantially altered by people for millennia (Perring and Ellis 2013). The high proportion of people living along the coasts have directly and indirectly altered coastal waters and their productivity (Vitousek et al. 1997). All marine ecosystems have also been altered to varying degrees by people (Halpern et al. 2008). Nearly all landscapes have been influenced or altered to some extent by past and present use by human communities, resulting in cultural, semi-cultural, and natural landscapes (Clewell and Aronson 2013). The bays and other waterbodies in which commercial shellfish aquaculture activities take place can be considered semi-cultural ecosystems because of their use by people over long periods of time for various activities. While shellfish aquaculture activities have local and temporary effects on the structure, function, and dynamics of estuaries, they do not cause losses of intertidal and subtidal areas or degrade water quality, in contrast to the habitat losses and water quality degradation caused by other types of human activities in or near coastal waters, such as coastal development, pollution, wetland losses, and freshwater diversions (Dumbauld et al. 2009). According to Dumbauld et al. (2009), the disturbances caused by commercial shellfish aquaculture activities are similar in scope and intensity to natural disturbances such as storm events and disturbances caused by other ecosystem engineers such as eelgrass and burrowing shrimp.

Several commenters said that the Corps has not fully documented that commercial shellfish aquaculture activities provide water quality benefits similar to wild bivalves. Many commenters expressed concern about conversions of natural shorelines to commercial shellfish production and impacts to native shellfish, forage fish, salmon, eelgrass, and birds. One commenter stated that a certain amount of natural shoreline should be required between aquaculture sites. One commenter stated that NWP 48 should restrict the use of mechanical harvesting.

Both commercially-grown bivalves and wild bivalves are filter feeding molluscs with the same basic anatomy and physiology. Different oyster species have different filtration rates, with larger oyster species filtering more water (Ruesink et al. 2005). Bivalves influence water quality by filtering out particles from the water column and removing nutrients, which increases the clarity of the water in the waterbody and can help reduce anthropogenic causes of eutrophication (Dumbauld et al. 2009). While commercial shellfish aquaculture activities have some impacts on intertidal and subtidal habitats, fish, eelgrass, and birds, coastal development and other human activities in these waterbodies and the watersheds that drain to these waterbodies have substantial impacts on those resources as well (*e.g.,* MEA 2005b). Commercial shellfish aquaculture activities are conducted near shorelines and coastal lands that have long been occupied and altered by people. The human occupation of these shorelines over time has changed the structure, function, and dynamics of these nearshore ecosystems, including the other species that use those ecosystems. Various coastal development activities have substantially altered shoreline characteristics, as well the water quality of coastal waters and the species that utilize nearshore waters. Shorelines have been altered by a variety of human activities for many years. Land use decisions, including the use and development of shorelines, is the primary responsibility of state and local governments. States can manage coastal development through their authorities under the Coastal Zone Management Act and state laws. The Corps' authorities are limited to regulating activities that involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States.

Glascoe and Christy (2004) examined the effects of coastal urbanization on water quality, especially microbial contamination of shellfish production areas. The quality of coastal waters and their habitats are strongly influenced by coastal development, and the pollution generated by the people that live in coastal areas (Glascoe and Christy 2004). They found that non-point source pollution, including pollution from stormwater runoff, wastes generated by livestock on land-based farms, and failing on-site septic systems, is the leading cause of declines in water quality in shellfish growing areas. Point source discharges from industrial and municipal wastewater systems also contribute to declining water quality in estuaries where shellfish production occurs (Glascoe and Christy 2004). While commercial shellfish aquaculture activities do have some adverse effects on eelgrass and other species that inhabit coastal waters, especially competition for space (Tallis et al. 2009), there are also substantial adverse effects caused by coastal land use and land cover changes, other uses of coastal lands and waters by people, and the activities of people who live in these coastal watersheds, especially the pollution they generate through those activities.

Division engineers can also add regional conditions to ensure that mechanical harvesting activities that require Department of the Army authorization result in no more than minimal individual and cumulative adverse environmental effects.

Several commenters asserted that the use of canopy nets has caused extensive modification of shorelines. They said these nets also make it difficult for birds to feed and may trap birds. One commenter stated that commercial shellfish aquaculture operators should not be allowed to harass birds and use large canopy net to keep birds from feeding on planted shellfish. One commenter remarked that the Corps

must comply with regulations to protect migratory birds. Many commenters also expressed concern about use of chemicals to remove eelgrass and native invertebrates, the introduction of non-native species, the introduction of plastics into the marine food web, and risks of parasitism and disease.

The use of canopy nets and their effects on birds are more appropriately addressed by district engineers on a case-by-case basis if the use of canopy nets is directly linked to commercial shellfish aquaculture activities that require DA authorization. General condition 19 addresses the requirements of the Migratory Bird Treaty Act. The Corps does not have the authority to regulate discharges of pesticides. Discharges of pesticides may require authorization by states or the U.S. EPA under section 402 of the Clean Water Act. Division engineers can impose regional conditions to address the use of plastics, if plastic materials are used for the activities regulated under the Corps' authorities.

Invasions of species from one area to another is a natural biological phenomenon, while human activities have greatly sped up the rates of those invasions (Vitousek et al. 1997). Introductions of non-native species occur through a variety of mechanisms, such as land use/land cover changes, commerce (*e.g.,* intentional introductions), and inadvertent introductions due to accidental transport (Vitousek et al. 1997), not just commercial shellfish aquaculture activities. Most ecosystems and human dominated lands are inhabited by native and non-native species and ecosystems, including their species composition, are changing a very rapid rate (Davis et al. 2011). The Corps does not have the authority to regulate the introduction of non-native species into waterbodies. In addition, the Corps does not have the authority to address risks of parasitism and disease from shellfish production or consumption. Those concerns are more appropriately addressed by state or local public health agencies.

Many commenters also said that there has not be a sufficient cumulative impact analysis conducted for NWP 48. One commenter said that the Corps needs to track cumulative impacts of these activities.

The cumulative effects analyses prepared by Corps Headquarters for the reissuance of this NWP were done in accordance with the definitions of ''cumulative impact'' provided in the applicable federal regulations. For the environmental assessment in the national decision document, we used the definition of ''cumulative impact'' in the Council on Environmental Quality's NEPA regulations at 40 CFR 1508.7. For the 404(b)(1) Guidelines analysis in the national decision document, we predicted cumulative effects using the approach specified at 40 CFR 230.7(b)(3), which states that the permitting authority is to predict the number of activities expected to occur until the general permit expires. Corps districts track the use of NWP 48 and other NWPs in our automated information system, ORM2. In ORM2, we track NWP activities that require PCNs as well as NWP activities that do not require PCNs but are voluntarily reported to Corps districts in cases where the project proponents want written verifications from the Corps.

Many commenters objected to the proposed definition of ''new commercial shellfish aquaculture operation'' which stated that it is ''an operation in an area where commercial shellfish aquaculture activities have not been conducted during the past 100 years.'' Many commenters objected to using 100 years as a threshold for identifying new commercial shellfish aquaculture activities. These commenters stated that the proposed definition would greatly expand fallow shellfish aquaculture areas, which they assert have recovered to their former natural state. Several of these commenters said that the proposed definition ''grandfathers'' commercial shellfish aquaculture operations, in contrast to the five year limits of other NWPs. One commenter recommended changing the threshold from 100 years to 5 years and another commenter suggested changing it to 4 years. Several commenters objected to paragraph (d) of the proposed NWP, which prohibits commercial shellfish aquaculture activities that directly affect more than ½-acre of submerged aquatic vegetation beds in project areas that have not been used for those activities during the past 100 years. They said that this paragraph essentially places no limits on the amount of submerged aquatic vegetation that can be disturbed by these activities.

Paragraph (d) of the proposed NWP 48 is linked to the proposed definition of ''new commercial shellfish aquaculture operation'' in the first paragraph of the proposed NWP as well as the definition of ''project area.'' Our intent with the definition of ''new commercial shellfish aquaculture operation'' and the 100-year period is to recognize that many of these activities have taken place over long periods of time, even though some sections of project areas may have been fallow for a number of years. The long time frame provided by the 100-year period is also in recognition that commercial shellfish aquaculture activities do not cause losses of intertidal and subtidal habitats and that components of those intertidal and subtidal ecosystems (*e.g.,* submerged aquatic vegetation, benthic organisms, and nekton that utilize those habitats) are resilient to the impacts of these activities and other disturbances. In general, those groups of organisms recover in a relatively short time after disturbances caused by planting, harvesting, or other commercial shellfish aquaculture activities. The Corps' regulatory authorities are limited to discharges of dredged or fill material into waters of the United States and structures or work in navigable waters, and the direct and indirect effects caused by those activities. The use of rotation cycles for farmed and fallow areas of commercial shellfish aquaculture operations will not affect the Corps' determination of eligibility for NWP 48 authorization. This is because the Corps considers the entire project area, as well as the description of the 5-year commercial shellfish activity provided in the PCN in the context of the overall ecosystem function, when determining whether the proposed activities will, or will not, result in no more than minimal adverse environmental effects, and thus qualify, or not, for NWP 48 authorization.

In addition, commercial shellfish aquaculture activities and submerged aquatic vegetation have been shown to co-exist with each other. The combination of shellfish and submerged aquatic vegetation provides a number of ecosystem functions and services (Dumbauld and McCoy 2015). Submerged aquatic vegetation is resilient to disturbances caused by oyster aquaculture activities, and the disturbances caused by oyster aquaculture activities are comparable to natural disturbances caused by winter storms (Dumbauld and McCoy 2015). Intertidal and subtidal marine and estuarine ecosystems, as well as other ecosystems, are dynamic, not static. As long as ecosystems are not too degraded by human activities and other environmental factors, they have resilience to recover after disturbances. Compared to the disturbances and degradation caused by coastal development, pollution, and other human activities in coastal areas, commercial shellfish aquaculture activities present relatively mild disturbances to estuarine and marine ecosystems. Dumbauld et al. (2009) presents a review of empirical evidence of the resilience of estuarine ecosystems and their recovery (including the

recovery of eelgrass) after disturbances caused by shellfish aquaculture activities. Because of the demonstrated co-existence of shellfish aquaculture and submerged aquatic vegetation and their resilience to withstand disturbances, we do not believe it is necessary to impose buffers around submerged aquatic vegetation beds. In areas where there are concerns regarding impacts to submerged aquatic vegetation, division engineers can modify NWP 48 to require PCNs for all activities, so that district engineers can review each proposed NWP 48 activity to ensure that those activities result in no more than minimal individual and cumulative adverse effects on submerged aquatic vegetation.

One commenter expressed concern that the proposed definition of ''new commercial shellfish aquaculture operation'' would adversely affect treaty rights. One commenter said that the Corps has no legal basis to apply the 100-year threshold to tribal uses or treaty rights. Several commenters recommended reverting back to the requirements in the 2007 NWP 48, which limited commercial shellfish aquaculture operations to the ''the area of waters of the United States occupied by the existing operation.'' These commenters also suggested an alternative of limiting new commercial shellfish aquaculture activities to areas where the operator can document that those areas have been part of a regular rotation of cultivation. One commenter stated that *U.S.* v. *Washington* subproceeding No. 89–3 set forth specific requirements to prove prior aquaculture activities and that these same requirements should be used for NWP 48. Several commenters expressed concern about the unknown quantity of new operations that would occur because of the 100-year threshold, the lack of a baseline, the lack of harvest records, cumulative impacts of changes to aquaculture species, and the potential to harm other species, including species listed under the Endangered Species Act. One commenter stated that large shellfish corporations have been gathering large numbers of leases in anticipation of the adoption of the 100-year threshold in NWP 48.

The definition of ''project area'' is focused on the geographic area in which the operator is authorized to conduct commercial shellfish aquaculture activities through a variety of instruments, including treaties. All NWP activities, including NWP 48 activities, must comply with general condition 17, tribal rights. General condition 17 has been modified to state that no NWP activity may cause more than minimal adverse effects to tribal rights (including treaty rights), protected tribal resources, or tribal lands. Division engineers can add regional conditions to this NWP to ensure that commercial shellfish aquaculture activities do not result in more than minimal adverse effects on tribal rights. These regional conditions may require PCNs for activities that might have the potential to affect tribal rights (including treaty rights), protected tribal resources, or tribal lands, to provide district engineers the opportunity to consult with the appropriate tribe(s) to ensure that the NWP activity complies with general condition 17. If the district engineer is uncertain whether a proposed NWP 48 activity might cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands, he or she should consult with the appropriate tribe or tribes, as well as his or her Office of Counsel staff, to understand the relevant treaty or treaties and applicable case law when determining the applicability of NWP 48.

We do not agree that NWP 48 should revert to the 2007 terms and conditions of that NWP, which limited the project area to the area for an existing commercial shellfish aquaculture activity. After the experience of implementing the 2007 and 2012 versions of NWP 48, as well as our understanding of the no more than minimal adverse environmental effects caused by these activities, we believe the definition of project area in this NWP, as well as the 100-year threshold, is appropriate to allow long established commercial shellfish aquaculture operations to be authorized by this NWP. This approach takes into account the dynamic nature of these operations over space and time, and does not discourage shellfish growers from letting portions of their project areas go fallow for periods of time.

Nationwide permits, as well as other DA permits, do not grant any property rights or exclusive privileges (see 33 CFR 330.4(b)(3) and 33 CFR 325, Appendix A). If the operator has an enforceable property interest established through a lease or permit issued by an appropriate state or local government agency, a treaty, or any easement, lease, deed, contract, or other legally binding agreement, then the activity can be authorized by NWP 48 as long as the operator complies with all applicable terms and conditions of the NWP, including regional conditions imposed by the division engineer and activity-specific conditions imposed by the district engineer. As discussed above, we believe that commercial shellfish aquaculture activities that comply with the terms and conditions of NWP 48 will have no more than minimal individual and cumulative adverse environmental effects because the disturbances caused by these activities on intertidal and subtidal ecosystems are temporary and those ecosystems have demonstrated their ability to recover from those temporary disturbances. These activities will cause little change to the environmental baseline of these intertidal and subtidal areas. They cause far less change to the environmental baseline than the adverse effects caused by development activities, pollution, and changing hydrology that results from the people living and working in the watersheds that drain to coastal waters where commercial shellfish aquaculture activities occur. To comply with the requirements for general permits issued under its authorities (*i.e.,* section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899), we do not need to examine historic records of harvests or cultivated species. Many species co-exist with commercial shellfish aquaculture activities and many species benefit from these activities (Dumbauld et al. 2009). Compliance with the Endangered Species Act is achieved through the requirements of general condition 18, and activity-specific and regional programmatic ESA section 7 consultations.

The 100-year threshold is used only to identify new commercial shellfish aquaculture activities for the purposes of applying the ½-acre limit for direct effects to submerged aquatic vegetation. If a commercial shellfish aquaculture activity is identified as a new activity and it will directly affect more than ½-acre of submerged aquatic vegetation, then the proposed activity does not qualify for NWP 48 authorization and an individual permit or a regional general permit would be required.

A couple of commenters supported the proposed 100-year threshold for identifying new commercial shellfish aquaculture operations because portions of shellfish farms lie fallow for extended periods of time. One commenter suggested modifying the definition to refer to a ''project area'' instead of an ''area'' because the term ''project area'' is used throughout the NWP. This commenter said that the general term ''area'' could be interpreted as applying to a smaller portion of the ''project area.'' This commenter also recommended using the term ''project area'' in paragraph (d) of this NWP.

We have changed ''an area'' to ''a project area'' to consistently refer to

''project area'' throughout the text of NWP 48. We have modified paragraph (d) to refer to ''project area'' instead of ''area.'' Paragraph (a) of this NWP states that the NWP does not authorize the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody. The first PCN threshold in the ''Notification'' paragraph states that a PCN is required if the proposed NWP activity will include a species that has never been cultivated in the waterbody. To clarify the relationship between the prohibition in paragraph (a) and this PCN threshold, if an operator proposes to cultivate a nonindigenous species in the waterbody that has never been cultivated in that waterbody, an individual permit is required. If the operator wants to continue to grow that nonindigenous species in the waterbody after the 2017 NWP 48 expires, the regulated activities associated with the continued cultivation of that nonindigenous species could be authorized by future versions of NWP 48, if NWP 48 is reissued and the terms and conditions of the future NWP 48s are the same as the 2017 NWP 48.

One commenter referenced NWPs 19 and 27 and their restrictions or prohibitions of impacts to submerged aquatic vegetation and said that similar limitations should be placed on NWP 48. One commenter stated that commercial shellfish aquaculture activities should be separated by submerged aquatic vegetation beds by buffers that are a minimum of 25 feet wide. One commenter said that the Corps has ignored the recommendations of other federal agencies relating to the protection of eelgrass. One commenter stated that this NWP should impose strict limits on these activities.

Nationwide permit 19 prohibits dredging in submerged aquatic vegetation because the dredging may result in water depths in which the submerged aquatic vegetation might take a long time to recover. Nationwide permit 27 authorizes aquatic habitat restoration, enhancement, and establishment activities, as long as those activities result in net increases in aquatic resource functions and services. Nationwide permit 27 prohibits the conversion of tidal wetlands to other uses, including the explicit prohibition against the construction of oyster habitat in vegetated tidal waters, to help ensure that there are not trade-offs that will result in net decreases in aquatic resource functions and services. The terms and conditions of NWP 48 serve a different purpose: to authorize commercial shellfish aquaculture activities that require DA authorization and result in no more than minimal individual and cumulative adverse environmental effects. In areas where there are concerns about cumulative effects to eelgrass or other species inhabiting areas where commercial shellfish aquaculture activities occur, division engineers can impose regional conditions to restrict or prohibit the use of this NWP.

One commenter stated that commercial shellfish aquaculture activities should be at least 100 feet from spawning areas to protect the species that spawn in those areas. In addition, this commenter said that this NWP should impose time-of-year restrictions to minimize impacts during spawning seasons. One commenter said that NWP 48 should not authorize activities that involve the cultivation of non-native species.

General condition 3, spawning areas, requires NWP activities to avoid, to the maximum extent practicable, being conducted in spawning areas during spawning seasons. We do not believe it is necessary, at a national level, to impose a buffer from spawning areas. Division engineers may impose regional conditions to restrict or prohibit NWP activities during certain periods during a year, such as spawning seasons. District engineers can impose similar conditions on specific NWP activities by adding conditions to the NWP authorization on a case-by-case basis. We do not agree that NWP 48 should be limited to the cultivation of native shellfish species. Five of the nine species of shellfish commonly cultivated on the west coast for commercial production are native species, and the other four species are from Europe or Asia. On the west coast, introduced shellfish species have been cultivated for decades (Ruesink et al. 2006), and are an important commercial commodity that provides more food for people than native oyster species.

One commenter said that the definition of ''project area'' could be interpreted in two different ways. One interpretation could be that the project area is the area in which an agreement specifically authorizes the operator to conduct aquaculture activities. Another interpretation could be that the project area is the area where a legally binding agreement establishes an enforceable property interest for the operator. This commenter stated that the proposed definition could mean that anyone who has a property interest in tidelands is also authorized to conduct commercial shellfish aquaculture activities. This commenter suggested modifying the definition of project area as: ''the area in which the operator conducts commercial shellfish aquaculture activities, as authorized by a lease or permit or other legally binding agreement.''

The definition of ''project area'' can be applied under either approach, depending on other laws and regulations that apply to areas that could be used for commercial shellfish aquaculture activities. An operator might not have an enforceable property interest because the state might own the subtidal lands that are needed for commercial shellfish aquaculture activities, but the state might issue a permit that allows that operator to conduct those activities on state submerged lands. In other states, the operator might be granted an enforceable property interest through an easement, lease, deed, contract, or other legally binding agreement to do commercial shellfish aquaculture. For example, in Washington State in 1895, the Bush and Callow Acts allowed nearly 19,000 acres of tidelands to be deeded for private ownership for the specific purpose of commercial shellfish aquaculture (Dumbauld et al. 2009). We believe the proposed definition is needed to provide clarity on the various types of instruments that could be used to establish an enforceable property interest for the grower, and provide flexibility to authorize these activities.

One commenter expressed support for the proposed definition of ''project area'' by including a lease or permit issued by an appropriate state or local government agency because such a lease or permit establishes a clear use or a clear intention of use of an area. A couple of commenters said that the definition of ''project area'' should not refer to deeds. One commenter said that in the State of Washington, large areas of tidelands were sold by the state that were made unsuitable for cultivation, but since those sales were made aquaculture practices have changed and those areas can now be used for cultivation.

A deed might be an appropriate instrument for conveying an enforceable property interest, depending on state law. If the tidelands can now be used for commercial shellfish aquaculture, even if they were unsuitable at the time the land was sold, then those activities can be authorized by NWP 48 if they require DA authorization.

One commenter requested that the NWP define ''commercial shellfish aquaculture operations'' and that the definition must not conflict with a tribe's treaty-secured rights to take shellfish. Another commenter suggested adding a definition of ''existing activity,'' and define that term as the

area under cultivation when NWP was first issued in 2007 or where the operator can document that the area has been subject to a regular rotation of cultivation.

We do not think it is necessary to define the term ''commercial shellfish aquaculture activity'' in the text of the NWP. It is simply the commercial production of shellfish. General condition 17 states that NWP activities cannot cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. If there are disputes between operators with valid commercial shellfish aquaculture permits or leases or other enforceable property interests, and a tribe's rights under one or more treaties to take shellfish, those disputes need to be resolved by the appropriate authorities. It is not necessary to define ''existing activity'' in NWP 48 because the NWP is because NWP 48 authorizes existing commercial shellfish aquaculture activities as long as they have been conducted in the project area at some time during the past 100 years.

Two commenters voiced their support for the proposed changes to the PCN requirements for this NWP. Several commenters objected to the proposed removal of the PCN threshold for dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation because they said submerged aquatic vegetation is important habitat. One commenter said the proposed removal of this PCN threshold is contrary to the Corps' and the Department of Defense's tribal consultation policies. One commenter said that a PCN should be required for an NWP 48 activity if the proposed activity will include a species that has never been cultivated in the waterbody, or the proposed activity occurs in a project area that has not been used for commercial shellfish aquaculture activities during the past 100 years.

We have determined it is no longer is necessary to require PCNs for dredge harvesting, tilling, or harrowing activities in areas inhabited by submerged aquatic vegetation because the submerged aquatic vegetation recovers after those disturbances occur. In a geographic area where dredge harvesting, tilling, or harrowing activities might result in more than minimal adverse effects to submerged aquatic vegetation, the division engineer can add regional conditions to this NWP to require PCNs for those activities. The removal of this PCN requirement is not contrary to Corps tribal consultation policies and the Department of Defense American Indian and Alaska Native Policy, because those policies do not directly address commercial shellfish aquaculture activities in areas inhabited by submerged aquatic vegetation. In addition, for the 2017 NWPs, Corps districts are consulting with tribes, and those consultations may result in regional conditions that address tribal concerns about impacts to submerged aquatic vegetation. Those consultations may also result in the development of procedures for coordinating NWP 48 PCNs with tribes before making decisions on whether to issue NWP 48 verifications to ensure that NWP 48 activities do not cause more that minimal adverse effects to treaty fishing rights or other tribal rights. A division engineer can impose a regional condition to require PCNs for dredge harvesting, tilling, or harrowing activities in areas inhabited by submerged aquatic vegetation, if he or she determines such a regional condition is necessary to ensure that NWP 48 activities cause no more than minimal individual and cumulative adverse environmental effects, which includes adverse effects to tribal rights (including treaty rights), protected tribal resources, and tribal lands. We have retained the proposed PCN thresholds in the final NWP.

Several commenters objected to the proposed removal of the PCN threshold for activities that involve a change from bottom culture to floating or suspended culture. One commenter stated that floating aquaculture facilities should be required to complete benthic surveys to adequately evaluate impacts to the benthos. Several commenters said that notification to tribes is important to avoid tribal treaty fishing access issues, especially in situations where the operator is proposing to change from bottom culture to suspended culture. These commenters stated that suspended culture can impact tribal net fisheries. One commenter stated that floating aquaculture disrupts the ability of the tribe to exercise their treaty rights as overwater structures interfere with net fisheries and takes away surface water areas of usual and accustomed fishing areas.

Because of the terms and conditions of this NWP, the activities it authorizes will result in no more than minimal individual and cumulative adverse environmental effects. The intertidal and subtidal habitats in which these activities occur are dynamic systems that recover after the short-term disturbances caused by commercial shellfish aquaculture activities and other short-term activities or natural events. The short-term disturbances caused by bottom culture versus floating culture are not substantive enough to warrant requiring PCNs for those changes in culture methods. Given the dynamic nature of these intertidal and subtidal ecosystems, the ecological benefits of commercial shellfish aquaculture activities, and the minimal disturbances those activities cause, we do not believe it is necessary to require benthic surveys. For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions to protect tribal rights (including treaty rights), protected tribal resources, or tribal lands and ensure compliance with revised general condition 17, tribal rights. District engineers can also develop coordination procedures with interested tribes to ensure that proposed NWP 48 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. If an operator is authorized to conduct a commercial shellfish aquaculture activity because he or she was granted a permit, lease, or other enforceable property interest, and there is a dispute regarding the effects of that activity on net fisheries conducted by tribes, then that dispute needs to be resolved by the appropriate authorities.

Two commenters objected to the proposed change in the PCN threshold from ''new project area'' to an ''area that has not been used for commercial shellfish aquaculture activities during the past 100 years.'' One commenter said tribes require notification and opportunity to comment on shellfish aquaculture projects as they may have impacts to treaty rights. One commenter said by defining new commercial shellfish aquaculture operations as operations occurring within the footprint of a previously authorized lease site within the past 100 years, almost all leases in North Carolina would be considered ''new operations'' and potentially require PCNs.

The proposed change in that PCN threshold is consistent with the proposed definition of ''new commercial shellfish aquaculture operation.'' For this NWP, Corps districts can develop coordination procedures with interested tribes to help district engineers determine whether proposed NWP 48 activities comply with general condition 17, tribal rights. Division engineers can add regional conditions to this NWP to require PCNs for NWP 48 activities that have the potential to affect treaty rights, so that districts can review those activities and consult with the tribes that might be affected. The definition of ''new commercial shellfish aquaculture activities'' and the associated PCN

threshold do not require existing commercial shellfish aquaculture activities to have continuously conducted those activities in the project area for 100 years. Those activities only need to be conducted for some period of time during that 100-year period. Those activities may have been conducted by different operators over time. For example, if a particular tract has been used for commercial shellfish aquaculture during the past 100 years, and that tract has been transferred or leased to a different commercial shellfish aquaculture operator then that tract is not considered a ''new'' project area. As explained in the proposed rule, for NWP 48 we are including areas that have been fallow for some time as part of the ''project area.'' We have also modified the ''Notification'' paragraph to state that if the operator will be conducting commercial shellfish aquaculture activities in multiple contiguous project areas, he or she has the option of either submitting one PCN for those contiguous project areas or submitting a separate PCN for each project area. We also made conforming changes to the last paragraph of NWP 48 to reference the project area or a group of contiguous project areas.

Two commenters suggested adding text to paragraph describing the information to be included in an NWP 48 PCN. Their suggested text is: ''No more than one pre-construction notification must be submitted for a commercial shellfish operation during the effective term of this permit. The PCN may include all species and culture activities that may occur on the project area during the effective term of the permit. If an operator intends to undertake unanticipated changes to the commercial shellfish operation during this period, and those changes involve activities regulated by the Corps, the operator may contact the Corps district to request a modification of the NWP verification, instead of submitting another PCN. If the Corps does not deny such a modification request within 14 days, it shall be deemed approved.'' As an alternative to including this text in the terms of NWP 48, these commenters said that there could be a form signed by the operator in which he or she attests that there will be no changes in operation during the five year period this NWP is in effect.

We have added the suggested text to that paragraph, with some modifications. If the operator requests a modification of the NWP verification, he or she must wait for the verification letter from the district engineer. We cannot include a 14-day default approval of a proposed modification. For example, the proposed modification may trigger a need to re-initiate ESA section 7 consultation if the prior NWP verification was for an activity that required an activity-specific ESA section 7 consultation. The added text to the paragraph discussing the information to be included in a PCN is a more appropriate means of reducing the number of PCNs that need to be submitted during the five year period this NWP is in effect. The development of a new form would likely require review and approval under the Paperwork Reduction Act. The added text to the ''Notification'' paragraph is a more efficient alternative to developing a new form.

One commenter said that NWP 48 PCNs should include information demonstrating compliance with the limits on impacts to submerged aquatic vegetation, providing mitigation for impacts to submerged aquatic vegetation and other special aquatic sites. One commenter stated that PCNs should include recent surveys identifying eelgrass, macroalgae, and forage fish. Several commenters said that PCNs should be required for each commercial shellfish aquaculture operation (*i.e.,* farm). Several commenters stated that any conversions of natural intertidal areas to intensive aquaculture farms should require PCNs. One commenter remarked that the PCN should state whether the operator will be applying pesticides to manage ghost shrimp or sand shrimp, which pesticides he or she will use, and if the operator will be using neonicotinoids.

As discussed above, we believe that the activities authorized by NWP 48 will have no more than minimal individual and cumulative adverse environmental effects on submerged aquatic vegetation and other special aquatic sites. The only limit to impacts to submerged aquatic vegetation is the ½-acre limit that applies to new commercial shellfish aquaculture operations. In areas where a Corps district determines that NWP 48 activities may have more than minimal adverse effects on submerged aquatic vegetation or other special aquatic sites, the district can request that the division engineer add a regional condition to this NWP to require PCNs for activities that have impacts to submerged aquatic vegetation or other special aquatic sites or impose limits on impacts to submerged aquatic vegetation or other special aquatic sites. As stated in paragraph (b)(5) of general condition 32, if a PCN is required then the PCN must include a delineation of special aquatic sites. We do not think it is necessary to require NWP 48 PCNs to include surveys of macroalgae or forage fish. Only NWP 48 activities that trigger one or both PCN thresholds in the ''Notification'' paragraph require PCNs. Pre-construction notifications are also required for proposed activities to be conducted by non-federal permittees that trigger the PCN requirements in paragraph (c) of general condition 18, which addresses compliance with the Endangered Species Act. We do not think it is necessary to require PCNs for each farm. If there are concerns within a particular region regarding conversions of intertidal areas to commercial shellfish aquaculture, the division engineer can modify this NWP to add PCN requirements for those activities. The Corps does not have the authority to regulate the use of insecticides and other pesticides, so we cannot modify the PCN requirements to gather that information. The use of insecticides and other pesticides may be regulated under other federal or state laws.

Many commenters said that mitigation should be required for all impacts to submerged aquatic vegetation and other special aquatic sites. Several commenters asserted that compensatory mitigation should be required for conversions of intertidal and subtidal areas. Several commenters stated that if the NWP 48 activity does not require a PCN, then compensatory mitigation cannot be required. One commenter said that compensatory mitigation should be required for the following activities: Removal of embedded natural rocks, shells, et cetera; removal or relocation of aquatic life; clearing native aquatic vegetation; grading, filling or excavation of tidelands; adding gravel or shell to make tidelands suitable for aquaculture; operations near intertidal forage fish spawning sites; unnaturally high densities of filtering bivalves; plastic and canopy pollution from aquaculture gear; and the effects of periodic substrate harvest. Many commenters indicated that commercial shellfish aquaculture activities have adverse effects on aquatic ecosystems because they use large amounts of plastic. These plastics include PVC tubes, poly lines, and synthetic canopy nets. One commenter said that plastics pose threats to human and aquatic life. One commenter stated that the Corps failed to adequately describe the possible direct, indirect, and cumulative effects caused by commercial shellfish aquaculture activities or how Corps district might require mitigation measures to ensure that the adverse environmental effects of these activities are no more than minimal.

Commercial shellfish aquaculture activities are compatible with

submerged aquatic vegetation and other special aquatic sites, because those special aquatic sites quickly recover after disturbances caused by those aquaculture activities. Commercial shellfish aquaculture activities also provide important ecological functions and services. Therefore, as a general rule, we do not believe that these activities should require compensatory mitigation. We agree that if an NWP 48 activity does not require a PCN and the project proponent does not submit a voluntary request for an NWP verification, then the district engineer cannot require compensatory mitigation. None of the activities listed by these commenters in the preceding paragraph would normally result in a compensatory mitigation requirement, primarily because they are unlikely to cause resource losses that would result in more than minimal adverse environmental effects. Trash, garbage, and plastic wastes are not considered fill material regulated under section 404 of the Clean Water Act (see 33 CFR 323.2(e)(3), which excludes trash and garbage from the definition of ''fill material''). As discussed above, we believe that the adverse effects of commercial shellfish aquaculture activities that comply with the terms and conditions of this NWP, including regional conditions imposed by division engineers and activity-specific conditions imposed by district engineers, will result in only minimal individual and cumulative adverse environmental effects.

Many commenters said that the terms and conditions of NWP 48 are not sufficient to protect species listed under the Endangered Species Act. Two commenters said that for NWP 48 the Corps must conduct ESA section 7 consultation and essential fish habitat consultation. One commenter stated that the Corps does not have enough staff to monitor compliance with those terms and conditions.

All activities authorized by this NWP must comply with general condition 18, endangered species. Paragraph (c) of general condition 18 requires that a non-federal permittee submit a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat. Corps districts will conduct ESA section 7 consultation for any activity proposed by a non-federal applicant that may affect listed species or designated critical habitat. The Corps district may conduct either formal or informal section 7 consultations, depending on whether there will be adverse effects to listed species or designated critical habitat. Corps districts may also conduct regional programmatic ESA section 7 consultations, if appropriate. For proposed NWP 48 activities that may adversely affect essential fish habitat, district engineers will conduct essential fish habitat consultation with the appropriate office of the National Marine Fisheries Service. District engineers may also conduct regional programmatic essential fish habitat consultations. Corps districts have sufficient staff and other resources to monitor compliance with the terms and conditions of NWP 48 and the other NWPs.

Several commenters stated that commercial shellfish aquaculture activities pose navigation hazards because netting can become caught on boat props and wind surfers, limiting the use of waters of safe recreation and navigation. Two commenters said that the Corps should coordinate with Puget Sound recovery goals and should use the Puget Sound model to identify where impacts from NWP 48 activities are likely to occur and may result in more than minimal individual and cumulative adverse environmental effects.

All NWP 48 activities must comply with general condition 1, navigation. The U.S. Coast Guard may require the operator to install aids to navigation to ensure that boaters and recreational users of the waterbody do not accidentally encroach on the structures in navigable used for the commercial shellfish aquaculture activities. Note 1 recommends that the permittee contact the U.S. Coast Guard. The locations for NWP 48 activities will be identified through permits or leases or other instruments or documents that establish enforceable property interests for the operators. Corps participation in Puget Sound recovery goals is more appropriately conducted at the Corps district level, in coordination with the Corps division office, rather than a rulemaking effort by Corps Headquarters (*i.e.,* the reissuance of this NWP). Any regional conditions added to NWP 48 to support Puget Sound recovery goals must be approved by the division engineer.

Several commenters said that the draft decision document does not comply with the requirements of the National Environmental Policy Act (NEPA). Several commenters asserted that the reissuance of NWP 48 requires an environmental impact statement. Several commenters said that the draft decision document for NWP 48 did not provide sufficient information on cumulative impacts and the potential effects of NWP 48 activities, and insufficient analysis of information to support a no more than minimal adverse environmental effects determination. Commenters also stated that the decision document did not include monitoring requirements. One commenter noted that the draft decision document stated that NWP 48 would result in impacts to approximately 56,250 acres of waters of the United States, including wetlands, and no compensatory mitigation would be required to offset those impacts. Several commenters said that the Corps did not present any peer reviewed scientific studies that have examined the effects of commercial shellfish aquaculture on natural shorelines, aquatic species, and birds. One commenter said that the Corps made no effort to provide information to the public on impacts of past NWP 48 activities, and there is no system in place to monitor and evaluate these impacts.

We believe that the final decision document fully addresses the requirements of NEPA, the 404(b)(1) Guidelines, and the Corps' public interest review. We prepared an environmental assessment with a finding of no significant impact to fulfill NEPA requirements. Therefore, an environmental impact statement is not required for the reissuance of this NWP. In addition, we determined that the reissuance of this NWP complies with the 404(b)(1) Guidelines. We also determined that the reissuance of this NWP, with the modifications discussed above, is not contrary to the public interest.

The NWP does not include explicit monitoring requirements. District engineers can conduct compliance inspections on NWP 48 activities, to ensure that the operator is complying with all applicable terms and conditions of this NWP, including any regional conditions imposed by the division engineer and activity-specific conditions imposed by the district engineer. If the district engineer determines that the permittee is not complying with those terms and conditions, he or she will take appropriate action. While the decision document states that we estimate that NWP 48 activities will impact approximately 56,250 acres of jurisdictional waters and wetlands during the 5-year period this NWP is in effect, it is important to remember that the vast majority of activities authorized by this NWP are on-going recurring activities in designated project areas. Many of these activities have been conducted in these project areas for decades. It is also important to understand that these activities do not

result in losses of jurisdictional waters and wetlands and that their impacts are temporary. The estuarine and marine waters affected by these activities recover after the disturbances caused by shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Those temporary impacts and the recovery of ecosystem functions and services results in no losses that require compensatory mitigation.

In this final rule, as well as the decision document, we discuss the effects of commercial shellfish aquaculture on natural shorelines, aquatic species, and birds. The Corps is not required to provide the public with information on the past use of NWP 48. The NEPA cumulative effects analysis in the decision document for this NWP includes past commercial shellfish aquaculture activities as the present effects of past actions.

Several tribes requested the development of regional conditions to address tribal concerns about NWP 48 activities. One commenter said that regional conditions must be consistent with treaty-reserved rights and support protection of nearshore habitat. One commenter said that NWP 48 is used a lot in some areas of the country, and that commenter believes that high usage results in more than minimal cumulative adverse environmental effects. One commenter recommended transferring the responsibility for processing NWP 48 PCNs for commercial shellfish aquaculture activities in Washington State to either North Pacific Division or Corps Headquarters.

The development of regional conditions is achieved through efforts conducted by the division engineer and the Corps district, and the approval of the regional conditions is made under the division engineer's authority. For the 2017 NWPs, Corps districts conducted consultation with tribes to develop regional conditions for this NWP and other NWPs. Those regional conditions can help ensure compliance with general condition 17, tribal rights, so that no NWP 48 activity will cause more than minimal adverse effects on reserved tribal rights (including treaty rights), protected tribal resources, or tribal lands. Division engineers can also modify, suspend, or revoke this NWP in geographic areas where there may be more than minimal individual and cumulative adverse environmental effects. Examples of such geographic areas include specific waterbodies, watersheds, ecoregions, or counties. Review of NWP 48 PCNs is the responsibility of Corps districts, and Corps divisions have oversight over their districts.

This NWP is reissued with the modifications discussed above.

NWP 49. *Coal Remining Activities.* We did not propose any changes to this NWP. One commenter said this NWP should not be reissued. A commenter suggested that aquatic resources within previously mined areas should not be considered to be subject to Clean Water Act jurisdiction. One commenter recommended encouraging NWP 49 activities by allowing the permittee to use the net increases in aquatic resource functions to produce compensatory mitigation credits for sale or transfer to other permittees. One commenter said that a watershed approach should be used to quantify ecological lift resulting from NWP 49 activities.

The purpose of this NWP is to provide general permit authorization for the remining of an unreclaimed coal mining site. Requiring that these activities result in net increases in aquatic resource functions will help restore unreclaimed areas that might otherwise not be restored. The restoration of unreclaimed coal mining areas is one of the most effective ways to reverse degraded water quality in a watershed. District engineers will determine on a case-by-case basis using applicable regulations and guidance whether aquatic resources on previously mined areas are waters of the United States and therefore subject to the Clean Water Act. A former coal mining site might be a suitable mitigation bank or in-lieu fee project if the sponsor obtains the required approvals from the Corps in accordance with the procedures in 33 CFR 332.8. Rapid ecological assessment tools, or other tools, can be used to determine whether a proposed NWP 49 activity will result in net increases in aquatic resource functions. Such tools may include watershed considerations in determining increases in specific ecological functions or overall ecological condition.

One commenter asked if the net increase in aquatic resource functions applies to the new mining activities or collectively to the new mining and the remining activities. Several commenters requested clarification of the requirement that the total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the area needed to do the reclamation of the previously mined area. One commenter said that the 40 percent requirement should be removed from this NWP.

The overall coal remining activity, which consists of the remining and reclamation activities, plus the new mining activities, must result in the required net increases in aquatic resource functions. The text of the NWP states that the ''total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area.'' For examples illustrating the application of the 40 percent requirement, please see the preamble discussion for NWP 49 in the 2012 final NWPs, which were published in the February 21, 2012, issue of the **Federal Register** (77 FR 10233).

This NWP is reissued without change.

NWP 50. *Underground Coal Mining Activities.* We did not propose any changes to this NWP, other than to clarify that any loss of stream bed applies to the ½-acre limit. Several commenters objected to the reissuance of this NWP, stating that these activities should require individual permits because they result in more than minimal adverse environmental effects.

The ½-acre limit for this NWP, as well as the requirement that all activities require PCNs and written verifications from district engineers, will ensure that this NWP only authorizes activities that result in no more than minimal adverse environmental effects, individually and cumulatively. If the district engineer reviews the PCN and determines that the proposed activity, after considering any mitigation proposal submitted by the applicant, will result in more than minimal adverse environmental effects, he or she will assert discretionary authority and require an individual permit for that activity.

This NWP is reissued as proposed.

NWP 51. *Land-Based Renewable Energy Generation Facilities.* We proposed to split Note 1 of the 2012 NWP 51 into two notes. We also sought comments on changing the PCN threshold in this NWP, which currently requires PCNs for all authorized activities.

One commenter said that these activities should require individual permits, instead of being authorized by an NWP. One commenter recommended adding terms to this NWP to authorize temporary structures, fills, and work that are necessary to construct, expand, or modify land-based renewable energy generation facilities. One commenter stated that this NWP should not authorize facilities in channel migration zones and floodplains where there will be direct and indirect impacts to special status species. Several commenters said that Note 1 should be modified to include linear transportation projects

and their potential authorization by NWP 14. One commenter suggested splitting the revised Note 1 into two notes. Several commenters recommended the removal of Note 3.

The ½-acre limit, along with the PCN requirements and compliance with the NWP general conditions, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. In response to a PCN, if the district engineer determines after considering the applicant's mitigation proposal that the proposed activity will cause more than minimal adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for that activity. Temporary structures, fills, and work necessary to construct, expand, or modify these facilities may be authorized by NWP 33. Since we have removed the PCN requirement for temporary construction, access, and dewatering activities in waters and wetlands subject only to Clean Water Act section 404, the use of NWP 33 with this NWP will not result in a PCN requirement unless a PCN is required because of general condition 18, endangered species, general condition 20, historic properties, or another general condition.

Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains. Proposed activities that might affect ESA-listed species or designated critical habitat or are in the vicinity of such species or critical habitat, or are located in designated critical habitat, require PCNs if the project proponent is a non-federal permittee (see paragraph (c) of general condition 18). Division engineers may impose regional conditions that require PCNs for impacts to other types of special status species. We do not believe it is appropriate to add NWP 14 activities to Note 1. The purpose of Note 1 is to address utility lines that transmit the energy generated by these land-based renewable energy generation facilities to other areas. There is no need to split Note 1 into separate notes because those two sentences cover the general concept of utility lines that transmit the energy to other places.

Several commenters stated that the acreage limit should be increased to one acre. One commenter asked why NWP 51 has a ½-acre limit when other NWPs have a 1/10-acre limit. One commenter said that NWP 51 should not authorize activities in known areas of special status species or critical habitat. A few commenters recommended adding waivers to NWP 51.

We are retaining the ½-acre limit for this NWP because it has been effective in ensuring that activities authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects. In geographic areas where an acreage limit greater than ½-acre is appropriate for land-based renewable energy generation facilities that involve activities that require DA authorization and will result in only minimal adverse environmental effects, district engineers can issue regional general permits. Only two NWPs have a 1/10-acre limit and 12 NWPs have a ½-acre limit.

The category of activities authorized by this NWP, and the adverse environmental effects of those activities, more closely resemble the categories of activities authorized by the NWPs that have the ½-acre limit. Activities authorized by NWP 51 must comply with general condition 18, endangered species. Division engineers can add regional conditions to this NWP to increase protection of other categories of special status species or particular habitat types. The ½-acre limit for this NWP cannot be waived, but the 300 linear foot limit for losses of intermittent and ephemeral stream beds can be waived by a district engineer on a case-by-case basis after conducting agency coordination and making a written determination that the proposed will result in no more than minimal adverse environmental effects.

Several commenters said the PCN threshold should be increased to ½-acre. A few commenters recommended changing the PCN threshold to 1/10-acre. One commenter stated that the Corps should continue to require PCNs for all NWP 51 activities. One commenter suggested requiring PCNs for proposed losses of greater than 1/10-acre of waters of the United States or losses of greater than 500 linear feet of stream bed. Several commenters said that agency coordination should be required for all NWP 51 PCNs. One commenter stated that the removal of the PCN requirement for NWP 51 will not ensure that those activities have no more than minimal adverse impacts, because those impacts would not be assessed or tracked. This commenter said that these types of projects have the potential to impact ESA-listed species.

We are changing the PCN threshold to require PCNs for losses of greater than 1/10-acre of waters of the United States. Land-based renewable energy projects provide an important public interest function by producing energy while contributing to energy industry reductions in greenhouse gas emissions. Changing the PCN threshold to ½-acre would result in no activities requiring PCNs because we are retaining the ½-acre limit for this NWP and not adopting the one acre limit suggested by several commenters. For non-federal permittees, all proposed activities that might affect ESA-listed species or designated critical habitat, are in the vicinity of listed species or critical habitat, or are in designated critical habitat require PCNs under general condition 18, endangered species. All proposed NWP 51 activities to be conducted by non-federal permittees that may have the potential to cause effects to historic properties require PCNs under general condition 20, historic properties. We will continue to track NWP 51 activities that require PCNs and that are voluntarily reported to Corps districts. To assess cumulative impacts of these activities, we will estimate the number of activities that are conducted but did not require PCNs.

This NWP is reissued with the modifications discussed above.

NWP 52. *Water-Based Renewable Energy Generation Pilot Projects.* We proposed to add floating solar panels to the types of water-based renewable energy generation pilot projects authorized by this NWP because they are another technology for generating renewable energy in waterbodies. We also requested comment on whether to continue limiting this NWP to pilot projects, or to modify the NWP to authorize permanent water-based renewable energy generation facilities.

One commenter said that these activities should require individual permits instead of being authorized by NWP. Several commenters opposed removing the limitation in NWP 52 to pilot projects. Several commenters supported removing the limitation to pilot projects. Several commenters asked whether wave-generated energy pilot projects are authorized by this NWP. Several commenters expressed support for adding pilot floating solar energy generation facilities. One commenter stated that activities that interfere with treaty fishing rights should be required to obtain individual permits.

We are retaining the limitation to pilot projects, to allow project proponents to collect data and determine whether they want to apply for individual permit authorization for permanent water-based renewable energy generation facilities. We have added wave energy devices to the list of types of water-based renewable energy generation pilot projects that can be authorized by this NWP. Activities authorized by this NWP must comply with general condition 17, tribal rights,

and not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. For the 2017 NWPs, Corps districts are consulting with tribes to identify regional conditions that protect reserved tribal rights and tribal trust resources. District engineers may also develop coordination procedures with tribes to help determine whether a proposed NWP activity might cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

One commenter stated that the NWP should require the collection of robust data to inform future decisions. Another commenter said that the NWP should make a clear distinction between navigable waters of the United States subject to the Rivers and Harbors Act of 1899 and jurisdictional waters that are only subject to the Clean Water Act. Several commenters objected to Note 4, which states that hydrokinetic renewable energy generation projects that require authorization by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920 do not require separate DA authorization under section 10 of the Rivers and Harbors Act of 1899.

The Corps' review is limited to evaluating the adverse environmental effects caused by the permitted activities, and that review does not require extensive amounts of data collection. The collection of data to assess the renewable energy generation capabilities of these pilot projects is for the benefit of the project proponent, to help him or her decide whether to apply for individual permits for more permanent facilities. Navigable waters of the United States are defined at 33 CFR part 329, and under section 10 of the Rivers and Harbors Act of 1899, DA permits are required for structures and work in those waters. The term ''structure'' is defined at 33 CFR 322.2(b) and includes any obstacle or obstruction, as well as power transmission lines. Renewable energy generation facilities placed in navigable waters are structures under that definition. Under section 404 of the Clean Water Act, the Corps regulates discharges of dredged or fill material into waters of the United States. If the water-based renewable energy generation facility does not involve discharges of dredged or fill material into waters of the United States, then it does not require section 404 authorization. If it is in navigable waters, then it requires section 10 authorization which may be provided by this NWP. Note 4 is based on current law, and it needs to remain in the NWP. In the paragraph preceding the ''Notification'' paragraph we have changed the last word of that paragraph from ''issued'' to ''required'' because NWP applicability only occurs if FERC authorization is not required for the activity.

Several commenters voiced their support for the ½-acre limit for floating solar generation units. One commenter said that floating solar panels should be limited to 50 square feet. Several commenters said that there should be no limits on the number of water-based renewable energy generation units. One commenter stated that this NWP should not authorize activities in submerged aquatic vegetation, areas inhabited by shellfish, and shellfish spawning areas. One commenter remarked that NWP 52 activities should be prohibited in fish-bearing streams. This commenter also said that the NWP should only authorize activities in ephemeral streams. Several commenters recommended prohibiting all activities in special aquatic sites. One commenter said that the 300 linear foot limit for losses of stream bed is too high. A few commenters suggested allowing waivers to the limits of this NWP.

We are retaining the ½-acre limit for floating solar panels. A 50 square foot floating solar panel would have little practical use in determining the feasibility of potential permanent facilities. The 10-unit limit is necessary to ensure that the activities authorized by this NWP will result in only minimal individual and cumulative adverse environmental effects, including adverse effects on navigation. General conditions 3 and 5 provide protection to spawning areas and shellfish beds, respectively, to ensure that NWP activities have no more than minimal adverse effects on those resources. Division engineers can impose regional conditions that restrict or prohibit these activities in areas with submerged aquatic vegetation, areas inhabited by shellfish, and shellfish spawning areas.

The renewable energy generation units authorized by this NWP require deeper waters and most fish will be able to avoid these units. Therefore, these units will have no more than minimal adverse effects on fish inhabiting those deep rivers. Since ephemeral streams only have flowing water during, and a short time after, precipitation events, they are not suitable for water-based renewable energy generation facilities. All activities authorized by this NWP require PCNs, which gives district engineers the opportunity to evaluate the effects these activities have on special aquatic sites. The loss of stream bed will be limited to losses caused by the construction of attendant features. While district engineers can waive the 300 linear foot limit for losses of stream bed if the affected streams are intermittent or ephemeral, they cannot waive the ½-acre limit. This NWP is consistent with the other NWPs that have ½-acre limits in that the ½-acre limit cannot be waived.

Several commenters recommended requiring agency coordination for all NWP 52 PCNs. One commenter said the PCN threshold should be increased to 1/10-acre. Another commenter suggested changing the PCN threshold from all activities to only those activities that result in losses greater than 1/10-acre, or losses of greater than 400 linear feet of stream bed. One commenter supported the current PCN requirements.

Agency coordination is only required for proposed NWP 52 activities that involve losses of greater than 300 linear feet of intermittent and ephemeral stream bed in cases where project proponents request waivers from district engineers. Because of the potential for more than minimal adverse effects on navigation to occur we believe that all activities authorized by this NWP should require PCNs.

We have also made some additional changes to this NWP. Some of these other changes are intended to be consistent with other NWPs. We have modified the third paragraph of this NWP by adding a sentence to explain that the loss of stream bed plus any other losses of jurisdictional waters and wetlands caused by the NWP activity cannot exceed ½-acre. We have modified Note 3 to remove the phrase ''pre-construction notification and'' to be consistent with Note 1 of NWP 12. Corps districts will send a copy of the NWP verification to the National Ocean Service for charting. The facility and its associated utility lines do not need to be charted if the district engineer does not issue an NWP verification letter. If the district engineer exercises discretionary authority and requires an individual permit, the relevant information will be provided to the National Ocean Service if the individual permit is issued.

This NWP is reissued with the modifications discussed above.

NWP 53. *Removal of Low-Head Dams.* This NWP was proposed as NWP A to authorize structures and work in navigable waters of the United States, as well as associated discharges of dredged or fill material into waters of the United States, for the removal of low-head dams. The removal of low-head dams restores rivers and streams and helps improve public safety. This NWP only authorizes the removal of low-head

dams; it does not authorize the construction of new dams to replace low-head dams that are removed. The removal of dams restores stream and riparian area functions (Roni et al. 2013, Doyle et al. 2005, Bushaw-Newton et al. 2002) and improves public safety (Tschantz and Wright 2011), especially for dams that are in need of repair or replacement or are no longer being used for their intended purposes.

Several commenters said they support the issuance of this new NWP. A few commenters expressed their support because the proposed NWP would authorize the removal of dams larger than the small water control structures that can be removed under the authorization provided by NWP 27. Several commenters stated that the activities authorized by this new NWP would restore small streams, restore floodplain connectivity, improve recreational access, improve public safety, and improve fish passage. Some commenters stated that NWP 27 could be modified to authorize these activities instead of issuing a new NWP. Other commenters said that low-head dams could be removed using NWP 3. One commenter objected to the proposed NWP. One commenter said that due to the wide variety of dam shapes and sizes, individual permits should be required for the removal of low-head dams.

We believe that there should be a separate NWP to authorize the removal of low-head dams instead of modifying NWP 27 to authorize these activities. Nationwide permit 27 authorizes a broad range of aquatic habitat restoration and enhancement activities, including wetland and stream restoration and enhancement. By issuing a separate NWP, we can keep this NWP focused on low-head dam removal activities and allow division engineers to add regional conditions to address regional concerns specific to low-head dam removal activities. While we have modified NWP 3 to authorize the removal of previously authorized structures or fills, there is and would be limited use of NWP 3 to authorize low-head dam removal activities. Many low-head dams were constructed long before DA permits were required for those activities. Many of these dams were built in the 19th century or earlier, to provide water and power for towns and cities, as well as power for industry (Tschantz and Wright 2011). Since many low-head dams were not authorized by the Corps because they did not require such authorization at the time they were constructed, NWP 3 cannot be used to remove those dam structures. This NWP only authorizes the removal of low-head dams that meet the definition provided in the text of the NWP. The removal of small water control structures is still authorized by NWP 27. Other dam removal activities, including dams that are not low-head dams, will require individual permits unless the Corps district has issued a regional general permit to authorize the removal of those other types of dams.

One commenter expressed support for the proposed definition of ''low-head dam'' and stated that the removal of dams that do not meet this definition should require an individual permit. Many commenters requested clarification of the definition of ''low-head dam.'' Several commenters suggested adding a definition of the term ''dam crest'' to clarify that this refers to the top of the dam from left abutment to right abutment, including if present, an uncontrolled spillway.

To respond to comments received on the proposed definition of ''low-head dam'' we have expanded the definition to provide additional criteria to identify low-head dams that can be removed under the authorization provided by this NWP. The revised definition is as follows:

> For the purposes of this NWP, the term ''low-head dam'' is defined as a dam built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest on a continual and uncontrolled basis. (During a drought, there might not be water flowing over the dam crest.) In general, a low-head dam does not have a separate spillway or spillway gates but it may have an uncontrolled spillway. The dam crest is the top of the dam from left abutment to right abutment, and if present, an uncontrolled spillway. A low-head dam provides little storage function.

The revised definition is a functional definition to limit this NWP to the removal of low-head dams that will result in no more than minimal individual and cumulative adverse environmental effects. Under this definition a low-head dam does not function as a storage dam. While a low-head dam imposes a barrier to the movement of fish and other aquatic organisms, especially those species that travel upstream, it still allows continuous water flow and does not substantially disrupt sediment transport (Csiki and Rhoads 2014). Downstream sediment transport continues despite the presence of the low-head dam, especially during higher flow events (Fencl et al. 2015). Another important feature of this definition is that it explicitly states that the low-head dam has little storage function. Since these low-head dams do not provide much storage, the amount of sediment that might be stored in the impoundment will be small and therefore relatively small amounts of sediment will be transported downstream after the low-head dam structure is removed. An example of a low-head dam with small storage function is a 2-meter high low head dam in Pennsylvania, which had a 2-hour hydraulic residence time in the impoundment before the low-head dam was removed (Bushaw-Newton 2002).

We have also added a parenthetical to address situations where a drought may result in no water flowing over the dam crest. We did not want to preclude the use of this NWP in situations where an applicant or a district engineer did not observe water flowing over the dam crest during a prolonged drought. The abutment is the valley side or valley wall against which the dam structure is constructed. To respond to commenters, we also defined the term ''dam crest.'' There are some low-head dams that have uncontrolled spillways. For an uncontrolled spillway, the crest of the spillway is what controls which specific water flows are discharged from the dam. A controlled spillway has gates that are manipulated to control water flows from the dam. There may be some low-head dams that have small navigational locks or millrace diversions, but these will be relatively rare. However, if these features are present, the removal of those low-head dams may be authorized by this NWP. These features do not occur frequently enough to include them in the definition in the text of the NWP. The district engineer will use his or her discretion to determine whether a dam proposed for removal is a low-head dam as defined by this NWP.

One commenter recommended defining ''low-head dam'' by using standards for ''small'' dams established by the Federal Energy Regulatory Commission (FERC) and Federal Emergency Management Agency (FEMA). One commenter suggested defining ''low-head dam'' as a dam less than five meters in height. Another commenter recommended defining ''low-head dam'' as ''a dam built across a stream designed to pass flows from upstream to downstream over the entire width of the dam crest on an uncontrolled basis, or any dam up to 25 feet in height.'' This commenter said that the definition needs to be clear that a low head dam is designed and constructed to pass flows from upstream to downstream. One commenter said that the proposed rule appeared to treat low-head dams as run-of-the-river dams, which includes large hydroelectric dams that operate in a run-of-the-river mode. One commenter stated that the

definition should be based on height criteria to authorize the removal of small dams that have different structural designs. This commenter noted that this would allow the NWP to authorize the removal of: (1) Small earthen dams that spill through low-level outlets, (2) uniquely constructed dams, and (3) dam-like structures such as fords or grade control structures that some states may define as dams.

As discussed above, we are using a functional definition to identify low-head dams for this NWP in order to limit the use of this NWP to dams that have the key features presented in the definition. There may be low-head dams slated for removal that district engineers, local agency staff, and others might not consider to be ''small'' but could still be removed under the authorization provided by this NWP because they satisfy the components of the definition provided in the NWP text. The term ''small dam'' and how it has been used in various contexts makes that term too ambiguous to use in this NWP. For example, as stated in the proposed rule, some people consider small dams to be dams that are not included in the National Inventory of Dams (see 81 FR 35204). There is a substantial amount of variability in those small dams because different states use different criteria to determine whether to include specific dams in the inventory. Definitions used by FERC and FEMA serve purposes other than river and stream restoration. As stated in the June 1, 2016, proposed rule, we proposed this NWP to provide a general permit to authorize a category of activities that restores rivers and streams and improves safety for users of small craft such as canoes and kayaks.

We believe that the functional definition provided in the NWP text is more effective than establishing a threshold height for identifying low-head dams. Dams that are five meters (16.4 feet) or 25 feet in height may have a substantial storage function. The definition in the final NWP does recognize that the low-head dam passes flows from upstream to downstream on a continual and uncontrolled basis, unless there is a drought. In the final NWP, we are providing more detail in the definition of ''low-head dam'' and are not using the term ''run-of-the-river dam.'' The preamble discussion of the proposed new NWP in the June 1, 2016, proposed rule was a general discussion of different dam classification approaches, and included a discussion of differences between run-of-the-river dams and storage dams. The preamble also included a general discussion of the scientific literature on dam removal. Some of the dam removal studies cited in the proposed rule examined the outcomes of removal of run-of-the-river dams or other types of dams, not just low-head dams. The removal of large hydropower run-of-the-river dams may be authorized by individual permits. The removal of small dam structures in headwater streams that do not meet the definition of low-head dam in this NWP might be authorized by NWP 27. If the proposed dam removal activity does not qualify for authorization under this NWP or NWP 27, then an individual permit will be required unless the Corps district has issued a regional general permit that could be used to authorize the proposed activity. District engineers can also issue regional general permits to authorize the removal of other types of dams, such as run-of-the-river dams, or fords or grade-control structures. The removal of fords or in-stream grade-control structures might also be authorized by NWP 27 as a stream restoration activity.

One commenter asked for more details on the scale of low-head dam removal that is authorized by this NWP. One commenter said that after the low-head dam is removed, it might be necessary to conduct a hydraulic analysis to update FEMA's Flood Insurance Rate Map for the affected area. One commenter stated that low-head dam removal projects will have both positive and negative impacts well beyond the dam footprint as a result of dewatering the former impoundment, releasing stored sediment, depositing surplus sediment on downstream benthic habitats, and changing the sediment dynamics. This commenter also said that low-head dam removal activities could affect state water rights, state owned stream channels, and other local jurisdictions. This commenter also said that lowering of water levels could impact state listed species. This commenter recommended coordinating PCNs for these activities with state resource agencies.

This NWP authorizes the removal of the low-head dam structure. It does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to restore the river or stream channel or its riparian areas after the low-head dam is removed. The restoration of the river or stream channel and associated riparian areas may be authorized by NWP 27, if the project proponent wants to do restoration work beyond removing the low-head dam. The project proponent may also choose to allow the river or stream and its riparian areas to recover through natural processes. Updating Flood Insurance Rate Maps after a low-head dam is removed is the responsibility of either the project proponent or the appropriate federal, state, or local floodplain management authority in that jurisdiction.

We recognize that the removal of low-head dams will have both positive and negative adverse impacts, generally with short-term adverse environmental effects and long-term beneficial environmental effects. Ecological restoration activities are intentional interventions intended to bring back ecological processes that were impaired, usually by human actions, to restore the historic continuity or ecological trajectory of the impaired ecosystem (Clewell and Aronson 2013). For this NWP, the intentional intervention is the removal of the low-head dam that has been impairing river and stream structure, functions, and dynamics. The removal of the low-head dam allows the structure, functions, and dynamics of the river or stream to recover in its contemporary watershed condition. The construction of the low-head dam resulted in long-term impairment of the river or stream by altering its hydrology and hydrodynamics, sediment transport processes, the movement of aquatic organisms through the stream network, and other ecological processes. The changes to river and stream structure, functions, and dynamics caused by the low-head dam resulted in losses or reductions of riverine functions and services. The adverse effects caused by the removal of low-head dams will be temporary, and the river or stream where the low-head dam was located will recover from those temporary adverse effects. Over time, as ecosystem development processes take place in the absence of the removed low-head dam, the structure, functions, and dynamics of the river or stream will recover. That recovery may not be full recovery if there were substantial changes to the watershed since the low-head dam was constructed (Doyle et al. 2005).

Low-head dam removal activities may require other authorizations from state governments. The authorization provided by this NWP does not obviate the need for the project proponent to obtain other federal, state, or local permits, approvals, or authorizations required by law (see item 2 of Section E, Further Information). Impacts to state listed species are more appropriately addressed by state agencies that are responsible for ensuring compliance with state laws and regulations. We do not believe it is necessary to require agency coordination for the PCNs for these activities. District engineers have the expertise to evaluate these activities,

and, if necessary, they can discuss specific proposals with their counterparts at federal, tribal, state, or local resource agencies.

One commenter said that this NWP should not authorize low-head dam removals if there are undesirable non-native species downstream of the low-head dam, because removal of dam structure would open a corridor to allow them to move upstream and colonize upstream reaches. This commenter also recommended that the NWP require staged dewatering of the impoundment if the low-head dam is located in a low-gradient stream. Another commenter suggested limiting removal activities to periods of low flow to prevent downstream adverse effects. This commenter recognized that many of the potential adverse effects are mitigated through the requirements of various NWP general conditions.

If the low-head dam is preventing harmful non-native species from reaching upstream reaches, the district engineer can exercise discretionary authority if he or she determines that the adverse environmental effects resulting from the removal of a barrier that prevents the migration of a harmful non-native species would be more than minimal. In such cases, an individual permit would be required and the district engineer could determine whether the proposed activity is not contrary to the public interest. Under the individual permit process, the district engineer could deny the authorization. In response to a PCN, a district engineer may add conditions to the NWP authorization to require staged dewatering of the impoundment to ensure that the individual and cumulative adverse environmental effects caused by the removal of the low-head dam are no more than minimal. Division engineers can add regional conditions to this NWP to limit low-head dam removal activities to certain times of the year in order to protect species during important life cycle events such as spawning seasons. The district engineer may also impose time-of-year restrictions on a case-by-case basis by adding conditions to a specific NWP authorization. We agree that a number of environmental concerns about these activities are already addressed by the NWP general conditions.

Several commenters stated that they agreed that district engineers should have discretion to determine whether sediment testing is necessary. One of these commenters said that the decision document for this NWP should make clear that questions related to sediment management should be addressed through the Clean Water Act section 401 water quality certification process. This commenter expressed concern that having district engineers require sediment testing would create a process that duplicates the state's water quality certification process.

The risk for contaminant-laden sediments is dependent on past and present uses of the watershed, the location of the impoundment, the history of excavating material from the impoundment, and sediment composition (Bushaw-Newton 2002). Prior to making such a determination, the district engineer should apply the guidance provided in Regulatory Guidance Letter 05–04, entitled: ''Guidance on the Discharge of Sediments From or Through a Dam and the Breaching of Dams, for Purposes of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.'' That guidance will inform the district engineer whether the release of sediment from the low-head dam removal activity will result in a regulated discharge of dredged or fill material under section 404 of the Clean Water Act. If that sediment release will not result in a regulated discharge under section 404 of the Clean Water Act, the district engineer should defer to the state water quality agency regarding whether sediment testing is necessary to ensure compliance with applicable water quality standards. If release of sediments will result in a regulated discharge of dredged or fill material, the district engineer has the discretion to determine that there is a need to test sediment that might be stored in the impoundment for contaminants, based on a ''reason to believe'' approach similar to the EPA's inland testing manual for dredged material.

We agree with the commenters that said that decisions to require testing of sediments stored by low-head dams are more appropriately made by the agencies responsible for making water quality certification decisions under section 401 of the Clean Water Act. Under section 401, those agencies have broader authority over those concerns than the Corps because they can require water quality certification for any discharge into waters of the United States, not just discharges of dredged or fill material into those jurisdictional waters and wetlands. We have made the appropriate changes to the decision document for this NWP to recognize the water quality certification agencies' authorities to ensure that any discharges from low-head dam removal activities comply with applicable water quality standards. For example, one study of a low-head dam removal (Bushaw-Newton et al. 2002) found that the removal of the low-head dam did not cause a substantial change in water quality.

Several commenters stated that the phrase ''under separate authorization'' should be removed from second paragraph of the proposed NWP. These commenters said that this NWP should authorized beneficial uses of natural material that was removed during low-head dam removal. One of these commenters remarked that the phrase ''in an area that has no waters of the United States'' is unclear and recommended replacing it with ''not in waters of the United States'' for clarity.

We are retaining this provision of the NWP because the NWP is intended to only authorize the removal of these low-head dams. After the low-head dam is removed, rivers and streams can re-establish themselves through natural ecosystem development processes. If the project proponent wants to conduct activities to accelerate the re-establishment of the river or stream channel and its riparian area and use material from the removal of the low-head dam structure he or she can seek authorization under NWP 27 or another form of DA authorization. Under NWP 27 or other forms of DA authorization, the material removed from the dam structure may be used for the restoration activity. We are using the phrase ''an area that has no waters of the United States'' because it is consistent with other NWPs that have similar terms. An area in which material removed from the low-head dam is deposited might have no jurisdictional waters or wetlands, it might have some jurisdictional waters or wetlands, or it might consist entirely of jurisdictional waters and wetlands. If it is the last two situations, then another form of DA authorization would be needed to authorize the placement of that material into those jurisdictional waters and wetlands. That authorization may be another NWP, a regional general permit, or an individual permit.

One commenter suggested that the PCN should require a description of how the low-head dam will be removed, the timing of the removal activity, and how the removed materials will be disposed. One commenter said that timing of the low-head dam removal is important to protect aquatic organisms from sediment plumes generated by low-head dam removal. One commenter observed that the proposed NWP does not include a requirement to sample pre- and post-removal sediment loads. Several commenters said that PCNs for these activities should include site assessments of legacy sediments, which

would describe the quality, quantity, and types of sediments stored behind the low-head dam. Several commenters stated that the PCN should also include a sediment assessment and sediment management plan and that the PCN should be coordinated with the applicable Clean Water Act section 401 agency.

The method, timing, and disposal practices for low-head dam removal should be determined on a case-by-case basis, and prospective permittees should describe these aspects of the proposed low-head dam removal in their PCNs. Paragraph (b)(4) of general condition 32 states that the prospective permittee may describe in the PCN proposed mitigation measures intended to reduce the adverse environmental effects caused by the NWP activity. For activities authorized by this NWP, this may include a description of how the low-head dam will be removed to avoid or minimize adverse environmental effects. For example, the project proponent may propose to conduct the low-head dam removal during a specific time of the year to protect aquatic species. He or she may also propose to remove the low-head dam in phases, to control releases of water and sediment from upstream of the dam. The PCN should also identify where the removed materials will be deposited, to ensure that they will not be deposited in waters of the United States unless the district engineer authorizes, under separate authorization, that disposal those jurisdictional waters and wetlands.

This NWP does not include a requirement to sample pre- and post-sediment loads because it is limited to low-head dams that have little storage capacity. Therefore, there will be little sediment stored in the low-head dam impoundments. Removal of the low-head dam structure will restore sediment transport functions to the river or stream, and any adverse effects caused by the small amount of sediment released from the removal of the low-head dam will be temporary as water flows transport and distribute that sediment downstream.

As discussed above, we agree with commenters that stated that agencies with responsibility for implementing section 401 of the Clean Water Act are the appropriate authorities for deciding whether sediment releases comply with applicable water quality standards. When evaluating water quality concerns during the PCN review process, the district engineer should also consider water quality in a watershed context, specifically adverse effects to water quality caused by non-point sources of pollution and stormwater discharges in that watershed. Under the Clean Water Act, the states have the authority to address non-point sources of pollution. Section 402(p) of the Clean Water Act addresses stormwater discharges. When considered in the context of non-point source pollution and stormwater pollution throughout the watershed that reaches the river or stream, the incremental contribution of pollutants associated with sediments that might be released as a result of low-head dam removal activities may be small.

One commenter said that these activities may result in a need to re-establish stream banks, and recommended that the PCN require information on how the applicant will re-establish a stable stream bank. Another commenter said that the PCN should describe how stream bank erosion will be prevented after the low-head dam is removed. One commenter requested that the PCN explain how the permittee will prevent streambank erosion once the water is drawn down.

After the low-head dam is removed, the river or stream channel upstream of the low-head dam will adjust to the change in hydrology and sediment transport. Downstream of the removed low-head dam, the river or stream channel will also adjust. For low-head dams with little storage function, there will likely be minor changes to river or stream channel bed morphology as the stream adjusts itself to a more natural water flow and sediment transport regime. The adjustment of a river or stream channel to low-head dam removal involves bed aggradation, bed degradation, bar development, and floodplain formation, to eventually resemble reference stream reaches (Bushaw-Newton et al. 2002). The low-head dam impaired those stream functions, and the removal of the low-head dam allows those functions to recover to the degree they can recover in a watershed that has changed during the period the low-head dam was in place (Doyle et al. 2005). After a dam is removed, vegetation rapidly colonizes the sediments exposed in the former impoundment (Orr and Stanley 2006). If the project proponent wants to conduct discharges of dredged or fill material into jurisdictional waters and wetlands or other regulated activities to repair the river or stream channel and riparian areas, then he or she can request authorization under NWP 27 or other form of DA authorization. We have added a Note to this NWP to make it clear that NWP 27 or another form of DA authorization is required for those other river or stream restoration activities, because this NWP only authorizes regulated activities conducted to remove the low-head dam.

The PCN does not need to describe how the permittee will re-establish stable stream banks. Rivers and streams are dynamic systems and erosion and deposition are natural processes. If the project proponent or riparian landowners want to conduct bank stabilization activities, they may seek authorization under NWP 13, other NWPs, or other forms of DA authorization. In the Note we added to this NWP, we also added a sentence to inform permittees that bank stabilization activities may be authorized by NWP 13. In the PCN, the prospective permittee may describe mitigation measures to minimize the adverse effects of the low-head dam removal activity. Such mitigation measures could include phased removal of the dam structure, sediment management activities, or conducting the low-head dam removal activity to a time of year when aquatic organisms are not spawning.

One commenter stated that compensatory mitigation should be required for wetland losses resulting from changes in hydrology caused by the removal of a low-head dam. One commenter stated that the PCN for these activities should describe how the project proponent will offset any losses of riparian wetlands that were established by the presence of the low-head dam. One commenter suggested that upstream wetlands should be monitored after the low-head dam is removed, to determine if there are adverse impacts to those wetlands. One commenter recommended adding a provision to this NWP similar to a provision of NWP 27 that states that compensatory mitigation is not required for those activities because they must result in net increases in aquatic resource functions and services. This commenter said such a provision is appropriate because any wetlands that were established as a result of the construction and operation of a low-head dam became established through losses of river and stream functions.

We have added a sentence to this NWP to state that, as a general rule, wetland compensatory mitigation is not required for low-head dam removal activities authorized by this NWP because these activities are restoration activities. Because the activities authorized by this NWP are intended to restore river and stream structure, functions, and dynamics, we do not believe that for most cases wetland compensatory mitigation should be required for losses of wetlands that were established as a result of the water

stored by the low-head dam. However, there may be cases where the wetlands associated with the low-head dam impoundment provide high levels of ecological functions and services and the district engineer may determine that compensatory mitigation should be required to ensure that the wetland losses caused by the NWP activity result in no more than minimal adverse environmental effects. River and stream functions provide important ecological services, and one of the objectives of this NWP is to facilitate the restoration of those ecological functions and services. Wetlands that were present before the low-head dam was constructed may recover if local hydrology has not changed substantially since the low-head dam was constructed. For these reasons, the PCN should not include a wetland compensatory mitigation proposal. There also does not need to be monitoring of upstream wetlands after the low-head dam is removed.

One commenter asked for clarification on how the Corps would determine whether a low-head dam is actually being used for its intended purpose. Many commenters said that the Corps should issue public notices for proposed low-head dam removals to solicit the views of upstream riparian landowners and to notify downstream landowners that additional water will be released in an effort to avoid property damage or hazards to people who use the river or stream for recreation.

This NWP only authorizes the removal of low-head dams. It does not authorize the construction or maintenance of low-head dams. Therefore, the current use of the low-head dam is not relevant to PCN review process because the district engineer is evaluating the reasonably foreseeable direct and indirect adverse environmental effects of the removal of the low-head dam. The NWP authorization would apply to the entity that has the authority to remove the low-head dam. That entity may be the dam owner or a federal, state, or local government agency if there is no private owner of the low-head dam. Riparian landowners upstream of the low-head dam should address their concerns to the owner of the low-head dam, or other party responsible for deciding whether to remove the low-head dam or conduct the repairs necessary to bring the low-head dam in compliance with current dam safety requirements.

We are limiting this NWP to the removal of low-head dams, which have little storage volume. There will be little additional water released downstream as the dam structure is removed. For low-head dams, storm flows pass over the dam crest (Tschantz and Wright 2011), and any damage to downstream properties is likely to be due to the higher stream discharges that occur during, and for a period of time after, those storm events. The removal of low-head dams will improve public safety, because these dams present a safety hazard to users of small craft such as canoes and kayaks (Tschantz and Wright 2011). We believe that limiting this NWP to low-head dams helps ensure that adverse effects on downstream landowners will be no more minimal. The removal of other types of dams (*e.g.,* storage dams or run-of-the-river dams), which may have substantial effects on downstream landowners, is more appropriately evaluated under the individual permit process.

Several commenters stated their support for requiring PCNs for all activities authorized by this NWP. One of these commenters said that the PCNs should be coordinated with the resource agencies.

We are requiring PCNs for all activities authorized by this NWP. There are a number of variables that need to be considered when evaluating dam removal activities, such as the physical characteristics of the dam, sediment loads, geomorphology of the stream system, hydrodynamics, and potential contaminants attached to fine sediments (Bushaw-Newton 2002). We believe that limiting this NWP to the removal of low-head dams reduces narrows the potential activity-specific expression of those variables so that these low-head dam removal activities will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer evaluates the activity-specific characteristics and determines the proposed activity will result in more than minimal adverse environmental effects, after considering mitigation proposed by the applicant, he or she will exercise discretionary authority and require an individual permit. We are not requiring agency coordination for these PCNs, but district engineers have the discretion to conduct agency coordination on a case-by-case basis if they need assistance from other agencies in making their decisions on whether to issue NWP verifications.

Proposed NWP A is issued as NWP 53, with the modifications discussed above.

NWP 54. *Living Shorelines.* This NWP was proposed as NWP B to authorize structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines. While some activities associated with living shorelines have been authorized by NWPs 13 and 27, the construction of living shorelines usually requires individual permits because the structures, work, and fills do not fall within the terms and conditions of the NWPs. Therefore, we proposed to issue this NWP to authorize the construction and maintenance of living shorelines, and make available to landowners another NWP that authorizes shore erosion control activities in coastal waters, to provide another option for streamlined NWP authorization to control coastal erosion.

We received many comments supporting the issuance of this NWP and many comments opposing the issuance of this NWP. Many commenters stated that they should have the right to protect their waterfront property from erosion using whatever techniques authorized by NWP that they choose as long as those activities will have no more than minimal adverse environmental impacts. Many commenters voiced their concerns that this new NWP would mandate the use of living shorelines over other approaches to bank stabilization. These commenters said that landowners should continue to be allowed to use bulkheads or revetments for shore erosion control if they want to protect their land in that way. Several commenters stated that this NWP should be withdrawn and that all bank stabilization and shore erosion control activities should require individual permits. One commenter opposed this NWP stating that it has the potential to result in impacts to tribal treaty fishing rights.

We are issuing this NWP to provide general permit authorization for the construction of maintenance of living shorelines in order to offer landowners an alternative general permit authorization to the various types of bank stabilization activities authorized by NWP 13. Built infrastructure (*e.g.,* bulkheads, revetments), natural infrastructure (*e.g.,* fringe wetlands, oyster reefs, beach dunes), and hybrid infrastructure (*e.g.,* living shorelines) to control erosion all have various strengths and weaknesses (Sutton-Grier et al. 2015, Table 1). The strengths of built shoreline infrastructure include long periods of experience in using these approaches, expertise in how to design and construct these features, understanding the level of protection provided by these structures, and their immediate effectiveness in controlling erosion after they are constructed (Sutton-Grier et al. 2015). Weaknesses of

built shore protection infrastructure include an inability to adjust to changing environmental conditions (*e.g.,* sea level rise), decreasing effectiveness over time as structures deteriorate, and negative impacts to coastal ecosystems on the project site (Sutton-Grier et al. 2015).

The strengths of living shorelines and other hybrid infrastructure shore protection approaches include the ability to use the best features of built and natural infrastructure, the provision of some ecological services other than erosion protection, the ability to design and implement innovative shore protection systems, and their ability to be used in coastal areas where there is not sufficient space for natural infrastructure (Sutton-Grier et al. 2015). Living shorelines may be an approach to adapting to sea level rise in coastal areas where there is space available for landward migration of fringe wetlands (Bilkovic et al. 2016). The weaknesses of living shorelines and other hybrid infrastructure approaches include: The present lack of empirical data demonstrating their performance, the need for more studies on the most effective designs for these hybrid approaches, their inability to provide all the ecological services that natural infrastructure supplies, the limited expertise of coastal planners and developers with these approaches, their negative impacts on species diversity, and the lack of cost-benefit data for these approaches (Sutton-Grier et al. 2015).

In these NWPs, we are not establishing a preference over one approach to shore erosion control over other approaches because there are numerous factors that must be considered when choosing an appropriate shore erosion control technique. The appropriate approach for shore erosion control is dependent on a variety of factors, such as substrate characteristics, site topography, water depths near the shore, fetch, and the extent of coastal development in the area (Saleh and Weinstein 2016). The type of waterbody is also important.

We are limiting this NWP to coastal waters, which consists of estuarine and marine waters and the Great Lakes. Another consideration in determining the appropriate shore erosion technique is the lack of space on urban coasts where there is not enough area to implement hybrid or natural approaches to shore erosion control (Sutton-Grier et al. 2015). We have revised the definition of ''living shoreline'' in this NWP using information in the Systems Approach to Geomorphic Engineering (SAGE) publication entitled: ''Natural and structural measures for shoreline stabilization'' [2] which was published in 2015 by the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Army Corps of Engineers (USACE). According to this publication, living shorelines are only applicable in coastal waters with low- to mid-energy waves, small fetch, and gentle slopes. Landowners and other entities that identify a need to protect their property and infrastructure from erosion can request authorization (if the proposed activity requires a PCN) under the NWP that is appropriate for the erosion control approach they propose to use.

There are other factors to consider when evaluating appropriateness and feasibility of living shorelines (Bilkovic et al. 2016). The construction of a living shoreline may require grading the riparian area and removing riparian vegetation (Bilkovic et al. 2016), which provides a number of ecological functions and services (NRC 2002). The removal of that riparian vegetation may not be consistent with local water quality or habitat protection requirements (Bilkovic et al. 2016). As an alternative to grading the riparian area and removing the vegetation, the living shoreline components may be constructed further into the waterbody, which may require variances from state or local tidewater regulations and impair navigation (Bilkovic et a. 2016). Finally, the construction of living shorelines in subtidal waters can infringe on state subaqueous lands (Bilkovic et al. 2016) and affect the finfish, shellfish, and other resources that use those tidewaters and submerged lands.

We have added a Note to this NWP to inform prospective permittees that bank stabilization activities outside of coastal waters, such as bioengineering and vegetative stabilization in inland rivers and streams, may be authorized by NWP 13. This NWP authorizes the construction and maintenance of living shorelines, as long as those activities result in no more than minimal individual and cumulative adverse environmental effects. Paragraphs (e) and (f) of this NWP require structures and fills in jurisdictional waters and wetlands, including navigable waters, to be minimized to the maximum extent practicable on the project site (see also paragraph (a) of general condition 23, mitigation). The district engineer will review the PCN and if the proposed activity will result in more than minimal individual and cumulative adverse environmental effects after considering mitigation proposed by the applicant, the district engineer will exercise discretionary authority and require an individual permit. Activities authorized by this NWP must comply with general condition 17, tribal rights. Under that general condition, NWP activities cannot cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

Several commenters said that this NWP should be withdrawn and that these activities should be authorized by modifying NWP 13. Many commenters expressed support for this proposed NWP because they are concerned that it is easier to obtain NWP 13 authorization than authorization to construct a living shoreline. These commenters said that under the current NWPs, living shorelines usually require individual permits, which discourage use of living shorelines as an alternative to hardened bank stabilization measures such as bulkheads, seawalls, and revetments. Several commenters said they support a new NWP that reduces the amount of time to obtain DA authorization for these activities. These commenters acknowledged the shorter timeframes in which an NWP authorization can be provided. One commenter noted that the issuance of this NWP would relieve regulatory burdens and support landowner preferences for the aesthetics and ecosystem services of living shorelines.

We have determined that it would be more appropriate to issue a separate NWP to authorize the construction and maintenance of living shorelines. Living shorelines are effective in specific areas of coastal waters, while NWP 13 authorizes a variety of bank stabilization approaches in a range of different categories of waters, from headwater streams to small lakes, larger rivers, high energy coastlines, and open ocean waters. The PCN thresholds differ between NWPs 13 and this new NWP because bank stabilization activities authorized by NWP 13 can often be constructed with small amounts of fill. On the other hand, living shorelines require larger amounts of fill to achieve desired grades for wave dissipation and vegetation establishment to reduce erosion, as well as fill structures such as sills to protect the sand fills and vegetation. If we had modified NWP 13 to authorize living shorelines, most proposed living shorelines would require written waivers from district engineers because they would exceed the limit of one cubic yard of fill material per running foot. Under this new NWP, written waivers from district engineers are only required if the structures or fills extend more than 30

[2] *http://sagecoast.org/.*

feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes, or if more than 500 linear feet of shoreline as measured along the bank is to occupied by the proposed living shoreline. Despite the differences in PCN thresholds, this NWP provides general permit authorization for the construction and maintenance of living shorelines. During FY 2106, the average (mean) evaluation time for NWP verifications was 40 days and the mean evaluation time for standard individual permits was 217 days.

Several commenters stated that living shorelines are not appropriate in the Great Lakes or other inland waters, especially inland lakes because long-term fluctuations of lake levels and major impacts of ice on the shorelines of these lakes.

We have modified the definition of ''living shoreline'' in the NWP to state that it can be used to authorize living shorelines in the Great Lakes. Living shorelines are not appropriate for streams, rivers, small lakes, and other inland waters. Vegetative stabilization and bioengineering may be used in inland waters to control erosion, and we have added a Note to this NWP to inform potential users of this NWP of the availability of NWP 13 to authorize those activities. If ice is likely to periodically damage or destroy the living shoreline and cause frequent maintenance and repair activities to be conducted after ice seasons, then other approaches to shore erosion control might be more appropriate for those sites.

Several commenters said that the NWP should use NOAA's definition of living shoreline. One commenter stated that under the certain conditions living shorelines can be used in higher energy shorelines. Another commenter said that properly engineered living shorelines can be used in any environment. One commenter recommending deleting the terms ''low-energy'' and ''mid-energy'' from the definition.

As discussed above, we have modified the definition of ''living shoreline'' to incorporate the site characteristics amenable to living shorelines that are identified in the 2015 NOAA–USACE SAGE publication that describes nature-based measures for shoreline protection. For the definition used for this NWP, we have used some concepts from NOAA's 2015 guidance on considerations for the use of living shorelines. We have utilized NOAA's definition with respect to a living shoreline being comprised mostly of native material, and incorporating living materials such as marsh plants with or without hard structures such as oyster reefs or stone sills.

We have deleted the following sentence from the first paragraph of the proposed NWP B: '' 'Living shoreline' is a broad term that encompasses a range of shoreline stabilization techniques along estuarine coasts, bays, sheltered coastlines, and tributaries.'' This sentence conveys an expansive view of living shorelines and where they are appropriate for use, and could lead to landowners and other entities considering the use of living shorelines on sites where they will not be appropriate or effective and where other approaches to erosion control should be used instead. We do not agree that living shorelines can be used in high energy coastlines. For those sites, substantial amounts of hard structures would be needed to protect the shoreline, and it is doubtful that there would be much of a sustainable living component in that higher energy erosive forces (Pilkey et al. 2012). We are not deleting the term ''low- to mid-energy'' from the definition because it is a critical component of the definition and it helps prospective permittees better understand where living shorelines are appropriate and feasible.

One commenter asked whether an oyster reef, by itself, could serve as the biological element of a living shoreline. This commenter said the text of this NWP should clarify that ''reef structures'' refers to oyster reefs. One commenter stated that this NWP should authorize restoration of sandy beaches in front of existing bulkheads.

An oyster reef can provide the biological element of a living shoreline. We have modified the first paragraph of this NWP to state that the reef structures may be inhabited by oysters or mussels. We have also modified paragraph (e) to refer to oyster or mussel reef structures. Sandy beaches restored in front of existing bulkheads may not be sustainable because the wave energy reflected from the bulkhead may erode the sand.

Many commenters said that living shorelines are not appropriate for man-made hydropower reservoirs where water levels are determined by the operator of the reservoir. Many commenters stated that living shorelines are not appropriate for shores subject to waves from boats, wind, and storms and that bulkheads and riprap are the appropriate erosion control measures for these types of sites. Several commenters opined that living shorelines are impractical for any waterbody that does not have a ''no wake'' restriction. Several commenters requested clarification on which other lakes and inland waters this NWP could be used. One commenter said this NWP should not authorize activities in inland freshwater lakes or rivers other than the Great Lakes and that NWPs 13 and 27 should be modified to allow for natural shoreline stabilization in inland waters.

We have modified the definition of ''living shoreline'' to make it clear that living shorelines are limited to coastal waters, including the Great Lakes. This NWP cannot be used to authorize erosion control activities in other lakes or inland waters, including hydropower reservoirs. In coastal waters, living shorelines may be successfully used for shorelines exposed to short fetches and subject to low- to mid-energy waves, including waves generated by moving vessels, wind, and storms. Landowners may seek advice from contractors and consultants to determine which shore erosion control approaches would be most appropriate and effective for their waterfront properties. Living shorelines can be effective for coastal shorelines subject to low to moderate boat wakes. We do not believe further clarification is necessary regarding which types of lakes living shorelines can be used because we are limiting this NWP to the Great Lakes and other coastal waters. We have added a Note to this NWP to notify prospective permittees of the availability of NWP 13 to authorize bank stabilization activities, including vegetative stabilization and bioengineering, in waters that are not coastal waters. Nationwide permit 27 only authorizes aquatic habitat restoration, enhancement, and establishment activities and does not authorize bank stabilization activities per se. Please see the preamble discussion of the modifications we made to NWP 27 to help ensure that it only authorizes aquatic habitat restoration, enhancement, and establishment activities.

One commenter requested justification of the following sentence, which appeared in the preamble of the proposed rule (81 FR 35206): ''Living shorelines maintain the continuity of natural land-water interface and provide ecological benefits which hard bank stabilization structures do not, such as improved water quality, resilience to storms, and habitat for fish and wildlife.'' This commenter stated that the statement should be removed or modified to improve its accuracy.

There is a growing number of studies and other documents that explain the features of living shorelines and the ecological services or benefits they can provide. Living shorelines, such as marsh-sill features, are nature-based measures to control shore erosion that

provide some degree of ecological functions and services through fringe wetlands or shellfish reefs that are integral components of those shore protection measures (NOAA–USACE 2015, Bilkovic and Mitchell 2013, Gittman et al. 2016). A bulkhead or seawall results in an abrupt barrier between aquatic and terrestrial environments (Dugan et al. 2011, Peterson and Lowe 2009). Both hard shore protection structures and living shorelines provide protection against storms and offer varying degrees of resilience, and sills and breakwaters and protect shorelines while continuing to allow fish and wildlife to access intertidal areas. Bulkheads, revetments, and seawalls do little to improve water quality, except to reduce sediment loads to waterbodies. Constructed fringe marshes along estuarine shorelines sequester carbon and nitrogen as those fringe wetlands develop over time (Craft et al. 2003).

One commenter recommended changing the 30-foot limit in paragraph (a) to 70 feet. Another commenter said the 30-foot limit should be increased to 35 feet, or use a ½-acre limit instead. A third commenter said that either the 30-foot limit should be eliminated or measured from the mean low water shoreline. This commenter recommended using the mean low water shoreline in tidal waters because using the mean high tide line would often require oyster reef components of living shorelines to be installed in intertidal waters rather than subtidal waters. One commenter said the proposed 30-foot limit is appropriate for the Great Lakes. One commenter said that the proposed 30-foot limit should be measured from the highest astronomical tide determined by the current National Tidal Datum Epoch. One commenter suggested replacing the 30-foot limit with a provision that limits the placement of structures and fills into waters less than 3 feet deep at mean low water in tidal waters or the ordinary high water elevation in non-tidal waters. Another commenter recommended authorizing living shorelines in regions with tidal ranges between 4 and 8 feet. The 4-foot tidal range would allow encroachment to 45 feet from the mean high water line and the 8-foot tidal range would allow encroachment up to 85 feet from the mean high water line.

We have changed paragraph (a) to measure the 30-foot encroachment from the mean low water line instead of the mean high water line in tidal waters. Since tidal range is not an issue in the Great Lakes, we are retaining the ordinary high water mark as the shoreline from which the 30-foot limit would be applied. This change should reduce the number of waivers needed by project proponents to construct oyster or mussel reef structures in subtidal waters. Using the highest astronomical tide to measure the 30-foot limit would result in nearly every living shoreline requiring a written waiver of that limit from the district engineer. We believe that using a linear foot limit for encroachments into the waterbody will be more effective at ensuring that these activities result in no more than minimal adverse environmental effects. For a narrow waterfront property an acreage limit could allow substantial encroachment into the waterbody. Using tidal ranges or water depths to limit encroachments of structures and fills into a waterbody would not be an effective approach for ensuring no more than minimal adverse environmental effects because substantial areas of the waterbody could be filled if it has shallow water depths that extend over a substantial distance.

One commenter said the 30-foot limit for this NWP should be changed to require fills to extend no more than 5 feet waterward from the edge of natural wetlands or to the mid-tide depth contour, whichever is deeper. This commenter also recommended that along shores where no wetlands exist, the landward edge of the sill should not extend greater than 30 feet waterward of the mean high water mark of tidal waterbodies or the ordinary high water mark of n non-tidal waterbodies. One commenter stated that grading steeper banks up to 30 feet into the water in an attempt to establish vegetation is likely to have the effect of altering the natural shoreline and extending the uplands. One commenter asked whether this NWP authorizes fills, especially sand fills, landward of sills, breakwaters, or other fill structures.

Changing the 30-foot limit to a 5-foot limit measured from the edge of existing wetlands would not be practical because there might not be vegetated wetlands along the existing shore, or the wetland vegetation might be sparse and the shore would need to be filled with sand and graded to construct a marsh fringe. The 30-foot limit, as measured from mean low water in tidal waters or the ordinary high water mark in non-tidal waters, is a simpler approach than trying to establish different limits based on the presence or absence of an existing marsh. As stated in the definition of ''living shoreline'' provided in the final NWP, living shorelines are constructed along shores with gentle slopes. Living shorelines may be less desirable to landowners with waterfront property that has steep slopes or bluffs if substantial grading of nearshore lands is necessary to install a living shoreline. We have modified paragraph (a) to include sand fills along with sills, breakwaters, or reefs, to make it clear that this NWP authorizes sand fills landward of sills, breakwaters, or reefs. Such fills may be necessary to achieve the proper shore elevations for the establishment of a wetland fringe, either through plantings or natural recruitment.

One commenter said that the 30 foot and 500 linear foot limits are too prescriptive, given the variability of shorelines across the United States. This commenter said that these limits should be determined through the regional conditioning process.

We are allowing the 30-foot and 500 linear foot limits to be waived by the district engineer on a case-by-case basis, after reviewing the PCN and coordinating that PCN with the resource agencies. For a waiver to occur, the district engineer has to issue a written determination with a finding that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. Division engineers can reduce these 30-foot and 500 linear foot limits through the regional conditioning process. If these limits and the ability to waive these limits make the use and administration of this NWP challenging in a particular geographic region, the district engineer can issue a regional general permit with different limits and procedures than this NWP and its general conditions.

One commenter recommended removing the 500 linear foot limit to encourage landowners and community groups to collectively implement living shorelines in a more cost effective manner. One commenter stated that activities in the Great Lakes that are over 500 feet long should require individual permits. One commenter stated that there should be no length limit on shoreline projects as long as those activities comply with state Coastal Zone Management Act (CZMA) policies.

The 500 linear foot limit does not preclude groups of adjoining landowners from working together to construct living shorelines at the same time, and working out arrangements with contractors to lower costs. For a proposed living shoreline in the Great Lakes that exceeds 500 feet in length, the district engineer will review the PCN and coordinate that PCN with the resource agencies. If the district engineer makes a written determination that the proposed living shoreline will result in no more than minimal

individual and cumulative adverse environmental effects, he or she will issue an NWP verification with or without additional conditions. The criteria under which states can issue CZMA consistency concurrences may be different from the ''no more than minimal adverse environmental effects'' requirement for NWPs and other general permits. States can impose conditions on these activities through their CZMA consistency determinations. To be authorized by this NWP, these activities require either CZMA consistency concurrences or presumptions of concurrence (see general condition 26, coastal zone management).

One commenter stated that the length limit should be defined as the total shoreline length of an activity minus any breaks in the treated shoreline. In other words, if the total length, minus the length of breaks, is greater than 500 feet, then a waiver would be required. One commenter said there should be no linear foot limits for this NWP. Several commenters asked how the length of a proposed activity would be calculated. One commenter suggested that as technology improves with the use of living shorelines, the 500 linear foot limit should be increased.

The 500 linear foot limit applies to the entire length of the treated shoreline. The treated shoreline is the footprint of the structures and fills for the living shoreline. If there are segments of the shore where no living shoreline will be constructed and those shore segments will be left in their current condition, then those segments are not counted towards the 500 linear foot limit. The 500 linear foot limit is necessary to ensure that these activities result in no more than minimal individual and cumulative adverse environmental effects. The waiver provision for this limit adds flexibility to the NWP, to allow district engineers to authorize activities that exceed the 500 linear foot limit without going through the individual permit process. To determine whether the 500 linear foot limit is exceeded, the length of treated shoreline for a single and complete project would be added. The 500 linear foot limit will be reevaluated during future rulemakings to reissue this NWP.

Several commenters recommended adding terms to this NWP to limit the use of oysters, mussels, and vegetation in living shoreline projects to native species. One commenter said that the NWP should allow natural processes to vegetate the living shoreline, instead of requiring vegetation to be planted. One commenter said that this NWP should authorize the use of mud for substrate to establish vegetation. Many commenters stated that this NWP should specify a minimum amount of living material to be required to meet the definition of living shoreline. One commenter asked for a definition of ''native material.''

We have revised paragraph (d) of this NWP to state that native plants appropriate for site conditions, including salinity, must be used for living shorelines that have tidal or lacustrine fringe wetlands, if the site is planted by the permittee. Natural revegetation is an effective approach to establishing or re-establishing coastal fringe wetlands, as long as the appropriate sediment elevations are provided for the development of the fringe wetland (Mitsch and Gosselink 2015, Chapter 18). In different areas of the country, various oyster and mussel species have been introduced into waterbodies and provide important ecosystem functions and services. If those non-native molluscan species are already the waterbody, there is not likely to be a substantive benefit to prohibiting their use in reefs for living shorelines. Mud is not an appropriate substrate for living shorelines, because it will be rapidly transported by tides, waves, and currents. For constructed marshes in estuaries, coarse grain sands are often used to reduce the likelihood of erosion of the substrate used for marsh plantings. The term ''native material'' generally applies to the plant materials that may be used for living shorelines. It may also refer to other organic materials such as oyster shell, coir logs, or wood that may be used for the construction and maintenance of living shorelines (Bilkovic et al. 2016).

One commenter said that the NWP should allow the use of beneficial, non-native structural material as long as that material does not pose a risk to wildlife. One commenter stated that if fill material is used the fill material must meet water quality standards and support the target vegetation. One commenter stated that sills can be constructed of native material found in a particular part of the country or use other local native materials that may have higher biological value than traditional slab concrete. This commenter also said that placement of clean, soft, dredged sediment can be beneficially reused for living shorelines and placed in coastal areas that have subsided.

The use of non-native structural materials may be necessary for some living shorelines. General condition 6 requires that suitable materials be used for NWP activities. Sills are usually constructed with stone, rather than concrete, slabs. If dredged material is suitable for the construction or maintenance of living shorelines then that material may be used.

One commenter stated that this NWP should require planting plans that show that no invasive species will be planted. One commenter said that this NWP should allow natural recruitment to establish the wetland fringe, instead of requiring the permittee to install plants for the wetland fringe. One commenter suggested adding a condition to require that all habitats altered or created by a living shoreline be free from non-native invasive plants for a minimum of 5 years. One commenter said this NWP should have a condition prohibiting the introduction of non-native species.

Paragraph (d) requires the use of native plants appropriate for current site conditions, including salinity, to be used for living shorelines that will have a wetland fringe, if the permittee wants to install plants to facilitate the development of the wetland fringe. As discussed above, the permittee may also allow natural recruitment to vegetate the wetland fringe for the living shoreline. A condition requiring permittees, over a five-year period, to remove any non-native plants that colonize a living shoreline is not reasonably enforceable, so adding such a condition would be contrary to the Corps' policy for permit conditions at 33 CFR 325.4(a). There have been a number of non-native species introduced to coastal waters over time. Those non-native plants and animals have naturalized and are as likely to occupy living shorelines as they have established themselves in a variety of coastal habitats.

Several commenters stated that breakwaters and groins should not be authorized by this NWP. One commenter requested clarification of what constitutes an artificial reef. One commenter said that this NWP should include a design standard for sills. This commenter expressed concern that not having a design standard would result in hardening of the shoreline in a manner inconsistent with the intent of the proposed NWP.

Breakwaters and groins may be a necessary component of living shorelines in coastal environments subject to higher energy waves, boat wakes, and currents. For the purposes of this NWP, a reef structure may consist of oyster or mussel bags, or other fill structures occupied by oysters or mussels. We do not use the term artificial reef, to avoid confusion with artificial reefs constructed for other purposes under 33 CFR 322.5(b). There are a variety of approaches for constructing living shorelines, so it

would not be appropriate to establish a national design standard in an NWP that can be used in coastal waters across the country.

One commenter said that many living shorelines are armored shorelines given a different name. This commenter stated that living shorelines have substantial adverse effects on estuarine beaches by altering their habitat characteristics and decreasing their ability to support estuarine communities. This commenter recommended requiring minimal use of larger hard, engineered structures, to prevent unneeded and damaging hard stabilization of these shorelines.

We have added a new paragraph (f) to this NWP to require sills, breakwaters, and other structures that are needed to protect the living shoreline's fringe wetlands to be the minimum size necessary to protect those wetlands. New paragraph (f) follows the recommendation in Bilkovic et al. (2016) which states that engineered structures should only be used when they are needed to support the wetland fringe and beach habitat of the living shoreline. Engineered structures such as sills and breakwaters should not be oversized relative to the living components (Bilkovic et al. 2016, Pilkey et al. 2012). Paragraph (a) of general condition 23, mitigation, also requires NWP activities, including the activities authorized by this NWP, to be designed and constructed to avoid and minimize permanent and temporary adverse effects to the maximum extent practicable on the project site.

One commenter remarked that if the proposed activity would compromise the flow of water, it should require an individual permit. One commenter stated that proposed paragraph (f) should require that any temporary impacts to living shorelines resulting from seawall repair or replacement should be exempt from mitigation requirements, as long as the area is restored after that seawall is repaired or replaced.

Living shorelines, especially living shorelines with sills or breakwaters, will have some effects on water flows because they are constructed to decrease the energy of incoming waves and other erosive water flows. Paragraph (f) of the proposed NWP has been redesignated as paragraph (g). This NWP requires that living shorelines be designed, constructed, and maintained so that they only have minimal adverse effects on water flows between the waterbody and the shore. Repair activities do not generally require compensatory mitigation. If a bulkhead or seawall is located landward of a living shoreline, and repair activities will have temporary impacts on the living shoreline, then the living shoreline should be repaired as well.

Several commenters said that paragraph (g) of the proposed NWP should be removed. One commenter stated that living shorelines should not be authorized in special aquatic sites.

We have removed the requirement to obtain a waiver for discharges of dredged or fill material into special aquatic sites. All activities authorized by this NWP require PCNs. Pre-construction notifications for this NWP require delineations of special aquatic sites (see the ''Notification'' paragraph of this NWP), as well as a delineation of other waters and wetlands on the project site (see paragraph (b)(4) of general condition 32). The construction and maintenance of living shorelines in special aquatic sites can be authorized by this NWP, as long as the permanent and temporary impacts to those special aquatic sites are minimized to the maximum extent practicable, and the district engineer determines that the adverse environmental effects are no more than minimal.

One commenter suggested adding language to the NWP to clarify that the maintenance of structures cannot increase the size of those structures beyond what was originally authorized. One commenter asked for clarification of the duration of this NWP and how that duration applies to long-term maintenance and repair activities. One commenter said paragraph (h) in the proposed NWP should be eliminated.

General condition 14 requires activities authorized by NWP to be properly maintained. The requirement for proper maintenance is emphasized by paragraph (h) of this NWP, because living shorelines require periodic maintenance to continue to serve as living shorelines. After storm events, it may be necessary to repair stone sills, breakwaters, reef structures, sand fills for fringe wetlands, and other components of the living shoreline. We have included maintenance activities in this NWP so that any required maintenance can be conducted under the authorization provided by this NWP. The NWP authorization applies for the length of time the authorized structures and fills are in place. If the landowner or other responsible party no longer wants to maintain the living shoreline, the structures and fills should be removed and the affected area restored.

Several commenters stated that beach nourishment to control erosion should be authorized by this NWP. We have not included beach nourishment in this NWP because they do not have a living component such as fringe wetland vegetation or oysters or mussels and are not considered living shorelines. When using the term ''beach nourishment,'' we are referring to larger scale beach fill projects, which usually occur on open coasts. This NWP does not authorize those beach restoration or replenishment activities because those types of shore protection approaches do not include a living component as required by the definition of ''living shoreline.'' For a living shoreline, there may be a portion of the living shoreline that consists of unvegetated sandy substrate (*e.g.,* a micro-beach or pocket-beach within or next to the fringe wetland). In this NWP we do not specify a minimum percent cover for vegetation, if the living shoreline authorized through an NWP 54 verification is designed to have a wetland fringe. In addition, we recognize that some movement of sand fill may be necessary to maintain the living shoreline. We have also revised paragraph (h) to make it clear that for maintenance activities the permittee has the option of planting vegetation or allowing natural recruitment of vegetation.

Many commenters said that the PCN requirements should be changed to provide a more streamlined authorization process. Many commenters supported the proposed PCN thresholds. Several commenter stated that PCNs should not be required for activities authorized by this NWP. Several commenters said that the PCN thresholds should be changed to make them equivalent to the PCN thresholds for NWP 13. Several commenters stated that all activities authorized by this NWP should require PCNs because living shorelines result in adverse environmental effects that need to be evaluated on a case-by-case basis to ensure that they are no more than minimal, individually and cumulatively. One commenter supported the proposal to not require PCNs for maintenance activities, but stated that if native corals or other organisms settle on the structure to be repaired, then a PCN should be required and the relocation of corals should be required.

We are requiring PCNs for all activities authorized by this NWP because living shorelines usually require substantial amounts of fill material, and the structures and work may extend 30 feet into the waterbody, with potential impacts to navigation and public resources in submerged lands. Living shorelines often convert subtidal habitats to intertidal habitats, so there are ecological tradeoffs (*e.g.,* Bilkovic and Mitchell 2013) that need to be considered by district engineers when

making their decisions on whether to issue NWP verifications. As stated elsewhere in this final rule, NWP 13 activities can often be constructed with minor amounts of fills in waters of the United States, whereas activities authorized by this new NWP typically require larger amounts of fill to construct fringe wetlands (Bilkovic and Mitchell 2013), protective structures such as sills and breakwaters, and oyster or mussel reefs. We have retained the provision that does not require PCNs for maintenance activities. If the proposed maintenance activity might affect Endangered Species Act (ESA) listed species or designated critical habitat, including ESA-listed coral species, and the prospective permittee is a non-federal permittee, then a PCN is required under general condition 18, endangered species.

Several commenters suggested that the PCN require information on the types of materials to be used for the proposed activity and to specify the height and slope of the proposed activity. One commenter said that the PCN should include information on how the methods and timing of construction may affect threatened or endangered species. One commenter said that the PCN should include a detailed biological assessment of the habitat that is proposed to be altered by the proposed living shoreline. One commenter stated that the PCN should include an alternatives analysis and explain why installation of a living shoreline is needed to control erosion.

The PCN must include the information required in paragraph (b)(4) of general condition 32. The PCN must include a description of the proposed living shoreline. We also recommend that the PCN include sketches or plans of the proposed NWP activity. If, during the review of the PCN, the district engineer determines that the proposed activity may affect ESA-listed species or designated critical habitat, then he or she will conduct ESA section 7 consultation. The formal or informal ESA section 7 consultation may result in permit conditions that impose time-of-year restrictions and other conditions to protect listed species and critical habitat. Those consultations may also result in conditions that affect the construction methods to avoid or minimize impacts to listed species or critical habitat. We do not believe a detailed biological assessment of the potentially impacted coastal habitat is required. If ESA section 7 consultation is required for the proposed activity, then a biological assessment or biological evaluation will be prepared for that formal section 7 consultation. If informal section 7 consultation is conducted and a written concurrence is issued by the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service, the district engineer will add applicable conditions to the NWP authorization that were necessary to get the written concurrence for the informal consultation request. Activities authorized by NWPs do not require an alternatives analysis (see 40 CFR 230.7(b)(1)). However, paragraph (a) of general condition 23, mitigation, requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site.

Many commenters expressed support for the proposed waiver provisions and many other commenters stated their opposition to the proposed waiver provisions. One commenter said that waivers not be issued for any of these activities. This commenter stated that if waivers are included, they should be capped at 50 feet for structures or fills extending into the water from the mean high tide line or ordinary high water mark. This commenter also recommended capping the length along the shore to no more than 750 linear feet. Proposed activities exceeding these thresholds would require individual permits. This commenter also said there should be no waivers for discharges in special aquatic sites. One commenter stated that waiver requests should be coordinated with other natural resource agencies prior to issuing those waivers.

We have retained the waiver provisions for the 30-foot limit for structures and fills extending into the waterbody, and for the 500-foot limit. The waivers provide the district engineer with the flexibility to authorize a living shoreline activity by NWP if he or she determines in writing, after coordinating the PCN with the resource agencies, that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. We do not believe that caps on waivers are necessary for the numeric limits in paragraphs (a) and (b) because of the requirement for the district engineer to issue a written waiver determination. A proposed activity that requires a waiver of one or both of these limits is not authorized unless the district engineer issues that written determination and an NWP verification is issued to the permittee. If the district engineer does not issue that written waiver determination, then the waiver is not granted and an individual permit is required. As discussed above, we have removed the provision requiring waivers for discharges in special aquatic sites. Paragraph (d)(2)(iv) of general condition 32 states that requests for waivers for this NWP require agency coordination.

One commenter asked how it would be determined if a living shoreline is appropriate for a particular location. Several commenters suggested rewording the text of this NWP to include shoreline restoration, shoreline softening, and shoreline enhancement projects. One of these commenters said the Corps should collect data on all shoreline stabilization projects to share with applicants examples of successful projects. Two commenters stated that there should be an evaluation period for new living shorelines to determine their effectiveness. One commenter suggested requiring multi-landowner projects that would result in large-scale living shorelines.

The project proponent determines whether to propose a living shoreline to control erosion at the coastal shoreline. The project proponent may hire a consultant or contractor to evaluate options for controlling erosion and determine which approach would satisfy the project proponent's needs. A coastal waterfront property owner may feel safer with a bulkhead, seawall, or revetment (Popkin 2015). The district engineer may offer advice to the project proponent on potential alternatives for controlling erosion at the site (see 33 CFR 320.4(g)(2)). Shoreline restoration, shoreline softening, and shoreline enhancement projects likely mean different things to different people, so we have not changed the text of this NWP to incorporate those terms. For example, shoreline restoration may be an ecological restoration activity authorized by NWP 27 because it returns structure, functions, and dynamics to a shoreline that has been damaged or degraded by human activities. Shoreline softening may mean the removal of a bulkhead, seawall, or revetment and replacing those hard structures with a tidal fringe wetland protected by stone sills. Shoreline enhancement projects may be actions taken to improve ecological functions performed by the shore at a particular site. These activities are likely to serve different purposes and authorization by other NWPs may be appropriate, or those activities may require other forms of DA authorization.

It would be more appropriate for consultants and contractors to share information on successful living shoreline activities with landowners and other entities that are considering using living shorelines to protect their property or infrastructure. As this NWP is used over the next five years, we

expect to receive feedback from Corps districts, permittees, contractors, consultants, and other interested parties. That feedback will be considered as we develop the proposed rule for the 2022 NWPs. There is also likely to be evaluations conducted by scientists and other academics on the effectiveness and long-term sustainability of living shorelines. Adjoining landowners can work together to plan, design, and implement living shorelines.

One commenter stated that this NWP should require the use of qualified consultants and contractors. Another commenter suggested that this NWP require that the work to design the proposed living shoreline be done under the supervision of a certified ecological designer. Several commenters stated that Corps districts should work with local designers and agencies to determine the availability of living shoreline contractors in their geographic areas of responsibility. Several commenters said that this NWP should require consultation with local watershed planning entities, water supply entities, or other local government agencies to ensure that proposed NWP activities do not interfere with a local level project or issue. One commenter said that living shorelines should not be built on undeveloped shorelines. One commenter stated that this NWP should require the installation of reflectors or other types of markers at intervals along the living shoreline. One commenter said that the PCN should require a monitoring plan for these activities.

An NWP cannot specify qualifications for consultants and contractors. Project proponents need to do their due diligence in selecting a consultant or contractor. We cannot add terms to this NWP to require the living shoreline to be designed and constructed under the supervision of a certified ecological designer. General condition 7, water supply intakes, states that no NWP activity may occur in the proximity of a public water supply intake, unless it is needed to repair or improve that intake or for adjacent bank stabilization. Authorization of the construction and maintenance of living shorelines by this NWP does not eliminate the need for the permittee to obtain other required federal, state, or local permits, approvals, or authorizations that are required by law. If the shoreline is undeveloped, then there might not be a need for a living shoreline to control erosion. However, if the parcel in question is zoned for development, it may be developed in the near future and the developer or landowner might request NWP authorization for a living shoreline in advance of constructing a house or other structure on that parcel. Paragraph (b) of general condition 1, navigation, requires for authorized activities the installation of any safety lights or signals prescribed by the U.S. Coast Guard. District engineers can add conditions to this NWP to require monitoring of the living shoreline to ensure that it is developing the intended features. However, we do not believe a monitoring plan should be required for all PCNs for these activities.

One commenter suggested adding a provision to this NWP that requires living shorelines to be designed, constructed, and maintained for the specific lifetime of the project. This commenter stated that this NWP should authorize temporary fills for the construction of these activities, similar to the language in NWP 13. One commenter stated that working at low tide should not be a requirement of this NWP. One commenter requested a definition of the term ''shoreline.'' One commenter stated that this NWP should require the permittee to provide assurances that the structures are sound and that they will not pose hazards to navigation.

Paragraph (h) of this NWP requires the authorized activity to be properly maintained. We have modified this paragraph as follows: ''The living shoreline must be properly maintained, which may require periodic repair of sills, breakwaters, and reefs, or replacing sand fills and replanting vegetation after severe storms or erosion events. This NWP authorizes those maintenance and repair activities, including any minor deviations necessary to address changing environmental conditions.'' These changes are intended to authorize repair activities, plus minor deviations needed to response to changing environmental conditions such as an increase in sea level at the site, so that the living shoreline can continue to function as a living shoreline. We have removed the phrase ''to the original permitted conditions'' that was in the proposed paragraph (h) to recognize the dynamic nature of coastal shorelines and the likely need to adjust living shoreline projects over time as environmental conditions change.

All activities authorized by this NWP require PCNs, so using NWP 33 to authorize temporary structures or fills that are not covered by this NWP would not place any additional burdens on prospective permittees. Their PCNs would specify this NWP and NWP 33 as the NWPs for which they are seeking verification from the district engineer. We have not added any terms and conditions that require regulated activities to be conducted at low tide. A shoreline is where a land mass intersects with a waterbody. That intersection may be identified in a number of ways, such as a high tide line, mean high tide line, mean low tide line, or other criteria. Activities authorized by this NWP must comply with general condition 1, navigation. Under that general condition, the Corps may require the permittee to remove the authorized structures or work (see paragraph (c) of that general condition).

One commenter stated that if the proposed living shoreline will impact one resource type and replace it with another resource type, the proposed activity should only qualify for this NWP if the district engineer determines the resource type substitution represents a desirable ecological outcome for the affected system. One commenter said that this NWP should not authorize activities in areas with Endangered Species Act listed species or designated critical habitat. One commenter asked for clarification whether mitigation is required for activities authorized by this NWP. One commenter stated that mitigation should not be required for living shorelines even if those activities result in impacts greater than 1/10-acre, because these activities result in net ecological gains through enhancement. One commenter said that this NWP should not be used by a permittee to provide compensatory mitigation for another activity.

All activities authorized by this NWP require PCNs, to provide district engineers the opportunity to review proposed activities to ensure that they result in no more than minimal individual and cumulative adverse environmental effects. We recognize that these activities will require ecological tradeoffs, as shallow water habitats are filled to construct features that reduce erosion, even though those features will have some living component such as fringe wetlands or oyster or mussel reefs and provide some ecological functions and services. Activities authorized by this NWP must comply with general condition 18, endangered species. District engineers will review PCNs and determine whether the proposed activities may affect ESA-listed species or designated critical habitat. For those activities that district engineers determine may affect listed species or designated critical habitat, they will conduct formal or informal ESA section 7 consultations.

District engineers may require mitigation for activities authorized by this NWP. If the district engineer

reviews a PCN and determines that the proposed activity will result in more than minimal adverse environmental effects, he or she will notify the project proponent and offer the applicant an opportunity to submit a mitigation proposal. If the applicant submits a mitigation proposal that is acceptable to the district engineer, then the district engineer will add conditions to the NWP authorization to require implementation of the mitigation proposal. Living shorelines are likely to provide some ecological functions and services, but they might not produce net gains because of the ecological tradeoffs that occur as a result of the structures and fills for living shorelines causing changes to plant and animal communities in nearshore estuarine waters (*e.g.,* Gittman et al. 2016, Bilkovic and Mitchell 2013, Pilkey et al. 2012). Those changes may be beneficial for some organisms and harmful to other organisms.

The construction and maintenance of a living shoreline could be considered by a district engineer to be a mitigation measure, especially if the project proponent proposes to replace a bulkhead, seawall, or revetment with a living shoreline to provide some additional ecological functions and services at a coastal site. But a living shoreline would not be considered compensatory mitigation because its primary purpose is shore erosion control, not aquatic resource restoration, enhancement, or preservation to offset unavoidable losses of jurisdictional waters or wetlands.

One commenter stated that the text of this NWP should make it clear that it authorizes the construction and maintenance of living shorelines on the west coast. More specifically, this commenter said that this NWP should authorize activities in bodies of water, such as the San Francisco Bay. One commenter remarked that the final NWP rule should recognize that coastal areas have other types of habitats, such as tidal marshes, mudflats, shellfish beds, submerged aquatic vegetation, microalgal and other vegetative beds. Many commenters expressed their support for the use of regional conditions to tailor this NWP to different geographic areas of the country.

This NWP authorizes the construction and maintenance of living shorelines in all coastal waters, not just the east and Gulf coasts. Approaches to designing and constructing living shorelines may vary by geographic region. Division engineers can impose regional conditions on this NWP to account for regional differences in aquatic resource functions and services, and potential regional impacts and benefits of living shorelines. San Francisco Bay is a coastal waterbody, so this NWP can be used to authorize living shorelines in that waterbody. There are many different types of habitats in coastal waters, and evaluation of impacts to the habitat types present at a specific site will be conducted during the PCN review process.

Proposed NWP B is issued as NWP 54, with the changes discussed above.

General Conditions

We received a number of comments recommending new general conditions for the NWPs. A few commenters suggested adding a new general condition that would require the permittee to clearly mark the limits of disturbance on the project site, or areas where the use of equipment would be excluded. A few commenters said that a new general condition should be added to require the permittee to provide post-construction reports that would include as-built plans, a description of the types of material discharged, the actual impacts, photo documentation of the completed activity, and a description of the compliance measures that were implemented to address the NWP general conditions.

District engineers can add conditions to NWP authorizations to require permittees to mark authorized limits of disturbance to avoid and minimize direct and indirect impacts to jurisdictional waters and wetlands. Because the NWPs authorize a wide variety of activities, many of which do not involve land disturbance activities, we do not think an NWP general condition is warranted. In general, compliance with the terms and conditions of the NWP verification are already addressed through the requirements of general condition 30, compliance certification. For an NWP authorization where permittee-responsible mitigation is required by the district engineer, permit conditions may be added to the NWP authorization or through the approved mitigation plan to require submission of as-built plans, photo documentation of the compensatory mitigation project, and other compensatory mitigation requirements (see 33 CFR 332.3(k) and 33 CFR 332.6(a)). It is not necessary for a permittee to address compliance with each NWP general condition through a post-construction report submitted to the district engineer.

One commenter recommended adding a general condition that would require reporting of any activity that involves water withdrawals, water withdrawal structures, or related appurtenances that do not require state wetland or stream permits. One commenter requested a new general condition that prohibits the use of treated wood except for framing structures above waters inhabited by salmonids. One commenter suggested adding a general condition that would require best management practices, such as horizontal directional drilling, the use of double silt fences, and doubling soil stabilization measures, in riparian areas to minimize impacts to mussels and fish during construction activities. Another commenter said that there should be a general condition that requires project areas to be assessed for the presence or absence of rare mussel habitat, pre-construction mussel surveys, and avoidance of direct disturbance of habitat and degradation of water quality when ESA-listed mussels and their habitat are found.

The Corps does regulate the withdrawal of water from waterbodies. Department of the Army authorization is required for structures in navigable waters subject to section 10 of the Rivers and Harbors Act of 1899, including structures that withdraw water from those waterbodies. If the waterbody is only subject to section 404 of the Clean Water Act, DA authorization is not required for a water intake structure unless there is an associated discharge of dredged or fill material into jurisdictional waters and wetlands that requires Clean Water Act section 404 authorization. Water intake structures that require DA authorization under section 10 of the Rivers and Harbors Act of 1899 and/or section 404 of the Clean Water Act may be authorized by NWP 7, which requires PCNs to Corps districts. The use of treated wood for activities authorized by NWP is more appropriately addressed by Corps districts on a case-by-case basis, after considering the specific NWP activity and its potential direct and indirect adverse environmental effects. Nationwide permit activities that might affect ESA-listed mussels or their designated critical habitat are addressed though compliance with general condition 18, endangered species. District engineers will conduct ESA section 7 consultation for any proposed NWP activity that they determine may affect listed mussel species or their designated critical habitat.

Discussion of Proposed Modifications to Nationwide Permit General Conditions

GC 1. *Navigation.* We did not propose any changes to this general condition. Two commenters asked for an explanation of what constitutes a more

than minimal adverse effect to navigation. These commenters also asked if temporary obstructions could be mitigated with portage.

District engineers will determine on a case-by-case basis whether proposed impacts of NWP activities on navigation will be no more than minimal after considering site-specific circumstances. District engineers will also use their discretion to determine whether temporary obstructions to navigation that would block the transport of interstate of foreign commerce will have more than minimal adverse effects on navigation and would thus require individual permits. During the evaluation of the individual permit application, the district engineer could determine whether portage is an appropriate mitigation measure while the temporary obstruction is in place.

The general condition is adopted as proposed.

GC 2. *Aquatic Life Movements.* We did not propose any changes to this general condition. Several commenters supported the proposed text of this general condition. Several commenters recommended changes to the general condition.

One commenter said that the general condition be revised to require avoidance and minimization of interference to all necessary life cycle movements of aquatic species indigenous to the waterbody. One commenter stated that this general condition should include additional requirements for proper culvert sizing to ensure unhindered fish passage and to reduce blow-outs that cause major impacts to river and stream channels. One commenter said that the stream bed should be returned to pre-construction contours unless the purpose of the NWP activity is to eliminate a fish barrier and restore the natural substrate of the stream and its contours. One commenter expressed concern that the minimal adverse environmental impacts required by this general condition are not being tracked or enforced, stating that NWP activities often disrupt necessary life cycle movements of aquatic life indigenous to the waterbody, including their migration.

Requiring avoidance and minimization of interference to all necessary life cycle movements of indigenous aquatic species in a waterbody is usually not practical or feasible. Road crossings and other fills in jurisdictional waters are likely to cause some interference to the necessary life cycle movements of indigenous aquatic species. At best, disruptions of movement should be reduced as much as is practicable. The purpose of this general condition is to ensure that the disruptions to the necessary life cycle movements of indigenous aquatic species are no more than minimal, unless the NWP activity's primary purpose is to impound water. Proper culvert sizing is more appropriately determined on a case-by-case basis, after considering site and watershed characteristics and climate, and the life cycle characteristics of the species indigenous to the waterbody. Large storm events will occasionally cause some authorized culverts to fail and become damaged or washed out, with adverse effects to downstream segments of the river or stream caused by those large flows.

The general condition requires the permittee to design the NWP activity so that it does not substantially disrupt the necessary life cycle movements of indigenous aquatic species, except under certain circumstances. It may not be practicable to return the stream bed to pre-construction contours because of site and engineering constraints, as well as costs. Those factors influence the practicability of road crossing options. The NWP activity should be constructed to allow expected high flows to continue unless its primary purpose is impound water or manage high flows (also see general condition 9). For some types of culverts, sediment transport should continue to maintain the natural stream substrate and general channel morphology. Activities authorized by NWP can have no more than minimal adverse effects on necessary aquatic life movements, and if a district engineer determines that a permittee is not complying, with the requirements of this general condition, he or she will take appropriate action. One action may be to require requiring remediation to ensure that the activity complies with general condition 2 and other applicable NWP general conditions or suspending. Another action could be to revoke the NWP authorization and require an individual permit for the activity if it substantially disrupts the necessary life cycle movements of indigenous aquatic species or otherwise cannot be conducted so that it has no more than minimal adverse environmental effects.

One commenter said this general condition should be more specific in terms of protocols to be used to ensure that NWP activities have no more than minimal adverse environmental effects. One commenter stated that there is a growing body of scientific literature that shows that a large percentage of culverted stream crossings across the country are not properly designed to allow for the safe passage of fish and other aquatic organisms. This commenter said there should be changes to this general condition to encourage the use of best management practices in the design, construction, modification, and replacement of bridges or culverts that cross waterbodies. This commenter recommended changing this general condition to require the use of stream-simulation principles to maintain or restore the waterbody's natural course, condition, capacity, and flows necessary to sustain the movement of those aquatic species. This commenter also said that this general condition should also require the use of open-bottom bridges and culverts whenever possible, or if the waterbody cannot be spanned with an open-bottom bridge or culvert the bottom of the bridge or culvert should be covered with natural substrate. This commenter also stated that the minimum crossing width must be 1.2 times the width of the waterbody from ordinary high water mark to ordinary high water mark. This commenter also said that the general condition should require the gradient or slope of the crossing structure to match the stream profile, so that the velocity and depth of water in the structure matches that of the stream. One commenter stated that this general condition should require maintenance of the natural bank full capacity or cross-sectional area of the stream channel.

Given the wide variation in river and stream structure, functions, and dynamics across the country, as well as the various geomorphic and hydrologic settings in which NWP activities are conducted, it is not possible to add more specific requirements to this general condition. Compliance with this general condition is more appropriately determined by district engineers on a case-by-case basis after considering the specific regional and site characteristics (*e.g.,* hydrology, geology, and climate), as well as the life cycle requirements of the aquatic species indigenous to the waterbody. This general condition requires culverted stream crossings to be properly designed and constructed to allow for the passage of fish and other aquatic organisms during migration and other life cycle events. Planning, design, construction, and maintenance practices are more appropriately determined for specific NWP activities. Attempting to impose the same practices, including best management practices, across the entire country is not practical and will not be effective. For some rivers and streams, it is not practicable to use bottomless culverts. We have modified this general condition to state that if a bottomless culvert cannot be used, then

the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

Given the wide variation in river and stream crossings across the country, the variability in the valleys in which those rivers and streams are located, and the need to consider hydrology and climate, it would not be appropriate to specify in this general condition a numeric minimum crossing width. It may also not be practicable to require, in all cases, that the gradient in the slope within the crossing structure to match the gradient or slope of the river or stream in the vicinity of the crossing. The purpose of this general condition is to ensure that adverse effects to aquatic life movements are no more than minimal. There may be methods to achieving that objective other than maintaining natural bank full capacity or the cross-sectional area of the stream channel. When reviewing PCNs, district engineers will evaluate proposed NWP activities to ensure that they comply with the requirements of this general condition.

The general condition is adopted as proposed.

GC 3. *Spawning Areas.* In the June 1, 2016, proposed rule, we did not propose any changes to this general condition. One commenter said that NWP activities should not be allowed in spawning areas. One commenter suggested revising the general condition to prohibit activities that would inhibit access of migratory species to their spawning areas. One commenter noted that spawning areas could be adversely affected by activities outside of those spawning areas, and that those indirect effects could also have negative impacts on species.

It is not practical to completely avoid impacts to spawning areas. The purpose of this general condition is to require permittees to avoid, to the maximum extent practicable, conducting NWP activities in spawning areas during spawning seasons. This requirement helps minimize adverse effects to spawning activities of aquatic organisms. General condition 2, aquatic life movements, addresses the movement of aquatic organisms in the waterbody. This includes access of migratory species to spawning areas, such as upstream spawning areas used by anadromous salmon. The general condition already recognizes that activities distant from spawning areas can physically destroy important spawning areas because of sediment transport to downstream areas and deposition of sediment in those spawning areas. Those indirect adverse effects are prohibited by this general condition.

This general condition is adopted as proposed.

GC 4. *Migratory Bird Breeding Areas.* We did not propose any changes to this general condition and no comments were received. The general condition is adopted as proposed.

GC 5. *Shellfish Beds.* We did not propose any changes to this general condition. A few commenters expressed support for the general condition as proposed. One commenter requested that the Corps define the term ''concentrated shellfish bed'' and clarify whether it refers to oyster and clam beds and not to streams inhabited by mussels. One commenter asked if this general condition only applies to marine waters. A commenter asked for clarification as to what constitutes a ''concentrated shellfish population'' and how that term relates to living shorelines that would be authorized by proposed new NWP B. This commenter inquired whether this general condition applies to waters that have large shellfish populations and whether it prohibits NWP activities on extant shellfish reefs.

The term ''concentrated shellfish bed'' refers to shellfish beds inhabited by shellfish species, such as oysters, clams, and mussels. This general condition is not limited to marine or estuarine waters, but could also apply to fresh waters that support concentrated beds of native shellfish. This interpretation is supported by the history of this general condition. Prior to the 2000 NWPs, this general condition was focused on shellfish production beds. In 2000, we modified this general condition by changing the title from ''Shellfish Production'' to ''Shellfish Beds'' so that it would cover more than areas actively managed for shellfish production (see 65 FR 12868). It should also be noted that the general condition applies to NWP 27 which authorizes habitat restoration activities to benefit shellfish in both tidal and non-tidal waters including freshwater streams. There are regional variations in what constitutes a shellfish concentration depending on the species and habitat types present. The identification of concentrated shellfish populations, for the purposes of determining compliance with this general condition, is more appropriately conducted by district engineers using local criteria and methods.

Areas that have concentrated shellfish populations are not suitable for the construction of living shorelines, because this general condition prohibits NWP activities in those areas, except for activities authorized by NWPs 4 or 48. District engineers will review PCNs for NWP 54 activities to determine if the proposed activity is precluded from NWP authorization by general condition 5 because it occurs in an area of concentrated shellfish populations. If it is precluded, the district engineer will inform the project proponent that an individual permit will be required for the construction of the proposed living shoreline. This general condition applies to areas within a waterbody that have concentrated shellfish populations. It does not apply to other areas of the waterbody that do not have concentrated shellfish populations. If there is an extant shellfish reef, this general condition prohibits NWP activities, except for activities authorized by NWPs 4 and 48.

This general condition is adopted as proposed.

CG 6. *Suitable Material.* We did not propose any changes to this general condition. One commenter supported the proposed general condition. One commenter suggested adding tires and encapsulated flotation devices to the list of unsuitable materials in the parenthetical in the text of the general condition.

Whether tires or encapsulated flotation are unsuitable materials is at the district engineer's discretion. In addition, division engineers can add regional conditions to this NWP to provide regional examples of unsuitable materials that are prohibited by this general condition. This general condition is adopted as proposed.

GC 7. *Water Supply Intakes.* We did not propose any changes to this general condition. Three commenters requested clarification on what constitutes ''proximity'' to a water supply intake for the purposes of this general condition. They also expressed concern over the review procedures used to determine compliance with this general condition. Two commenters said that all NWP activities should be prohibited within water source protection areas for public water systems. One commenter asserted that district engineers are not ensuring compliance with general condition 7, and suggested that this general condition should be modified to mirror the review and documentation requirements for general condition 18, endangered species, and general condition 20, historic properties.

The term ''proximity'' is to be applied using the commonly understood definition of that term (''very near, close'' according to Merriam-Webster's Collegiate Dictionary, 10th edition). Therefore, the proposed NWP activity would have to be very near, or close to, the public water supply intake for

general condition 7 to apply. For those NWP activities that require PCNs or are voluntarily reported to Corps districts, district engineers will review the PCNs to determine if general condition 7 applies. For those NWP activities that do not require PCNs and are not voluntarily reported to Corps districts, district engineers have the authority to determine whether those unreported NWP activities comply with all applicable general and regional conditions. If an activity does not comply with one or more applicable conditions, the district engineer will take appropriate action under 33 CFR part 326.

We do not agree that all NWP activities should be prohibited in water source protection areas for public water systems. NWP activities can be conducted in those areas with little or no minimal adverse effects to water quality. In addition, all NWPs that authorize discharges into waters of the United States require Clean Water Act section 401 water quality certification. States can deny water quality certification for any NWP activity that might result in a discharge that is not in compliance with applicable water quality standards. General conditions 18 and 20 are based on federal laws impose specific requirements (*e.g.,* ensure its actions are not likely to jeopardize the continued existence of any endangered species or threatened species) or trigger consultation requirements. There is no federal law that imposes a comparable requirement for federal actions that take place in proximity to a public water supply intake. Division engineers can add regional conditions to the NWPs to prohibit the use of one or more NWPs in areas used for public water supplies.

One commenter stated that PCNs should be required for all NWP 12 activities within a certain distance of public water supply intakes. This commenter also said that if PCNs are not required for those NWP 12 activities, then that NWP should be prohibited in the watershed of the public water supply intake. A commenter said that this general condition does not provide sufficient safeguards against pollution of drinking water supplies.

For those NWP 12 activities that require PCNs or are voluntarily reported to the Corps, district engineers will review those proposed activities to ensure that they comply with this general condition. Division engineers can restrict or prohibit the use of NWP 12 in water source protection areas for public water systems. District engineers can also take action if they determine that a specific activity does not comply with this general condition and therefore does not qualify for NWP authorization.

This general condition is adopted as proposed.

GC 8. *Adverse Effects from Impoundments.* We did not propose any changes to this general condition. One commenter supported the proposed general condition. One commenter asked for a definition of the term ''maximum extent practicable'' as it applies to this general condition, or for examples of activities that satisfy that provision.

District engineers will use their discretion in determining whether specific impoundments authorized by NWP have minimized, to the maximum extent practicable, adverse effects to the aquatic system as a result of accelerated water flows or restricted water flows. The application of that term is dependent on case-specific circumstances and site conditions. This general condition is adopted as proposed.

GC 9. *Management of Water Flows.* We did not propose any changes to this general condition. A few commenter expressed support for the proposed general condition. One commenter stated that this general condition: Helps ensure that proper floodplain functions are maintained, helps safeguard communities during natural disasters, and preserves connectivity among aquatic habitats. One commenter said that this general condition should recognize that structures or fills, such as a temporary causeway or work pad, placed into open waters will raise backwaters to some degree, and that rise in water level should be acceptable as long as it does not cause significant flooding or damage to property.

The proposed general condition provides an exception to the prohibition against restricting or impeding the passage of normal or high flows, in cases where the primary purpose of the NWP activity is to impound water or manage high flows. It is the permittee's responsibility to ensure that such impoundments do not cause flood damage or other types of property damage. Paragraph 4 of Section E, Further Information, states that the NWPs ''do not authorize any injury to the property or rights of others.''

One commenter stated that this general condition should be modified to ensure that the pre-construction course and condition of a waterbody is maintained during the construction of permanent and temporary crossings of the waterbody. This commenter said that this is especially important because road crossings of streams that do not account for various flow conditions may fail during severe storms and flooding events. This commenter recommended adding ''and the construction, replacement, or rehabilitation of temporary and permanent crossings (*e.g.,* bridges or culverts)'' after ''stormwater management activities''.

We have modified the first sentence of this general condition by removing the word ''and'' before ''stormwater'' and adding the phrase ''and temporary and permanent road crossings'' after ''stormwater management activities'' to add road crossings to the examples of activities where the pre-construction course, condition, capacity, and location of open waters must be maintained to the maximum extent practicable.

This general condition is adopted with the modification discussed above.

GC 10. *Fills Within 100-Year Floodplains.* We did not propose any changes to this general condition. One commenter said that this general condition is not a surrogate for E.O. 11988 (Floodplain Management) compliance. This commenter recommended modifying general condition 10 to require an evaluation of existing flood risk data to satisfy floodplain management requirements, and to ensure that NWP activities are outside of the floodway or have minimal hydraulic impacts and do not place critical facilities at high risk. Two commenters said that NWPs that authorize development activities should not be allowed to authorize activities in 100-year floodplains. One commenter stated that Federal Emergency Management Agency (FEMA)-approved floodplain management requirements in one area of the country also protect essential fish habitat.

The only fills in 100-year floodplains that are regulated by the Corps are discharges of dredged or fill material into jurisdictional waters and wetlands. The NWP program supports the objectives of E.O. 11988 by encouraging minimization of losses of waters of the United States to qualify for NWP authorization, including losses of waters of the United States in 100-year floodplains. The NWPs also require avoidance and minimization of temporary and permanent impacts to waters of the United States to the maximum extent practicable on the project site (see paragraph (a) of general condition 23, mitigation). We do not have the authority to regulate the filling of uplands within 100-year floodplains, including upland floodways. The primary responsibility for determining land use and zoning lies with state, local, and tribal governments (see 33 CFR 320.4(j)(2)), which includes land use within 100-year floodplains.

Concerns about adverse effects on floodplains and floodways are more appropriately addressed by the state and local agencies that have the primary responsibility for floodplain management. General condition 10 reminds permittees that they must comply with applicable FEMA-approved state or local floodplain management requirements.

Development activities in jurisdictional waters and wetlands within 100-year floodplains can be authorized by NWPs 29, 39, and other NWPs as long as they have no more than minimal individual and cumulative adverse environmental effects. We acknowledge that FEMA-approved floodplain management requirements can also protect other important resources, such as essential fish habitat.

This general condition is adopted as proposed.

GC 11. *Equipment.* We did not propose any changes to this general condition. Two commenters said they support the reissuance of this general condition as proposed. One commenter stated that this general condition should provide examples of other minimization measures that should be taken when equipment is used in streams, such as minimization of soil disturbance, proper installation of turbidity barriers, and the placement of oil booms downstream of equipment used in waters. This commenter also suggested that water quality sampling should be required to ensure water quality standards are met throughout the construction period. One commenter said that the use of heavy equipment in jurisdictional waters and wetlands has potential to leak or spill petroleum products into those waters and wetlands. This commenter recommended modifying this general condition to require equipment to be maintained in good working order to ensure that there will be no leaks of contaminants, and require spill kits for on-site emergency cleanups.

Actions taken to minimize the impacts of equipment on streams are more appropriately identified on a case-by-case basis, after considering the type of work to be done in the stream, the flow regime, the geomorphology of the stream, and other factors. Ensuring that activities authorized by NWPs meet applicable water quality standards is achieved through the water quality certification process. If an individual water quality certification is required for an NWP activity, the certification may include activity-specific conditions that require actions, such as water quality sampling, to ensure the NWP activity complies with applicable water quality standards. We recognize that there is a potential for mechanical equipment to leak or spill petroleum products. Such discharges may also be addressed through the water quality certification process. Leaks and spills of fuel, hydraulic fluids, transmission fluids, and other fluids from equipment used to conduct NWP activities are not discharges of dredged or fill material that are regulated under section 404 of the Clean Water Act. Such spills or leaks may also require action under other federal, state, or local laws and regulations. The purpose of this general condition is to minimize adverse effects to jurisdictional waters and wetlands that are caused by equipment that disturbs soil. We do not have the authority to regulate the maintenance of equipment, or to mandate the use of spill kits for on-site emergency cleanups. Project proponents should comply with all other applicable federal, state, and local laws and regulations, which may address the operation and maintenance of construction equipment and responding to spills and leaks from that equipment during construction activities.

This general condition is adopted as proposed.

GC 12. *Soil Erosion and Sediment Controls.* To clarify the application of this general condition in tidal waters, we proposed to modify the last sentence to encourage permittees to conduct work during low tides to reduce soil erosion and sediment transport during construction activities in waters subject to the ebb and flow of the tide.

Three commenters stated their support for the proposed modification of this general condition. One commenter objected to the proposed change, stating that it would be interpreted and applied by Corps districts as a requirement. One commenter said that this general condition should prohibit activities during low tides when migratory birds are using tidal flats. Two commenters stated that this general condition should be modified to require maintenance of downstream water quality, and to require NWP activities to be conducted during periods of low flow. Two commenters asked that the general condition define the term ''stabilized'' and include stabilization guidelines and a requirement for post-construction monitoring of stabilization activities.

The last sentence of this general condition clearly states that permittees are encouraged to conduct NWP activities in waters of the United States during periods of no-flow or low-flow or during low tides. The general condition does not mandate that NWP activities be done during those no- or low-flow stages or during low tides. Nationwide permit activities can be conducted at other flow stages or tides and result in no more than minimal adverse environmental effects, so it is not necessary to require NWP activities to be conducted during no- or low-flow stages or during low tides.

General condition 4 requires that NWP activities avoid breeding areas for migratory birds to the maximum extent practicable. General condition 19 also addresses the applicability of the Migratory Bird Treaty Act to the NWP program, and states that the permittee is responsible for contacting the local office of the U.S. Fish and Wildlife Service to determine if an ''incidental take'' permit is necessary and available under the Migratory Bird Treaty Act.

The maintenance of downstream water quality will be addressed through the water quality certification issued by the state, tribe, or U.S. EPA. The appropriate stabilization measures will be determined on a case-by-case basis and are dependent on site conditions. The appropriate stabilization measures may also be dictated by state or local sediment and erosion control regulations. These state or local sediment and erosion control regulations may also require post-construction monitoring.

This general condition is adopted as proposed.

GC 13. *Removal of Temporary Fills.* We did not propose any changes to this general condition. One commenter said that temporary fills should be limited to no more than 180 days. A few commenters stated that temporary mats should not be considered to be fill material and should not be counted towards NWP acreage limits. One commenter said that temporary mats are not necessary for activities authorized by NWPs 3 and 12. One commenter stated that the sidecasting of material excavated from a ditch is not a discharge of dredged or fill material, and that the Corps lacks the authority to regulate excavation activities.

What constitutes a temporary fill is at the discretion of the district engineer. Defining a temporary fill as a fill that is in place for no more than 180 days may discourage the removal of temporary fills within a shorter period of time. For some NWP activities, temporary fills should be removed immediately after construction to minimize temporary losses of aquatic resource functions and services. For some other NWP activities, temporary fills may need to be in place for longer periods of time to allow the impacted area to recover and stabilize so that it can withstand normal flows after the temporary fills are removed.

Whether timber mats and other temporary mats constitute a discharge of dredged or fill material that requires Clean Water Act section 404 authorization is at the district engineer's discretion after applying the definitions at 33 CFR 323.2. Waters of the United States that are temporarily filled and then restored to pre-construction contours and elevations are not included in the measurement of ''loss of waters of the United States'' (see the definition of ''loss of waters of the United States'' in Section F, Definitions). Activities authorized by NWPs 3 and 12 often use temporary mats to minimize adverse effects to waters of the United States. The text of those NWPs explicitly state that use of temporary mats is authorized for those activities.

The sidecasting of excavated material during ditch maintenance may be exempt from Clean Water Act section 404 permit requirements (see 33 CFR 323.4(a)(3)). If the ditch maintenance activity does not qualify for the Clean Water Act section 404(f)(1)(C) exemption, the deposition of excavated material into jurisdictional waters and wetlands may be considered a discharge of dredged material (see 33 CFR 323.2(d)). District engineers will determine on a case-by-case basis whether excavation activities require DA authorization under section 404 of the Clean Water Act by applying the current regulations, including the current definition of ''discharge of dredged material.''

This general condition is adopted as proposed.

GC 14. *Proper Maintenance.* We did not propose any changes to this general condition. One commenter stated support for this general condition. One commenter said this general condition should require precautions during maintenance activities to minimize impacts to jurisdictional waters and ensure that downstream water quality is maintained.

Maintenance activities conducted under the NWP authorization are required to comply with all applicable general and regional conditions, which will minimize adverse effects to jurisdictional waters and wetlands and protect water quality. Proper maintenance requires promptly repairing damaged or deteriorating structures and fills so that they do not cause additional adverse effects to jurisdictional waters and wetlands.

This general condition is adopted as proposed.

GC 15. *Single and Complete Project.* We did not propose any changes to this general condition. Two commenters said that this general condition should state that an NWP activity cannot be expanded or modified at a later date to enlarge the permitted activity. One commenter stated that for the purposes of cumulative impacts analysis, the ''single and complete project'' definition should not be tied to the impacts of the NWP activity, but to the effects caused by that activity.

If, for a single and complete non-linear project, the proposed expansion or modification of a previously authorized NWP activity does not have independent utility from the previously authorized NWP activity, and the loss of waters of the United States that would result from proposed expansion or modification plus the previously authorized loss of waters of United States falls under the limit(s) of applicable NWP(s), that expansion or modification can still be authorized by NWP. If the loss of waters of the United States that would result from proposed expansion or modification plus the previously authorized loss of waters of United States exceeds the limit(s) of applicable NWP(s), that expansion or modification would require an individual permit unless there is a regional general permit that can authorize the expansion or modification. If the proposed expansion or modification has independent utility from the previously authorized NWP activity, then the limit(s) would apply to the proposed expansion or modification. Consistent with the Council on Environmental Quality's NEPA regulations at 40 CFR 1508.8, we consider ''impacts'' and ''effects'' to be synonymous. Therefore, we also consider the terms ''cumulative impact analysis'' and ''cumulative effects analysis'' to be synonymous.

One commenter said that this general condition should define ''single and complete project'' in the same manner as the definition of ''single and complete non-linear project'' in Section F of the NWPs. One commenter stated that the same definition of ''independent utility'' should be applied to both linear and non-linear projects, to avoid piecemealing. This commenter said that linear roadway crossings generally do not have independent utility, so the definition of linear transportation projects should conform with the definition of single and complete non-linear project. This commenter stated that this recommended change would result in a more accurate cumulative impact analysis. Another commenter said that linear and non-linear projects should not be treated differently for the purposes of applying the limits of the NWPs.

The definitions of ''single and complete linear project'' and ''single and complete non-linear project'' are addressed in the ''Definitions'' section of this preamble and the NWPs. This general condition addresses the general concept of ''single and complete project'' regardless of whether the proposed NWP activity is a single and complete linear project or single and complete non-linear project. The concept of independent utility does not apply to individual crossings of waters of the United States for linear projects because each separate and distant crossing of waters of the United States is necessary to transport people, goods, or services from the point of origin to the terminal point. For both linear projects and non-linear projects, the cumulative impact analysis considers the use of the applicable NWP or NWPs within a geographic region, such as a watershed, ecoregion, state, or Corps district. The acreage limit for an NWP applies to the single and complete project; for linear projects each separate and distant crossing of waters of the United States is considered a single and complete project (see the definition of ''single and complete linear project'' and 33 CFR 330.2(i)).

Two commenters suggested changing this general condition to prohibit the use of the same NWP more than once for the same utility line project, rather than allowing the use of NWP 12 for each separate and distance crossing of waters of the United States along a linear project. One commenter stated that for activities that may be authorized using multiple NWPs because the activity components are single and complete, that only one PCN is required to apply for all applicable NWPs.

As stated above, for linear projects such as utility lines authorized by NWP 12, each separate and distant crossing of waters of the United States is considered a single and complete project. For activities that have components that can be authorized by different NWPs, only one PCN needs to be submitted. The PCN should identify which NWP the project proponent wants to use to authorize a particular component, and the PCN should identify which components of the larger overall project have independent utility.

This general condition is adopted as proposed.

GC 16. *Wild and Scenic Rivers.* We proposed to modify this general condition to require pre-construction notification for any NWP activity that will occur in a component of the National Wild and Scenic River System,

or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status.

A few commenters expressed support for the proposed PCN requirement and a few commenters opposed the PCN requirement. One commenter said that NWPs should not be used to authorize activities within Wild and Scenic Rivers. One commenter recommended basing the PCN requirement on the potential to adversely affect the river and not only on the location of the proposed NWP activity. This commenter also suggested that NWP activities conducted by federal agencies do their own compliance with the Wild and Scenic Rivers Act, similar to the proposed changes to paragraph (b) in general condition 18, endangered species, and general condition 20, historic properties.

The Wild and Scenic Rivers Act does not prohibit activities in a Wild and Scenic River or a study river; it requires coordination with the federal agency with direct management responsibility for that river to ensure that the activity will not adversely affect the river's designation as a Wild and Scenic River or a study river. Therefore, NWPs are an appropriate mechanism for providing DA authorization for some activities in these rivers. The proposed modifications to this general condition were based on federal agency regulations and guidance for implementing the Wild and Scenic Rivers Act, and the text of section 7(a) of the Wild and Scenic Rivers Act. For the purposes of DA authorizations issued by the Corps section 7(a) of the Wild and Scenic Rivers Act limits the Corps' responsibilities to activities that might have a ''direct and adverse effect on the values'' for which the river was established. Therefore, the location of the proposed NWP activity is relevant to determining whether coordinating an NWP PCN with the federal agency with direct management responsibility for that river is required. Section 7(a) of the Wild and Scenic Rivers Act requires the federal agency authorizing the water resources project to do the coordination with the federal agency with direct management responsibility for that river.

One commenter stated that the term ''component'' is too broad and said that specific river segments should be identified. One commenter requested a list of current ''study rivers'' for purpose of submitting PCNs. One commenter said that PCNs should not be required for NWP 3 activities within Wild and Scenic Rivers or study rivers. This commenter also stated that PCNs should not be required for agencies that have direct management responsibilities for Wild and Scenic Rivers or study rivers. One commenter requested clarification of the review process for these PCNs and suggested that the NWP activity should not be prohibited if the federal agency with direct management responsibility for that river does not issue a written determination that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

The text of the general condition includes the internet address for obtaining information on Wild and Scenic Rivers and study rivers, to assist prospective permittees in complying with this general condition. A study river list is available at *https://www.rivers.gov/study.php* . Activities authorized by NWP 3 must comply with this general condition. If federal agencies with direct management responsibilities over these rivers want to use the NWPs to satisfy the permit requirements of section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899, they must comply with this general condition and provide documentation that demonstrates that their activities will not adversely affect the Wild and Scenic River designation or study status. When a Corps district receives a PCN from a non-federal permittee for a proposed NWP activity that will occur in a component of the National Wild and Scenic River System or in a study river, the district engineer will follow the coordination procedures described in the regulations and guidance for implementing the Wild and Scenic River Act. Until the federal agency with direct management responsibility for that river issues its written determination, the project proponent cannot proceed under the NWP authorization.

This general condition is adopted with the modifications discussed above.

GC 17. *Tribal Rights.* We did not propose any changes to this general condition. One commenter supported the proposed general condition. Several commenters stated that the federal government's tribal trust responsibilities requires federal agencies to protect tribal rights, resources, and cultures and this general condition does not adequately fulfill those responsibilities. Several commenters stated that NWPs should not authorize activities that affect tribal rights and that individual permits should be required to ensure that tribal treaty rights are addressed in the Corps' review process. One commenter said that NWPs should not authorize any activity that implicates tribal treaty rights. Several commenters noted that some NWP activities can occur without pre-construction notification and said that tribes should be involved in the review of NWP PCNs.

As discussed below, we have modified this general condition to better fulfill the Corps' fiduciary responsibilities towards tribes. The revised general condition requires that NWP activities cannot cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. Proposed activities that require DA authorization that cannot comply with the revised general condition require individual permits, if there are no regional general permits available to authorize those activities. Division engineers can add regional conditions to one or more NWPs to require PCNs to provide district engineers the opportunity to review proposed activities to ensure that they do not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. District engineers can also develop coordination procedures with tribes to review PCNs to get the tribes' input on whether the proposed activities will cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

Several commenters stated that the NWPs do not examine cumulative or indirect impacts on treaty rights. They said that NWP activities in the aggregate can have serious consequences to treaty-reserved resources. One commenter mentioned that resolution #SPO–16–002 was adopted in June 2016 by the National Congress of American Indians. That resolution urged the Department of Defense to reaffirm its commitment to consult with Tribal Nations when its activities impact tribal interests. That resolution represents 562 individually recognized Indian Tribes across the United States, and expresses their concern that the Department of Defense's tribal consultation principles and policies are not being followed and therefore the Department of Defense is not fulfilling its federal trust obligations and not protecting tribal interests.

District engineers monitor the use of the NWPs in specific geographic regions, to ensure that the use of the NWPs does not result in more than minimal cumulative adverse environmental effects, which includes adverse effects to tribal rights (including treaty rights), protected tribal resources, and tribal lands. If a district engineer determines that more than minimal cumulative adverse effects are occurring, he or she should recommend

regional conditions, or the suspension or revocation of the applicable NWPs, to the division engineer. The division engineer will follow the procedures at 33 CFR 330.5(c) to modify, suspend, or revoke those NWP(s) in the appropriate geographic area. The Corps uses the Department of Defense American Indian and Alaska Native Policy to guide its interactions with tribes. The Corps also had developed additional policies, which are available at: *http://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/*.

One commenter said that this general condition should be invoked for NWPs 3, 13, and 48 because the activities authorized by these NWPs affect salmon or shellfish and the natural resources upon which they depend. One commenter requested establishment of a dispute resolution procedures for tribal consultation and clarification on how the NWP PCN will be handled when a tribe objects to the proposed activity.

This general condition applies to NWPs 3, 13, and 48, as well as all of the other NWPs. If a tribe has concerns with how a Corps district is implementing these NWPs, the tribe should raise those concerns to the district. Disagreements concerning interpretation of treaties may need to be resolved by other parties.

One commenter said that Corps divisions and districts should be provided support to promote tribal involvement and collaborative decision-making. One commenter stated that the proposed general condition is limited because it refers only to ''reserved treaty rights.'' This commenter remarked that the general condition should also include other treaty rights that are explicit retained. This commenter said that ''reserved treaty rights'' are those rights that the tribe did not specifically relinquish in the treaty, in other words, the treaty is silent on them. This commenter also said that, according to the Department of Defense American Indian and Alaska Native Policy, the Corps' fiduciary duties to tribes also apply to tribal lands and protected tribal resources. This commenter recommended revising this general condition to be consistent with the Department of Defense policy cited above and to require PCNs for proposed activities that might affect protected tribal resources, tribal rights (including treaty rights), and tribal lands.

During the past three rulemakings for the NWPs (2007 and 2012 and this rulemaking for 2017), Corps Headquarters issued memoranda to its division and district offices that requested that Corps districts consult with tribes on the NWPs to develop regional conditions, coordination procedures, and other measures to ensure that the NWPs have no more than minimal adverse effects on tribal trust resources and tribal rights. For the 2017 NWPs, the memorandum was issued on March 10, 2016. We have revised general condition 17 to read as follows: ''No activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.'' We have removed the phrase ''or its operation'' because the Corps may not have the legal authority to regulate the operation of the facility or structure after the authorized activity is completed.

The principles in the Department of Defense American Indian and Alaska Native Policy apply to Department of Defense actions, which includes actions undertaken by the Corps such as the issuance of NWPs and other types of DA permits to authorize activities it regulates. The Corps' responsibilities for protecting tribal rights (including treaty rights), protected tribal resources, and tribal lands applies only to the activities it has the authority to regulate. For the NWPs, those activities are discharges of dredged or fill material into waters of the United States that the Corps has the authority to regulate under section 404 of the Clean Water Act and structures and work in navigable waters of the United States that the Corps has the authority to regulate under section 10 of the Rivers and Harbors Act of 1899. The Corps does not have the legal authority to regulate or impose conditions on actions or activities outside of its jurisdiction, such as activities in upland areas or operation and maintenance activities that do not require DA authorization.

The terms ''tribal rights,'' ''protected tribal resources,'' and ''tribal lands'' are defined in the Department of Defense American Indian and Alaska Native Policy. Tribal rights are defined as: ''Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.'' Protected tribal resources are defined as: ''Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.'' Tribal lands are defined as: ''Any lands title to which is either: (1) held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.'' To make these definitions readily accessible to users of the NWPs, we have added these definitions to the ''Definitions'' section of the NWPs (Section F).

There are presently 567 federally-recognized tribes, including Alaska Native tribes, and 370 ratified treaties.[3] In addition, each tribe is a distinct and separate government, and consultations may vary among tribes. Consultation procedures with tribes will vary, because different tribes have different customs and organization. Also, consultation with tribes is the responsibility of the federal government, not prospective permittees. Given the number of federally-recognized tribes, the number of ratified treaties, the fact that each tribe is a distinct and separate government, and that different consultation approaches are necessary for different tribes, we cannot expect most prospective permittees understand applicable treaties, what the protected tribal resources are, and other relevant factors to know when to submit PCNs for proposed NWP activities that might cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. A more effective approach for addressing tribal rights, protected tribal resources, and tribal lands is the regional conditioning process and the development of coordination procedures between Corps districts and tribes.

Prior to the publication of the June 1, 2016, proposed rule in the **Federal Register**, Corps districts initiated government-to-government consultations for the 2017 NWPs, to identify regional conditions to protect tribal rights, protected tribal resources, or tribal lands. These consultations may also result in the development of coordination procedures between Corps districts and tribes to review PCNs to ensure that those NWP activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. Division engineers can add regional conditions to one or more NWPs to require PCNs for proposed activities in a geographic region that have the potential to cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

This general condition is adopted with the modifications discussed above.

[3] *http://www.bia.gov/FAQs/index.htm*, accessed October 18, 2016.

GC 18. *Endangered Species.* We proposed to modify paragraph (a) of this general condition to define the terms ''direct effects'' and ''indirect effects.'' We also proposed to modify paragraph (b) to clarify that federal agencies only need to submit documentation of compliance with section 7 of the Endangered Species Act (ESA) when the terms and conditions of the NWP, or regional conditions imposed by the division engineer, require the submission of a PCN. In addition, we proposed to modify paragraph (d) to clarify that the district engineer may add activity-specific conditions to an NWP authorization after conducting formal or informal ESA Section 7 consultation.

Many commenters stated their support for adding the definitions of direct effects and indirect effects to paragraph (a) of this general condition. One commenter asked how ''direct effects'' and ''indirect effects'' will be considered in this general condition. One commenter said that this general condition should be revised to eliminate the open-ended review process for the ESA. One commenter said that the Corps should only be required to address aquatic species under this general condition.

The definitions of ''direct effects'' and ''indirect effects'' were added to paragraph (a) of this general condition to ensure that both direct and indirect effects to listed species and designated critical habitat are considered when making ''might affect'' and ''may affect'' determinations. Endangered Species Act section 7 consultations are not open-ended processes, although they take time to complete. Formal ESA section 7 consultations end with the issuance of biological opinions. Informal ESA section 7 consultations end when the U.S. FWS and/or NMFS issue their written concurrences, or when they state that they do not concur with the district engineer's ''may affect, not likely to adversely affect'' determination for a proposed NWP activity. If the U.S. FWS and/or NMFS do not provide written concurrence with the district engineer's ''may affect, not likely to adversely affect'' determination, then formal ESA section 7 consultation is required unless the applicant modifies the proposed activity to allow the district engineer to make a ''no effect'' determination. If the district engineer makes a ''no effect'' determination for a proposed NWP activity, then ESA section 7 consultation is not required. Activities authorized by NWPs and other forms of DA authorization can affect terrestrial endangered and threatened species, and district engineers are required to conduct ESA section 7 consultations for NWP activities that may affect those terrestrial listed species.

Several commenters stated their support for the proposed changes to paragraph (b) regarding federal permittee requirements. One commenter objected to the proposed modification, stating that the Corps has an independent duty to ensure that NWP activities are in compliance with ESA section 7 for activities conducted by federal permittees. A few commenters requested clarification of the provision in paragraph (b) that states that the district engineer will verify that the appropriate documentation has been submitted, in terms of another federal agency's compliance with section 7 of the ESA. These commenters asked which actions will be verified, and what the appropriate documentation should be. Several commenters asked when state transportation agencies can be considered as federal permittees under 23 U.S.C. 139(c)(3). One commenter said that state departments of transportation with NEPA authority should be allowed to be treated as federal agencies with respect to NWP requirements, such as ESA compliance. One commenter asked whether the term ''non-federal permittee'' applies to state mining regulatory authorities acting under SMCRA.

We have retained the proposed changes in paragraph (b) of this general condition. The appropriate documentation to provide to district engineers to demonstrate a federal permittee's compliance with ESA section 7 can be a biological opinion issued by the U.S. FWS and/or NMFS, a written concurrence from the U.S. FWS and/or NMFS for an informal ESA section 7 consultation, or a written ''no effect'' determination made by the federal permittee. Unless a state agency is a department of transportation which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, it remains the Corps' responsibility to make ESA section 7 effect determinations for activities authorized by the NWPs that will be conducted by non-federal permittees. The delegation of responsibilities to state departments of transportation through 23 U.S.C. 139(c)(3) only applies to NEPA responsibilities, not to ESA responsibilities. Responsible entities under the Department of Housing and Urban Development's Community Development Block Grant program can take responsibility for ESA section 7 compliance under the provisions of 24 CFR part 58. The project proponent that needs to obtain SMCRA authorization from the state mining regulatory authority is a non-federal permittee that must comply with paragraph (c) of this general condition.

A few commenters expressed support for the requirement for non-federal applicants to submit PCNs when listed species or their designated critical habitat ''might be affected or is in the vicinity of the project.'' A couple of commenters said that the Corps cannot rely solely on information provided by non-federal applicants regarding potential effects to listed species, stating that it is insufficient for meeting the requirements of the ESA. Several commenters asked for clarification of the difference between ''might affect'' and ''may affect.'' Several commenters said that the term ''in the vicinity'' should be clarified. One commenter requested definitions for ''vicinity'' and ''affected.'' One commenter stated that by not defining ''in the vicinity'' there is potential for non-compliance with section 7 of the ESA. One commenter said that PCNs should only be required for proposed activities that could affect designated critical habitat. One commenting agency said that the proposed changes to this general condition will result in a requirement for that agency to submit a few hundred more PCNs each year. A few commenters stated that submittal of PCNs by non-federal applicants only when any listed species or designated critical habitat ''might be affected'' fails to include candidate species and is not in compliance with conferencing regulations under Section 7 of the ESA.

The purpose of the PCN requirements in paragraph (c) of general condition 18 is to establish a low reporting threshold to ensure that PCNs are submitted for any proposed NWP that has the potential to affect listed species or designated critical habitat. When the district engineer receives the PCN, he or she will evaluate the information in the PCN, plus other available information, to determine whether the proposed activity may affect listed species or designated critical habitat and thus require ESA section 7 consultation. This paragraph of the general condition is written so that prospective permittees do not decide whether ESA section 7 consultation is required. If the project proponent conducts an activity that affects listed species or designated critical habitat, but did not submit the PCN required by paragraph (c), the activity is not authorized by NWP. That activity is an unauthorized activity and the Corps will take appropriate action to respond to the unauthorized activity.

As explained in the preamble to the June 1, 2016, proposed rule, we established the ''might affect'' threshold in 33 CFR part 330.4(f)(2) and paragraph (c) of general condition 18 because it is more stringent than the ''may affect'' threshold for section 7 consultation in the U.S. FWS's and NMFS's ESA section 7 regulations at 50 CFR part 402. The word ''might'' is defined as having ''less probability or possibility'' than the word ''may'' (Merriam-Webster's Collegiate Dictionary, 10th edition). As we also discussed in the June 1, 2016, proposed rule, we cannot explicitly define the term ''in the vicinity'' for the purposes of general condition 18 because the ''vicinity'' is dependent on a variety of factors, such as species distribution, ecology, life history, mobility, and, if applicable, migratory patterns, as well as habitat characteristics and species sensitivity to various environmental components and potential stressors. The vicinity is also dependent on the NWP activity and the types of direct and indirect effects that might be caused by that NWP activity. If a non-federal project proponent conducts an activity and does not comply with general condition 18 or any other applicable general condition, then the activity is not authorized by NWP. The district engineer will take appropriate action for the unauthorized activity.

Because of the requirements of ESA section 7 and the U.S. FWS's and NMFS's implementing regulations at 50 CFR part 402, we cannot limit PCNs to NWP activities that might affect designated critical habitat. We acknowledge that as more species are listed as endangered or threatened, and more critical habitat is designated, there will be increases in the number of PCNs submitted to Corps districts each year. For species proposed to be listed as endangered or threatened, or for proposed critical habitat, ESA section 7 conferences are not required except for proposed actions that are likely to jeopardize the continued existence of any proposed species or adversely modify or destroy proposed critical habitat. The district engineer has the discretion to confer with the U.S. FWS and/or NMFS if he or she determines that a proposed NWP activity is likely to jeopardize the continued existence of the proposed species or destroy or adversely modify the proposed critical habitat. Because the NWPs only authorize activities that result in no more than minimal adverse environmental effects, and the threshold for ESA section 7 conferences is high (*i.e.,* likely to jeopardize proposed species or adversely modify or destroy proposed critical habitat), we believe that conferences will only be necessary in rare circumstances for proposed NWP activities and do not need to address conferences in this general condition. District engineers will conduct conferences for proposed NWP when necessary.

One commenter said that a PCN should only be required if there are potential impacts to listed species and/or designated critical habitat, and a PCN should not be required for the potential presence of a listed species. One commenter stated that a PCN should only be required when ESA section 7 consultation is required. One commenter stated that a PCN not be required in Northern long-eared bat habitat when there is no effect to the species, specifically when no clearing is involved. This commenter said that based on the term ''in the vicinity'' in paragraph (c), non-federal applicants would be required to submit a PCN for every NWP activity within this species' broad range. One commenter said that the Corps should require PCNs for proposed NWP activities that would take place within 10 river miles of ESA-listed species. One commenter stated that non-federal applicants should be allowed to satisfy the PCN requirement by demonstrating that ESA section 7 consultation has already been satisfactorily completed.

Under paragraph (c) of general condition 18, and 33 CFR 330.4(f)(2), PCNs are required if any listed species or designated critical habitat might be affected by the proposed NWP activity or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat. The district engineer reviews the PCN and determines whether ESA section 7 consultation is required, because under section 7(a)(2) of the ESA, federal agencies are responsible for ensuring that actions they authorize are not likely to jeopardize the continued existence of listed species, or destroy or adversely modify designated critical habitat. The prospective permittee does not decide whether ESA section 7 consultation is required for NWP activities; that is the Corps' responsibility. The prospective permittee's responsibility is to submit a PCN to the district engineer when there is a possibility that the proposed NWP activity might affect listed species or designated critical habitat. We acknowledge that the requirements of general condition 18 will result in more PCNs for listed species that have large ranges, but those requirements are necessary to comply with ESA section 7(a)(2). A PCN threshold of 10 river miles within the location of ESA-listed species would not be an effective PCN threshold, especially for mobile listed species. As discussed below, we have added a new paragraph (f) to general condition 18 to allow ESA compliance through a valid ESA section 10(a)(1)(B) incidental take permit. If the applicant does not have a valid ESA section 10(a)(1)(B) incidental take permit, and the proposed NWP activity may affect listed species or designated critical habitat, then the Corps is required to conduct ESA section 7 consultation.

A few commenters recommended that an ESA section 7 consultation should be completed in 45 days or less after the date of receipt of a complete PCN. A few commenters stated that if the applicant cannot commence the NWP activity even if the 45-day review period has passed, unless the Corps makes a ''no effect'' determination or ESA section 7 consultation is completed, this general condition places a burden on applicant. One of these commenters suggested that the Corps either adhere to the 45-day review period for complete PCNs or revise this general condition to state that these ESA section 7 consultations will take no more than 90 days. One commenter stated that for linear projects, the Corps should not issue NWP verifications for any crossings of waters of the United States until ESA section 7 consultation is completed for those crossings that require section 7 consultation. This commenter also said the general condition should prohibit the prospective permittee from beginning construction of the linear project until after those consultations are completed.

If formal ESA section 7 consultation is required, there are timeframes that are mandated by section 7(b) of the ESA. The NWPs cannot change those timeframes. If informal ESA section 7 consultation is conducted, there are no timeframes for completion, but written concurrence from the U.S. FWS and/or NMFS is required before informal consultation is concluded. If the U.S. FWS or NMFS will not provide their written concurrence, or explicitly disagrees that the proposed activity ''may affect, is not likely to adversely affect'' listed species or critical habitat, then formal ESA section 7 consultation is necessary to fulfill the consultation requirements of ESA section 7(a)(2). As stated in paragraph (c) of general condition 18, if the district engineer determines that the proposed NWP activity may affect listed species or designated critical habitat, the activity is not authorized by NWP until the district engineer completes ESA section 7 consultation or determines that the

proposed NWP will have ''no effect'' on listed species or designated critical habitat.

District engineers have discretion in timing the issuance of NWP verifications for NWP activities that require PCNs. Linear projects often have crossings that require PCNs and crossings that do not require PCNs. For those linear projects, the PCN must also identify the use of NWP(s), regional general permit(s), or individual permit(s) to authorize other separate and distant crossings that require DA authorization (see paragraph (b)(4) of general condition 32). If some or all of the other separate and distance crossings are authorized by NWP without a requirement to submit a PCN (and they do not trigger the PCN requirements in paragraph (c) of general conditions 18 or 20, or other general conditions), then those activities are authorized by NWP unless the district engineer exercises his or her authority at 33 CFR 330.5(d) to suspend or revoke those NWP authorizations. There are also likely to be substantial segments of linear projects that are sited in uplands over which the Corps has no control and responsibility. The entity constructing the linear project can begin construction in the uplands prior to receiving the NWP verification or other DA authorizations.

Several commenters said they support allowing district engineers to add species-specific conditions to NWP verifications. One commenter asked whether district engineers would add species-specific conditions to the NWP itself or to the NWP verification letters. One commenter stated that Corps districts should not be allowed to add activity-specific conditions to NWPs when there are regional conditions related to the protection of listed species.

District engineers have the authority to modify NWPs by adding conditions to the NWP authorization (see 33 CFR 330.5(d)). This includes conditions to protect listed species and designated critical habitat. The conditions are written in the NWP verification letter, but they apply to the NWP authorization. In their NWP verification letters, district engineers may reference regional conditions or add those regional conditions to the NWP authorization to ensure that the permittee is aware of those conditions and to make those conditions easier to enforce.

One commenter said that the Corps is required to seek concurrence from the U.S. FWS and/or NMFS for any ''no effect'' determination. One commenter voiced support for using regional programmatic consultations to comply with section 7 of the ESA. A few commenters suggested that the Corps develop an informational guidance document and Web site dedicated to region-specific listed species under the jurisdiction of U.S. FWS, similar to what was developed by the NMFS.

Federal agencies are not required to seek concurrence from the U.S. FWS or NMFS for their ESA section 7 ''no effect'' determinations (see page 3–12 of the 1998 Endangered Species Consultation Handbook issued by the U.S. FWS and NMFS). For the 2017 NWPs, we plan on developing a general information guidance document to assist NWP users in complying with general condition 18. This document will be posted on the Corps Headquarters regulatory program Web site at: *http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/.*

One commenter recommended changing this general condition to require non-federal applicants to submit a list of endangered and threatened species and designated critical habitat locations for the subject county in which the proposed NWP activity will occur, especially for NWPs 3, 12, 13, 14, 21, 39, 44, and 48.

Paragraph (c) of this general condition requires a non-federal permittee to submit a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat. Other activities authorized by other NWPs might trigger the PCN requirement in paragraph (c), so we will not modify this general condition to focus on the eight NWPs identified by the commenter.

One commenter said that the Corps should include the entire linear project in its action area instead of limiting the action area to the crossings of waters of the United States. This commenter asserted that the Corps' approach for ESA compliance for linear projects does not comply with the ESA. One commenter stated that compensatory mitigation should be required for unavoidable adverse impacts to federally-listed species when NWP activities use treated wood below the water line. One commenter said that the Corps must conduct an activity-specific NEPA analysis when it implements an incidental take statement as a condition of the Corps' NWP verification and that the Corps' implementation of the incidental take statement should cover the entire linear project, not just crossings of waters of the United States.

The U.S. FWS's and NMFS's ESA section 7 regulations at 50 CFR 402.02 define the term ''action area'' as ''. . . all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.'' When the Corps initiates ESA section 7 consultation on proposed activity that it determines ''may affect'' listed species or designated critical habitat, it consults on the direct and indirect effects caused by the proposed NWP activity. In paragraph (a) of this general condition, we define the terms ''direct effects'' and ''indirect effects.'' Indirect effects can be some distance from the direct effects of the proposed NWP activity. The Corps' approach to conducting ESA section 7 consultations for linear projects complies with the ESA. Section 7(a)(2) consultations for linear projects may include the effects of interdependent and interrelated activities. Interrelated and interdependent activities are not federal actions, because they are not authorized, funded, or carried out by the Corps or other federal agency. Including interrelated and interdependent activities in a formal ESA Section 7 consultation and biological opinion does not grant the Corps any authority to regulate those activities and their effects on listed species and critical habitat. Therefore, the Corps does not have the legal authority to enforce conditions that the U.S. FWS and/or NMFS might impose on those interrelated and interdependent activities in an incidental take statement in a biological opinion. The FWS and NMFS would be responsible for enforcing those provisions of the incidental take statement that apply to the upland activities outside of the Corps' jurisdiction.

District engineers will determine on a case-by-case basis whether compensatory mitigation is required for unavoidable adverse impacts to federally-listed species. The Corps only adopts and incorporates those provisions of an incidental take statement that apply to the actions authorized by the Corps. If the incidental take statement in a biological opinion has provisions that apply to activities in upland areas outside of the Corps' action areas for linear projects, where the Corps does not have the authority to control those upland activities, the Corps will not incorporate those provisions in its NWP authorization. The U.S. FWS and NMFS can use their authorities to enforce provisions of the incidental take statement that apply to upland linear project segments that are outside of the

Corps' control and responsibility. From the Corps' perspective, those upland linear project segments are not federal actions, and therefore the Corps is not responsible for preparing NEPA documents for those actions.

Several commenters recommended using Habitat Conservation Plans to streamline compliance with this general condition if the prospective permittee has been issued an ESA section 10 permit that also authorizes incidental take that may result from the proposed NWP activity. Several commenters said that PCNs should not be required for non-federal permittees when their ''take'' of listed species is authorized by ESA section 10 permits and is addressed through HCPs with incidental take statements. A few commenters said that a non-federal permittee should be able to proceed with the proposed NWP activity 15 days after providing the district engineer with the ESA section 10(a)(1)(B) incidental take permit and HCP. One commenter said the PCN requirement of this general condition should be satisfied through a programmatic notification submitted to the district engineer, if more than one activity to be authorized by NWP has been the subject of a prior ESA section 7 consultation.

We have added a new paragraph (f) to this general condition, to cover circumstances in which the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit and approved Habitat Conservation Plan for a project or group of projects that includes the proposed NWP activity. A group of projects may be covered by an ESA section 10(a)(1)(B) and large-scale (*e.g.,* county) Habitat Conservation Plan. Whenever the U.S. Fish and Wildlife Service or the National Marine Fisheries Service issues an ESA section 10(a)(1)(B) incidental take permit, they conduct an intra-Service consultation under ESA section 7(a)(2). The intra-Service ESA section 7(a)(2) consultation conducted for the ESA section 10(a)(1)(B) permit and Habitat Conservation Plan will include their opinion whether the proposed project or group of projects is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. We believe that adding this paragraph to general condition 18 reduces duplication and also fulfills the Corps' obligations under ESA section 7(a)(2). The district engineer will coordinate with the FWS and/or NMFS as appropriate to determine whether the agency that issued the ESA section 10(a)(1)(B) incidental take permit considered the proposed NWP activity and the associated incidental take in its internal ESA section 7 consultation for that ESA section 10(a)(1)(B) permit.

We cannot eliminate the PCN requirement for non-federal permittees that is established by 33 CFR 330.4(f)(2). The PCN requirement is necessary to allow the district engineer to determine, after coordinating with the agency that issued the ESA section 10(a)(1)(B) incidental take permit (*i.e.,* the FWS and/or NMFS), whether the ESA section 10(a)(1)(B) incidental take permit and the internal ESA section 7 consultation for that incidental take permit covers the proposed NWP activity and its anticipated incidental take. The district engineer should respond to the complete PCN to notify the non-federal applicant whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7(a)(2) consultation is necessary, to ensure from the Corps' perspective, that the proposed NWP activity is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adversely modification of designated critical habitat. We also cannot state in the revised general condition that the prospective permittee can proceed with the NWP activity within 15 days of providing the district engineer with a copy of the ESA section 10(a)(1)(B) incidental take permit and Habitat Conservation Plan, because district engineers have 45-days to review complete PCNs and there are other exceptions to the 45-day review period. For example, if the proposed NWP activity is determined by the district engineer to have the potential to cause effects to historic properties, consultation will be required to fulfill the requirements of section 106 of the National Historic Preservation Act. Activities authorized by NWPs 21, 49, and 50 require written verifications before proceeding with the authorized work. We cannot replace the PCN requirement individual NWP activities with a programmatic notification, because each proposed NWP activity needs to be evaluated to determine if ESA section 7 consultation is required.

One commenter expressed concern that the requirements of this general condition result in ESA section 7 consultations occurring in the absence of a real potential for listed species conflicts. One commenter said that ESA section 7 consultations should only occur if the site for the proposed activity has an occurrence of listed species or the site is located in designated critical habitat. One commenter stated that the requirements of general condition 18 should only apply to activities in jurisdictional areas that might affect endangered species.

For a non-federal permittee, this general condition requires a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat. The district engineer will review the PCN to determine if the proposed NWP activity may affect listed species or designated critical habitat and thus require ESA section 7 consultation. If the district engineer determines the proposed NWP activity will have no effect on listed species or designated critical habitat, he or she will issue the NWP verification letter if the proposed activity complies with all other applicable terms and conditions of the NWP and will result in no more than minimal adverse environmental effects. When making an effect determination for the purposes of ESA section 7, the district engineer considers the direct and indirect effects caused by the proposed NWP activity. An NWP activity conducted in jurisdictional waters and wetlands can have indirect effects on listed species or designated critical habitat outside of those jurisdictional waters and wetlands, and thus require the district engineer to conduct ESA section 7 consultation.

This general condition is adopted with the modifications discussed above.

GC 19. *Migratory Birds and Bald and Golden Eagles.* We proposed to modify this general condition to state that the permittee is responsible for ensuring that his or her action complies with the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act, instead of stating that the permittee is responsible for obtaining any ''take'' permits from the U.S. Fish and Wildlife Service. There may be situations where such ''take'' permits are not required and compliance with these acts may be achieved through other means.

Several commenters stated their support for the proposed modification. Two commenters said that the proposed modification will increase burdens on applicants and create delays in the NWP verification process. This general condition does not require any action by district engineers and will not delay their reviews of PCNs and voluntary requests for NWP verifications. Permittees are responsible for contacting the local office of the U.S. Fish and Wildlife Service to determine if they need to take action to reduce impacts to migratory birds or bald or golden eagles, or obtain incidental take permits under these two laws.

This general condition is adopted as proposed.

GC 20. *Historic Properties.* Parallel with the proposed modifications of paragraph (b) of general condition 18, we also proposed to modify paragraph (b) of general condition 20 to state that federal permittees only need to submit documentation of their compliance with section 106 of the National Historic Preservation Act (NHPA) if the proposed NWP activity requires pre-construction notification because of other terms and conditions, including regional conditions imposed by division engineers.

One commenter asked how district engineers will determine if NWP activities will affect historic properties and who is expected to satisfy the requirements of section 106 of the NHPA. One commenter recommended revising paragraph (a) as follows: ''In cases where the district engineer is notified, or determines based on scoping performed in accordance with 36 CFR 800.4(a), that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized until the district engineer finds that the requirements of Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations (36 CFR part 800) have been satisfied.''

District engineers will review PCNs and determine whether proposed NWP activities have the potential to affect historic properties. If the district engineer determines that the proposed NWP activity has no potential to cause effects on historic properties, section 106 consultation is not required. If the district engineer determines that the proposed NWP activity will result in either ''no historic properties affected,'' ''no adverse effects,'' or ''adverse effects,'' he or she will conduct NHPA section 106 consultation with the appropriate consulting parties. The NWPs, via the requirements of general condition 20, provide general guidance on historic properties and compliance with NHPA section 106, but further details on the section 106 process are provided in other Corps regulations and guidance, and do not need to be included in the text of paragraph (a) of this general condition.

Several commenters supported the proposed change to paragraph (b) regarding federal permittees' compliance with section 106 of the NHPA. One commenter suggested modifying paragraph (b) to state that if the district engineer identifies deficiencies in the federal permittee's section 106 compliance, then he or she will consult further with the federal agency and other parties to resolve those deficiencies. Several commenters stated that paragraph (b) exempts non-lead federal agencies from fulfilling their section 106 responsibilities. One commenter said that paragraph (b) results in the Corps designating another agency as the NHPA section 106 compliance lead without the agreement of the other agency. One commenter requested further clarification to address situations where no other federal lead agency has the responsibility.

Federal permittees have an independent obligation to comply with section 106 of the NHPA. If an NWP activity that will be conducted by a federal permittee requires a PCN and the district engineer determines while reviewing the PCN that the federal permittee's section 106 compliance documentation is insufficient, then he or she will notify the federal permittee that additional section 106 consultation may be necessary. Paragraph (b) of this general condition is not equivalent to a lead federal agency concept. The purpose of paragraph (b) is to avoid duplicative consultation efforts, because federal agencies have their own obligation to comply with NHPA section 106. When a federal permittee is conducting an NWP activity, it is either conducting the same undertaking as the Corps (*i.e.,* the permitted activity), or a larger undertaking that involves other activities that the Corps does not have the authority to regulate. If there is no federal permittee, then paragraph (c) of this general condition would apply.

One commenter recommended revising the fourth sentence of paragraph (b) as follows: ''If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary to fulfill the requirements of the NHPA and relevant regulations have been complied with.'' This commenter suggested adding the following sentence after the fourth sentence: ''If the district engineer identifies deficiencies, then the district engineer will consult further with the federal agency and other parties to resolve them.''

The last sentence of paragraph (b) makes it clear that if there are deficiencies in the federal permittee's documentation of section 106 compliance, it is the federal permittee's responsibility to address those deficiencies. The Corps is not required to conduct that additional consultation on behalf of the federal permittee.

One commenter said that paragraph (c) should be modified to make it clear who is responsible for making an effect determination for the purposes of section 106 of the NHPA. Several comments stated that by referencing ''current procedures'' in paragraph (c) of this general condition, the Corps suggests to prospective permittees that compliance with the Corps' current regulations and guidance fulfills its section 106 NHPA responsibilities. Several commenters recommended revising this general condition to require non-federal applicants to provide documentation in their PCNs from qualified professionals to state that standard procedures have been followed to identify historic properties. One commenter said that the third sentence in paragraph (c) should include ''designated tribal representative'' because not all federally recognized tribes have Tribal Historic Preservation Officers.

We have modified paragraph (c) by adding two sentences to make it clear that it is the district engineer's responsibility to make section 106 effects determinations: ''Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: No historic properties affected, no adverse effect, and adverse effect.'' We are retaining the fourth sentence in paragraph (c) to refer to our current procedures for addressing the requirements of section 106 of the NHPA, which are Appendix C to 33 CFR part 325, the April 25, 2005, interim guidance in which we adapt the applicable provisions of 36 CFR part 800 to augment Appendix C, and the January 31, 2007, interim guidance in which we provide further guidance on adapting the applicable provisions of 36 CFR part 800 to Appendix C.

Modifying paragraph (c) to require non-federal applicants to provide documentation from qualified professionals goes beyond the ''good faith effort'' required to identify historic properties for minor activities authorized by the NWPs. The magnitude and nature of the undertaking and the degree of federal involvement are considerations for determining what is required to identify historic properties (see 36 CFR 800.4(b)(1)), and for many NWP activities these are both minimal. For activities that have the potential to cause effects to historic properties, applicants often hire consultants to assist in the section 106 process. We have modified the third sentence of paragraph (c) to include ''designated

tribal representative'' as an option for assistance regarding information on the location of potential historic resources, consistent with 36 CFR 800.2(c)(2)(i)(B).

Several commenters stated that this general condition does not provide sufficient guidance to non-federal applicants to ensure compliance with section 106 because the information requirements for PCNs are vague and set a low threshold. These commenters expressed concern that district engineers will not have sufficient information from applicants or may not receive PCNs at all. Several commenters stated that this general condition and its PCN requirements unlawfully delegates to non-federal entities the Corps' responsibility to comply with section 106 of the NHPA.

We are not delegating responsibilities to comply with Section 106, but as a permitting agency we can require certain information from project proponents. This general condition requires prospective permittees to submit PCNs for proposed activities that might have the potential to cause effects to historic properties. In this general condition, we changed the word ''may'' to ''might'' to be consistent with the language in paragraph (c) of general condition 18, endangered species, because it serves a similar purpose. As with paragraph (c) of general condition 18, paragraph (c) of general condition 20 places the responsibility of determining whether NHPA section 106 is necessary. The district engineer will evaluate the PCN, and if he or she determines that the proposed NWP activity has the potential to cause effects to historic properties, he or she will initiate section 106 consultation with the appropriate consulting parties. For the section 106 consultation, the district engineer will make one of three effect determinations: ''no historic properties affected,'' ''no adverse effect,'' and ''adverse effect.''

We have made changes to paragraphs (c) and (d) to more clearly articulate the district engineer's process for complying with NHPA section 106 for NWP activities undertaken by non-federal permittees. We have moved the second sentence from paragraph (d) to paragraph (c). We have also added two new sentences to paragraph (c). The first new sentence states that section 106 consultation is required when the district engineer determines the proposed activity has the potential to cause effects to historic properties. The second new sentence states that the district engineer will consult with consulting parties identified under 36 CFR 800.2(c) when he or she determines the proposed activity may result in ''no historic properties affected,'' ''no adverse effects'' on historic properties, or ''adverse effects'' on historic properties. We have also made some edits to the last sentence of paragraph (c) to provide additional clarity.

At the beginning of the first sentence of paragraph (d), we added the phrase ''For non-federal permittees,'' to make it clear that paragraph (d) applies to non-federal permittees. In what is now the second sentence of paragraph (d), we deleted the phrase ''and will occur'' because if section 106 consultation is required, the district engineer will do that section 106 consultation.

One commenter said that PCNs should be required for all NWP activities that involve ground disturbance. One commenter stated that this condition sets a lower threshold for requiring review than Appendix C to 33 CFR part 325 and should be revised. One commenter stated that general condition 20 and 32, and their reliance on compliance by permittees, often results in the Corps' failure to consult with federally recognized tribes in a government-to-government relationship.

Requiring PCNs for all NWP activities that involve ground disturbance would result in many additional PCNs for activities that have no potential to cause effects to historic properties. The intent of paragraph (c) is to require non-federal permittees to submit PCNs for any proposed NWP activity that might have the potential to cause effects to historic properties. The PCN requirement gives district engineers the opportunity to make effect determinations for the purposes of complying with section 106 of the NHPA. General condition 20 only addresses historic properties and the requirements of section 106 of the NHPA. As discussed above, general condition 20 does not delegate the Corps' section 106 responsibilities to permittees. In addition, we have made substantial changes to general condition 17, tribal rights, to address the Corps' fiduciary responsibilities towards tribes, which extend beyond historic properties. General condition 17 addresses tribal rights (including treaty rights), protected tribal resources, and tribal lands. District engineers will consult with tribes on NWP activities that have the potential to cause effects to historic properties of significance to those tribes.

Two commenters said they support paragraph (e) and its implementation of section 110(k) for intentional adverse effects. One commenter noted that the NHPA was recodified and the citation to section 110(k) should be corrected to 54 U.S.C. 306113. We have revised the first sentence of paragraph (e) to refer to 54 U.S.C. 306113.

Several commenters said that this general condition unlawfully limits the scope of the Corps' ''permit area.'' One commenter stated that 33 CFR part 325, Appendix C is not approved by the Advisory Council on Historic Preservation (ACHP) as a program alternative, as required by 36 CFR 800.14. This commenter said that Appendix C is an internal Corps process that does not fulfill the requirements of section 106 of NHPA. One commenter recommended that the Corps continue working with the ACHP in order to bring its regulations into compliance with the NHPA. One commenter stated that Appendix C violates tribal consultation requirements, and more importantly, meaningful consultation with tribes.

General condition 20 does not use the term ''permit area.'' When evaluating PCNs, district engineers will determine the appropriate scope of analysis for the purposes of NHPA section 106 using its current procedures for addressing the requirements of that statute. The ACHP's regulations at 36 CFR 800.14(a) states that an ''agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.'' Both 36 CFR 800.14(a) and NHPA section 110(a)(2)(E) state that a federal agency's program alternative has to be ''consistent'' with the ACHP's regulations. Neither of those provisions state that those program alternative have to be ''approved'' by the ACHP. The Corps complies with section 106 of the NHPA through Appendix C and the interim guidance documents April 25, 2005, and January 31, 2007. We continue to work with the ACHP on this matter. The 2005 and 2007 interim guidance documents were issued to make the regulatory program's NHPA section 106 procedures consistent with the ACHP's regulations. The Corps complies with tribal consultation requirements and its fiduciary responsibilities to tribes through the Department of Defense American Indian and Alaska Native Policy and the Corps' November 1, 2012, Tribal Consultation Policy.

Several commenters said that certain state departments of transportation have been assigned responsibilities by the Federal Highway Administration under the authority in 23 U.S.C. 327 to conduct compliance under section 7 of the Endangered Species Act. These commenters stated that this practice needs to be recognized in general condition 20 for historic properties, because these departments of

transportation are considered ''federal permittees'' and their own procedures apply for compliance with section 106. Several commenters indicated that some Corps districts re-coordinate with State Historic Preservation Officers that were already contacted by state transportation agencies during their review process.

If a state agency is a department of transportation to which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, then that state agency would be responsible for section 106 compliance under paragraph (b) of this general condition. We do not need to make any changes to the text of this general condition to recognize this assignment of authority. If a PCN is required, non-federal applicants, including state departments of transportation that have not been assigned authority under 23 U.S.C. 327 are asked to provide any documentation which may expedite the review process for NHPA section 106. For NWP activities conducted by non-federal permittees, it is the Corps' responsibility to comply with the requirements of section 106.

One commenter stated that reliance on general conditions 20 and 32, is not a substitute for activity-specific compliance with section 106 of the NHPA. This commenter said that the Corps should conduct a section 106 review out prior to reissuing the NWPs. One commenter said that the general condition should state that the Corps is not obligated to delay issuance of an NWP verification until after an official agreement is obtained from a state.

General condition 20 provides the means for activity-specific compliance with section 106 of the NHPA. General condition 32 describes the general PCN requirements for the NWPs. As discussed in another section of this final rule, we have determined that the issuance or reissuance of the NWPs by Corps Headquarters has no potential to cause effects to historic properties. The NWPs authorize activities over a five-year period, after they are issued and go into effect. When the Corps issues or reissues NWPs, there are no specific NWP activity sites identified; when the NWPs go into effect several weeks after they issued or reissued, they could potentially authorize activities in jurisdictional waters and wetlands anywhere in the United States. In other words, during the rulemaking process for the issuance or reissuance of the NWPs there are no specific historic properties on which to conduct NHPA section 106 consultation. General condition 20 requires completion of NHPA section 106 consultations, and when section 106 consultation is required, the Corps cannot issue an NWP verification letter until after the consultation has been completed.

Several commenters requested clarification of how PCN requirements will be defined to promote a consistent and streamlined approach and a clearer understanding of general condition 20. Several commenters stated that the PCN review timeframe should be limited to 45 days, or a maximum of 90 days when it is necessary to complete section 106 consultation. These commenters said that if the applicant has not gotten a response from the Corps within those timeframes, the applicant should be permitted to proceed with the NWP activity. One commenter said that the Corps should eliminate the open-ended review process for section 106 of the NHPA.

For those NWP activities that require NHPA section 106 consultation, we acknowledge that it will take longer for district engineers to issue NWP verifications because we have to provide sufficient time for consulting parties to provide comments on our ''no historic properties affected,'' ''no adverse effects,'' and ''adverse effect'' determinations. Compliance with section 106 of the NHPA is mandatory, not optional. General condition 20 states that if section 106 consultation is required, the project proponent cannot conduct the NWP activity until section 106 consultation is completed. The review process for section 106 of the NHPA is not open-ended; it concludes after the applicable procedures are followed and the district engineer can make his or her decision on the NWP PCN.

One commenter said that linear undertakings should not be segmented separately and reviewed as individual crossings. This commenter stated that, for linear projects, the Corps should include all areas where historic properties may be directly and indirectly affected by the undertaking, if any historic properties are present.

For linear projects, where the crossings of waters of the United States involve discharges of dredged or fill material into waters of the United States and/or structures or work in a navigable waters of the United States, the undertakings for the purposes of section 106 of the NHPA are the crossings that require DA authorization. The Corps does not have the authority to regulate upland segments of linear projects, and therefore those upland segments are not undertakings for the purposes of section 106 of the NHPA. The ACHP's regulations at 36 CFR 800.16(y) define ''undertaking'' as: ''a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.'' By including ''activity'' in its definition of ''undertaking,'' the ACHP's definition recognizes that federal agencies may not issue permits or licenses for entire projects, and those federal agencies might only issue permits or licenses for specific components of entire projects.

For linear projects, from the Corps' perspective, the crossings of waters of the United States authorized by NWPs or other types of DA permits, are the undertakings. For those crossings that require DA authorization, district engineers consider the direct and indirect effects of those crossings on historic properties that are caused by the discharges of dredged or fill material into waters of the United States and/or structure or work in navigable waters of the United States. If the operation and maintenance of those linear projects do not involve activities that require DA authorization, then the Corps is not required to evaluate the effects of those operation and maintenance activities on historic properties. The Corps' scope of analysis for the purposes of section 106 of the NHPA is the same regardless of whether the activities regulated by the Corps are authorized by NWPs or other general permits, or by individual permits.

This general condition is adopted with the modifications discussed above.

GC 21. *Discovery of Previously Unknown Remains and Artifacts.* We did not proposed any changes to this general condition. One commenter expressed support for general condition 21, but requested that this condition require the permittee to cease work in the area of the discovery of the previously unknown historic, cultural, or archeological remains and artifacts. This commenter noted that the wording of this general condition only allows for recovery activities or eligibility determinations, while failing to address other types of measures that might be determined necessary to avoid, minimize, or mitigate adverse effects to historic properties. One commenter said that general condition 21 is not a substitute for compliance with section 106 of the NHPA in individual cases. This commenter asserted that in absence of a section 106 review process that is carried out prior to reissuance of the NWPs, the Corps fails to meet the requirements of 36 CFR part 800.

General condition 21 requires permittees to avoid, to the maximum extent practicable, construction

activities that may affect the remains and artifacts until coordinated has been completed. This condition permits construction activities to continue outside of the discovery, while protecting the area of the discovery until coordination is complete. If these remains and artifacts are determined, after NHPA section 106 consultation, to be historic properties, other types of measures to avoid, minimize, or mitigate adverse effects to those historic properties may be implemented on a case-by-case basis. The district engineer can ask the project proponent to stop work, but the Corps does not have the authority to require the project proponent to stop work in the event of the discovery of previously unknown historic, cultural, or archeological remains and artifacts.

The purpose of this general condition is to address previously unknown remains and artifacts that are revealed during while the authorized NWP activity is being conducted. If the artifacts or remains were known at the time the district engineer reviewed the PCN or voluntary request for NWP verification, he or she would have made an eligibility determination, and if necessary, conducted NHPA section 106 consultation. Section 106 consultation was either not done because the remains or artifacts were unknown at the time the NWP PCN or voluntary request for NWP verification was being evaluated by the district engineer, or section 106 consultation was done for known historic properties included in, or eligible for inclusion in, the National Register of Historic Places. When the discovery of the previously unknown remains and artifacts are reported to the district engineer, he or she will initiate federal, tribal, and state coordination to determine whether the artifacts or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places. Section 106 consultation will be conducted when necessary for these discoveries. General condition 21 is not a substitute for section 106 consultation.

This general condition is adopted as proposed.

GC 22. *Designated Critical Resource Waters.* We did not propose any changes to this general condition, except to add proposed new NWP B to paragraph (b). We did not receive any comments on this general condition. Since we are issuing proposed new NWP B as NWP 54, we have added NWP 54 to paragraph (b).

This general condition is adopted with the modification discussed above.

GC 23. *Mitigation.* We proposed to modify the opening paragraph of this general condition and paragraph (b) to clarify that mitigation can be required by district engineers to ensure that activities authorized by NWPs will result in no more than minimal individual and cumulative adverse environmental effects. Also, we proposed to modify paragraph (d) to state that compensatory mitigation for stream losses should be provided through rehabilitation, enhancement, or preservation, to be consistent with 33 CFR 332.3(e)(3), which states that streams are difficult-to-replace resources. In paragraph (e), we proposed to modify the first sentence to state that compensatory mitigation provided through riparian areas can be accomplished by restoration, enhancement, or maintenance of those areas. In addition, we proposed to modify paragraph (f)(1) to state that if the district engineer determines compensatory mitigation is required for the proposed NWP activity, the preferred mechanism for providing compensatory mitigation is either mitigation bank credits or in-lieu credits. In the June 1, 2016, proposed rule we also requested comment on ways to improve how compensatory mitigation conducted under the NWP program is implemented to offset direct, indirect, and cumulative effects.

Several commenters said that the Corps should only require compensatory mitigation for activities that require individual permits. Many commenters said that project proponents should not be allowed to use compensatory mitigation to reduce the impacts of their activities to qualify for NWP authorization. Several commenters expressed support for allowing applicants an option to prepare a mitigation plan to reduce adverse environmental effects to no more than minimal to qualify for NWP authorization. One commenter stated that district engineers should continue to be allowed flexibility in determining when compensatory mitigation is to be required for NWP activities, especially when many aquatic resources are already heavily degraded.

The Corps' regulations at 33 CFR 330.1(e)(3) state that district engineers can require mitigation to ensure that activities authorized by NWPs result in no more than individual and cumulative adverse environmental effects. Under the procedure in 33 CFR 330.1(e)(3), district engineers offer prospective permittees the opportunity to submit mitigation proposals to reduce the adverse environmental effects caused by NWP activities. The mitigation required under the authority of 33 CFR 330.1(e)(3) can be compensatory mitigation, but it can also be additional on-site avoidance and minimization of adverse impacts to jurisdictional waters and wetlands. District engineers have the discretion to determine when compensatory mitigation is to be required for NWP activities, and consider the degree of functions being performed by the jurisdictional waters and wetlands that will be adversely affected by the NWP activities (see paragraph 2 of Section D, District Engineer's Decision).

One commenter stated that compensatory mitigation should only be required for impacts to jurisdictional waters. One commenter suggested that compensatory mitigation should not be required for restoration activities. One commenter said that the reference to the aquatic environment in general condition 23 should be retained.

It is implicit in general condition 23 that compensatory mitigation is only required for NWP activities that impact jurisdictional waters and wetlands. However, under general condition 32 a complete PCN requires a delineation of wetlands, other special aquatic sites, and other waters, and some of those wetlands, other special aquatic sites, and other waters might not be subject to Clean Water Act jurisdiction. Therefore, if compensatory mitigation is required for a proposed NWP activity, and there was no approved jurisdictional determination issued for the project site, there may be occasions where compensatory mitigation was required for impacts to waters and wetlands, where some of those waters and wetlands might not be subject to Clean Water Act jurisdiction. If a project proponent wants an approved jurisdictional determination for a parcel where he or she might be proposing an NWP activity, the project proponent should request and receive that approved jurisdictional determination prior to submitting a PCN for the proposed NWP activity.

In general, compensatory mitigation is not required for restoration activities. In NWP 27, which authorizes aquatic habitat restoration, enhancement, and establishment activities, there is a provision that states that compensatory mitigation is not required for activities authorized by that NWP because they result in net increases in aquatic resource functions and services. We added a similar provision to new NWP 53, which authorizes the removal of low-head dams to restore rivers and streams and improve public safety. The NWP regulations, as well as section 404(e) of the Clean Water Act, refer to adverse environmental effects, so mitigation for NWP activities is

intended to help ensure that activities authorized by NWPs cause no more than minimal adverse environmental effects.

One commenter stated that compensatory mitigation should be required for all unavoidable impacts to wetlands, special aquatic sites, and all stream types (ephemeral, intermittent and perennial). One commenter said that mitigation should only be completed on-site to better compensate for the loss at that location. A few commenters expressed their support for maintaining existing thresholds for compensatory mitigation requirements.

Compensatory mitigation is only required when necessary to ensure that activities authorized by NWPs result in no more than minimal individual and cumulative adverse environmental effects. Avoidance and minimization are other forms of mitigation that may also result in NWP activities causing no more than minimal adverse environmental effects. Under the sequence articulated in 33 CFR 330.1(e)(3), the district engineer first evaluates the PCN and determines whether the proposed activity will cause no more than minimal adverse environmental effects. If the district engineer determines the proposed activity will result in more than minimal adverse environmental effects, he or she will offer the project proponent the opportunity to submit a mitigation proposal to reduce the adverse environmental effects so that they are no more than minimal, individually and cumulatively. If the district engineer determines the mitigation proposal will reduce the adverse environmental effects, so that the net adverse environmental effects are no more than minimal, he or she will add conditions to the NWP authorization to require the project proponent to implement the mitigation proposal. If the district engineer determines that the mitigation proposal will not reduce the adverse environmental effects so that they are no more than minimal, he or she will exercise discretionary authority and instruct the project proponent on how to apply for an individual permit. On-site compensatory mitigation is often not an ecologically effective means of providing compensatory mitigation for impacts to jurisdictional wetlands because hydrologic conditions on the project site are likely to have been altered as a result of the permitted activity (NRC 2001). In the 2008 mitigation rule (33 CFR part 332), there is a framework for evaluating compensatory mitigation options to reduce risk and uncertainty in compensatory mitigation decision-making (see 33 CFR 332.3(a) and (b)). In this general condition, we have not made any changes to the compensatory mitigation thresholds for the NWPs.

One commenter said that the Corps should require all applicants to take all practicable steps to avoid and minimize adverse impacts. Paragraph (a) requires permittees to design their NWP activities to avoid and minimize adverse effects, including both temporary and permanent adverse effects, to the maximum extent practicable on the project site.

One commenter said that mitigation measures should be required for losses of streams and open waters, including mitigation measures to improve floodplain connectivity and to provide flood storage. Another commenter stated that mitigation should be required for impacts to native aquatic vegetation such as eelgrass and kelp. A few commenters said that preservation of high quality aquatic resources should be a priority option for mitigation.

District engineers have the authority to require mitigation for losses of streams and other open waters (see paragraphs (d) and (e) of this general condition). That mitigation may result in the restoration of floodplain connectivity and the provision of one or more floodplain functions. District engineers also have the discretion to require compensatory mitigation for impacts to vegetated estuarine and marine habitats that are caused by NWP activities. We agree that preservation can be used to provide compensatory mitigation, as long as the preservation proposal complies with 33 CFR 332.3(h).

Many commenters said that the 1/10-acre threshold for wetland mitigation should be retained. One commenter suggested increasing the threshold for requiring wetland compensatory mitigation to one acre. Many commenters said that wetland compensatory mitigation should not be required if wetland fills are unavoidable. One commenter stated that district engineers should not be allowed to waive the wetland compensatory mitigation requirement.

We have retained the 1/10-acre threshold for requiring wetland compensatory mitigation for wetland losses, with the district engineer's discretion to waive that compensatory mitigation requirement or require wetlands compensatory mitigation for wetland losses of less than 1/10-acre. For many NWP activities, wetland losses authorized by NWP result in no more than minimal individual and cumulative adverse environmental effects without the need to require wetland compensatory mitigation. The NWPs authorize unavoidable impacts to wetlands, and wetland compensatory mitigation is sometimes necessary to ensure that NWP activities result in no more than minimal adverse environmental effects.

One commenter stated that stream mitigation should only be required if it is practicable. One commenter recommended requiring compensatory mitigation for all losses of stream beds. One commenter said that compensatory mitigation should not be allowed to reduce adverse impacts of losses of stream bed. One commenter suggested establishing a threshold of 500 linear feet for requiring stream compensatory mitigation. One commenter suggested that paragraph (d) should state that the district engineer may require stream mitigation, instead of stating that the district engineer ''should'' require stream mitigation. A few commenters stated that the Corps should not require compensatory mitigation to offset all losses of stream bed. Several commenters said that compensatory mitigation should not be required for losses of intermittent or ephemeral streams. One commenter said that stream creation or establishment should be acceptable compensatory mitigation. One commenter asked which types of projects can be done to mitigate for the loss of stream length.

Similar to wetland compensatory mitigation, compensatory mitigation for losses of stream bed is only required when district engineers determine such compensatory mitigation is necessary to ensure that activities authorized by NWPs result in no more than minimal individual and cumulative adverse environmental effects. Stream mitigation can reduce the adverse environmental effects of NWP activities so that they are no more than minimal. District engineers have the discretion to require compensatory mitigation for losses of perennial, intermittent, and ephemeral streams. In general, stream compensatory mitigation should be accomplished through rehabilitation, enhancement, and preservation because the Corps' regulations consider streams to be difficult-to-replace aquatic resources (see 33 CFR 332.3(e)(3)). We have added the phrase ''if practicable'' to the last sentence of paragraph (d) to state that stream rehabilitation, enhancement, or preservation activities should be practicable. Stream compensatory mitigation for NWP activities should not be provided through establishment/creation approaches because establishment/creation activities have not been

demonstrated to effectively provide stream ecological functions.

Stream restoration and enhancement can be done using a variety of techniques, such as dam removal and modification, culvert replacement or modification, fish passage structures when connectivity cannot be restored or improved by dam removal or culvert replacement, levee removal or setbacks, reconnecting floodplains and other riparian habitats, road removal, road modifications, reducing sediment and pollution inputs to streams, replacing impervious surfaces with pervious surfaces, restoring adequate in-stream or base flows, restoring riparian areas, fencing streams and their riparian areas to exclude livestock, improving in-stream habitat, recreating meanders, and replacing hard bank stabilization structures with bioengineering bank stabilization measures (Roni et al. 2013). Stream restoration projects should focus on restoring ecological processes, through activities such as dam removal, watershed best management practices, improving the riparian zone, and reforestation, instead of focusing on the manipulation the structure of the stream channel (Palmer et al. 2014).

One commenter said that the Corps should require use of a science-based assessment tool that is capable of measuring lost stream functions caused by impacts and stream functions gained from through restoration and/or enhancement activities. One commenter stated that paragraph (d) would allow for continued, unchecked and unmitigated losses of open waters or streams that support salmon or shellfish.

We agree that science-based assessment tools should be used to assess losses of stream function or condition caused by NWP activities, and to assess increases in stream function or condition resulting from stream compensatory mitigation projects. Science-based stream assessment tools can also be used develop ecological performance standards for stream compensatory mitigation projects. However, we recognize that those tools are not available in many areas of the country. Activities authorized by NWPs will result in some losses of streams and other waters that support salmon or shellfish, and district engineers have the discretion to require compensatory mitigation to ensure that the adverse environmental effects resulting from those activities are no more than minimal.

One commenter stated that riparian mitigation requirements should be consistent with the jurisdiction where the mitigation is occurring. Another commenter said that the restoration of riparian areas should not be allowed as a compensatory mitigation option. One commenter stated that buffers should be wider than 25 feet.

Riparian mitigation requirements are determined by district engineers on a case-by-case basis. District engineers can develop local guidelines for riparian mitigation. The restoration of riparian areas is important for rivers, streams, and other open waters, because those riparian areas provide substantial contributions to the ecological functions and services performed by rivers, streams, and other open waters. Paragraph (e) of general condition 23 allows district engineers to require riparian areas a little wider than 25 feet if there are documented water quality or habitat concerns. There are limits to the widths of riparian areas required by district engineers, because compensatory mitigation requirements for NWPs and other DA authorizations must be roughly proportional to the permitted impacts (see 33 CFR 320.4(r)(2) and 33 CFR 332.3(f)(1)). We have modified paragraph (e) to state that compensatory mitigation provided through riparian areas can be accomplished by maintenance/protection of those riparian areas. A well-developed, functional riparian does not need to be restored if it provides ecological functions in its present state.

Several commenters said that paragraph (f)(1) of general condition 23 should be modified to make it clear that the use of mitigation banks or in-lieu fee programs is not mandatory if they are impractical when compared to other mitigation alternatives. One commenter objected to the change in paragraph (f)(1) to establish a preference for the use of mitigation bank or in-lieu fee program credits to provide compensatory mitigation for NWP activities. One commenter said that the proposed modification of paragraph (f)(1) places mitigation banks and in-lieu fee programs on the same level, contrary to the 2008 mitigation rule. This commenter also said that permittees should be allowed to do permittee-responsible mitigation when it is justified. One commenter said that permittee-responsible mitigation remain a viable option, as it may be more ecologically and financially appropriate for some projects. One commenter said that the applicant should be allowed to propose any mitigation option he or she thinks is appropriate, instead of following the hierarchy in 33 CFR 332.3(b). One commenter expressed support for the mitigation hierarchy in 33 CFR 332.3(b). A few commenters object to the hierarchy of mitigation banks being the first consideration. One commenter said that the Corps should select the most environmentally preferable method for wetland mitigation, rather than using the hierarchy listed in the 2008 rule.

As stated in proposed paragraph (f)(1), the use of mitigation bank and in-lieu fee program credits to provide compensatory mitigation for NWP activities is preferred, not required. This preference is based on the hierarchical framework for considering compensatory mitigation options for NWPs and other DA permits that is provided in 33 CFR 332.3(b). That framework was developed to manage risk and uncertainty in aquatic resource compensatory mitigation projects. The proposed paragraph (f)(1) was also made in recognition of the higher risk and uncertainty associated with permittee-responsible mitigation, especially on-site permittee-responsible mitigation where changes to hydrology and other site characteristics caused by the permitted activity make it more difficult to achieve the intended objectives of a compensatory mitigation project (NRC 2001). As stated in the 2001 NRC report, third-party mitigation approaches such as mitigation banks and in-lieu fee programs have some advantages over permittee-responsible mitigation. Paragraph (f)(1) does not supersede the framework established in 33 CFR 332.3(b); it merely reflects Conclusion 5 in the 2001 NRC report. Paragraph (f)(1) does not preclude the use of permittee-responsible mitigation, if such compensatory mitigation is approved by the district engineer after contemplating the considerations discussed in 33 CFR 332.3(a) and (b).

One commenter stated that the proposed change to general condition 23 is unclear as to whether a mitigation plan is required or not. This commenter said that proposed paragraphs (f)(3) and (f)(5) conflict with each other. Another commenter stated that proposed paragraphs (f)(1) and (f)(2) conflict with each other. One commenter said that the public should be involved in the approval process for mitigation plans.

General condition 23 does not require submission of a mitigation plan unless the district engineer determines compensatory mitigation is required to ensure that the proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects. If the prospective permittee proposes to use mitigation bank or in-lieu fee program credits to provide compensatory mitigation for the proposed NWP activity the mitigation plan only needs to provide the baseline

information and a description of the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)). General condition 32 does not require a mitigation plan for a complete PCN.

We added a new paragraph (f)(2) to state that the amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects. Paragraphs (f)(4) and (f)(6) of general condition 23 (paragraphs (f)(3) and (f)(5) in the proposed rule) do not conflict with each other. They are consistent with 33 CFR 332.4(c)(2)(ii), which addresses the preparation and approval process for mitigation plans for general permit activities. Paragraph (f)(4) describes the requirements for mitigation plans for permittee-responsible mitigation required for NWP activities. Paragraph (f)(6) reflects the flexibility in 33 CFR 332.4(c)(2)(ii) in allowing elements of a compensatory mitigation project to be addressed through permit conditions instead of being addressed in the mitigation plan. We have modified paragraph (f)(3) (proposed paragraph (f)(2)) to apply this paragraph to permittee-responsible mitigation, because mitigation bank credits and in-lieu fee program credits may not be explicitly linked to restoration activities. In addition, the review and approval of mitigation banks and in-lieu fee programs, as well as credit releases from approved mitigation banks and approved in-lieu fee project sites, undergo a rigorous review by the Corps and the other agencies participating in the interagency review process associated with mitigation banks and in-lieu fee programs. There is no public review process for the review of mitigation plans. The district engineer will review the proposed mitigation plan and determine whether it is sufficient for ensuring the NWP activity will cause no more than minimal adverse environmental effects.

One commenter said that when a permittee is a public agency (*e.g.,* a flood control district or county) and it is required to do permittee-responsible mitigation, when the district engineer requires site protection he or she should acknowledge that the public agency can fulfill this obligation with public ownership or in fee easement over the property. One commenter stated that when a public entity conducts mitigation on public property, the site protection requirement be relaxed. One commenter said that, for a compensatory mitigation site, county ownership or a park designation should fulfill the site protection requirement.

The Corps' compensatory mitigation regulations address site protection at 33 CFR 332.7(a) and those regulations allow a range of site protection options, including alternatives to more commonly used site protection instruments such as conservation easements and deed restrictions/restrictive covenants. For a permittee-responsible mitigation project conducted by a public agency or by a state or local government agency, site protection can be provided by agency ownership of the mitigation site, as long as that agency commits to managing and protecting the mitigation site including the aquatic resources and other natural resources on the property. The public agency may also provide site protection by purchasing an easement for the property used for the permittee-responsible mitigation project as long as that easement protects the aquatic resources and other resources on the site over other uses of the land. Section 332.7(a) states that for government property, ''long-term protection may be provided through federal facility management plans or integrated natural resources management plans.'' Other types of land management plans may also be acceptable approaches to protecting permittee-responsible mitigation sites on publicly-owned lands, and the district engineer should evaluate the public agency's proposed plan for protecting and managing the mitigation site, to determine if that proposed plan satisfies the requirements of 33 CFR 332.7(a). However, if the public agency or state or local government agency decides, in the future, that it has to or wants to use the mitigation site for other purposes, because of changes in statutes, regulations, or agency needs or missions, then the agency will be required to provide alternative compensatory mitigation (see 33 CFR 332.7(a)(4)). In addition, the party responsible for providing the compensatory mitigation must notify the district engineer 60 days prior to taking any action that would void or modify the site protection instrument or site management plan (see 33 CFR 332.7(a)(3)).

Several commenters requested a more thorough explanation of compensatory mitigation monitoring requirements for NWP activities. One commenter asked for guidance on the monitoring requirements for aquatic habitat rehabilitation, enhancement or restoration activities. This commenter stated that monitoring requirements should be commensurate with impacts.

Monitoring requirements for compensatory mitigation projects are determined by district engineers on a case-by-case basis. General requirements for monitoring are provided at 33 CFR 332.6. Monitoring is required to ensure that the compensatory mitigation project site is meeting its performance standards, and to determine if measures such as remediation or adaptive management are necessary to ensure that the compensatory mitigation project is accomplishing its objectives. Monitoring requirements will vary, depending on the specific characteristics of the compensatory mitigation project, such as the compensatory mitigation mechanism (*e.g.,* restoration, enhancement, establishment, or preservation), the type of aquatic resource being provided as compensatory mitigation (*e.g.,* forested wetlands, perennial stream), and the ecosystem development characteristics of the compensatory mitigation project. Either the approved mitigation plan or permit conditions will specify the monitoring requirements for a particular compensatory mitigation project. Monitoring requirements are commensurate with the characteristics of the compensatory mitigation project, not the impacts authorized by NWP or other types of DA permits.

One commenter stated that mitigation should always be at a 2:1 ratio to ensure that more aquatic habitat is replaced. One commenter said that a national mitigation ratio be used for the NWPs.

The amount of compensatory mitigation to be provided for an NWP activity is determined by the district engineer. Factors used to determine the amount of compensatory required by the district engineer are provided at 33 CFR 332.3(f)(2). Those factors include: The method of compensatory mitigation (*e.g.,* rehabilitation), the likelihood of ecological success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and its functions, and/or the distance between the affected aquatic resource and the compensation site. The rationale for the required amount of compensatory mitigation must be documented in the administrative record for NWP verification. A national mitigation ratio cannot be established for the entire country, because those decisions require case-by-case analysis by district engineers. The amount of compensatory mitigation necessary to offset impacts to jurisdictional waters or wetlands authorized by an NWP or other type of DA permit must be roughly proportional to the permitted impacts.

One commenter said that off-site mitigation should not be allowed and on-site avoidance and minimization should be required instead. A few commenters stated that mitigation banking is a way to avoid alternatives analysis procedures.

Off-site compensatory mitigation is an appropriate option for providing compensatory mitigation for NWP activities, as long as the off-site compensatory mitigation project is approved by the district engineer. Off-site compensatory mitigation includes off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee programs. Paragraph (a) of general condition 23 requires on-site avoidance and minimization to the maximum extent practicable for both permanent and temporary adverse effects caused by NWP activities. Compensatory mitigation requirements, including the use of mitigation banks to provide any required compensatory mitigation, are determined after the prospective permittee has complied with the on-site avoidance and minimization requirements in paragraph (a) of this general condition. Alternatives analyses are not required for NWP activities.

Several commenters expressed support for not requiring compensatory mitigation for non-jurisdictional activities, such as tree clearing for overhead power lines that do not involve discharges of dredged or fill material into waters of the United States. One commenter requested examples of activities that are beyond the scope of the district engineer's authority or discretion to require compensatory mitigation.

We have retained the provisions in paragraph (i) as proposed. Because the purpose of mitigation, including compensatory mitigation, in the NWP program is to reduce the adverse environmental effects caused by an NWP activity to ensure that they are no more than minimal, individually and cumulatively, compensatory mitigation requirements established by the district engineer must relate to the direct and indirect effects caused by the NWP activity. That would be the discharges of dredged or fill material in waters of the United States and/or the structures of work in navigable waters of the United States.

Several commenters stated that compensatory mitigation for NWP activities is not effective in offsetting adverse impacts. One commenter stated that post-permit compensatory mitigation cannot be used to make the no more than minimal adverse environmental effects determination, because it is legally impermissible and because the Corps lacks sufficient evidence to conclude that mitigation will render the impacts caused by NWP activities to be no more than minimal. One commenter said that mitigation under the NWPs does not compensate for losses of functions and services, and instead results in adverse impacts. One commenter stated the Corps should establish and manage a database to understand the impact of the NWP program, including the effectiveness of mitigation actions.

The restoration, enhancement, preservation, and in some circumstances, the establishment of aquatic resources has been demonstrated to increase or maintain ecological functions and services, which offset losses of ecological functions and services caused by activities authorized by NWPs and other types of DA permits. For difficult-to-replace aquatic resources, such as streams, bogs, and springs, compensatory mitigation should be provided through in-kind rehabilitation, enhancement, or preservation (see 33 CFR 332.3(e)(3)) because these types of aquatic resources cannot be established by manipulating uplands. When a district engineer receives a permittee-responsible mitigation proposal from the applicant, he or she carefully evaluates that proposal to determine whether it will be ecologically successful and fulfill its objectives in providing certain aquatic resource functions and services. If the permittee-responsible mitigation project is approved, the district engineer requires monitoring to ensure that it is meeting its ecological performance standards and is developing into the target aquatic resource. If the permittee-responsible mitigation project is not meeting its ecological performance standards, the district engineer will work with the permittee to identify actions, including adaptive management, to make adjustments to the mitigation project so that it meets its objectives. If the permittee-responsible mitigation project fails, the permittee may be required to provide alternative compensatory mitigation.

If the required compensatory mitigation is to be provided through mitigation bank or in-lieu fee program credits, oversight by the district engineer, with input from federal and state resource agencies and other agencies, helps ensure that mitigation banks and in-lieu fee projects produce the required amount and type of restored, enhanced, established, and preserved aquatic resources and other natural resources. Mitigation banks and in-lieu fee projects are required to have credit release schedules, which are linked to ecological performance standards and other requirements, to ensure that the mitigation bank or in-lieu fee project is meeting its objectives in providing the desired aquatic resources and functions and services. Monitoring and adaptive management are also required for mitigation banks and in-lieu fee projects.

For the issuance or reissuance of the NWPs, the decision documents for those NWPs describe, in general terms, the mitigation measures taken for NWP activities to ensure they result in no more than minimal individual and cumulative adverse effects. That is a general discussion because of the wide variation of aquatic resource types across the country, the functions and services they provide, and the methods for restoring, enhancing, and in certain circumstances, establishing those aquatic resource. The decision documents also provide a general discussion of studies on aquatic resource restoration and enhancement that demonstrate that these activities can provide increases of aquatic resource functions. To fulfill the requirements of NEPA, the decision document includes an environmental assessment, with a mitigated finding of no significant impact. Mitigated findings of no significant impact are appropriate for fulfilling NEPA requirements (see the Council on Environmental Quality's January 14, 2011, guidance entitled ''Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact'').

The Corps tracks authorized impacts and permittee-responsible mitigation in its Regulatory program automated information, ORM. The Corps tracks credits produced by approved mitigation banks and in-lieu fee programs in the Regulatory In-Lieu Fee and Banking Information System (RIBITS), which is available at: *https://ribits.usace.army.mil/ribits_apex/f?p=107:2*:

One commenter stated that upland buffers should be accepted as compensatory mitigation for NWP activities. One commenter asked how district engineers assess indirect impacts to wetlands authorized by NWPs. One commenter asked when compensatory mitigation is to be required for temporary impacts. One commenter said that district engineers should not require any more stringent methods of compensatory mitigation than what is provided in the 2008 mitigation rule.

Upland buffers can be used to provide compensatory mitigation for NWPs (see

33 CFR 332.3(i)). District engineers can use rapid ecological assessment tools to assess indirect effects to wetland caused by activities authorized by NWPs. If rapid ecological assessment tools or other tools are not available or practical to use, then district engineers will use their judgement in evaluating those indirect impacts. Compensatory mitigation is required for temporary impacts when the district engineer determines such compensatory mitigation is necessary to ensure the NWP activity results in no more than minimal adverse environmental effects. Paragraph (f) of this general condition states that compensatory mitigation projects must comply with the applicable provisions of 33 CFR part 332, so the compensatory mitigation requirements for the NWP program are the same as for other types of DA permits.

One commenter stated that compensatory mitigation requirements should be determined by district engineers, because they are familiar with the regional conditions and the mitigation needs of their geographic areas of responsibility. Several commenters stated that compensatory mitigation should be required after the 404(b)(1) Guidelines had been followed. One commenter said that the Corps should focus on a consistent nationwide criteria for when compensatory mitigation is required. One commenter said that compensatory mitigation is unnecessary and impractical for the vast majority of NWP activities. One commenter said that compensatory mitigation should be required for all losses of waters of the United States.

Compensatory mitigation requirements for NWP activities are determined by district engineers on a case-by-case basis. The Corps complied with the 404(b)(1) Guidelines when it issued or reissued the NWPs. For a specific activity authorized by an NWP, a separate 404(b)(1) Guidelines analysis is not required. There is a national standard for when compensatory mitigation required, and that standard is found in 33 CFR 330.1(e)(3), which was established in 1991 (see the November 22, 1991, issue of the **Federal Register** at 56 FR 59110). Approximately 90 percent of the activities authorized by NWP through written verifications issued by district engineers do not require compensatory mitigation (see Table 5 in U.S. Army Corps of Engineers and U.S. EPA (2015)). Compensatory mitigation is only required when necessary to ensure that NWP activities result in no more than minimal adverse environmental effects (see 33 CFR 330.1(e)(3)). If the district engineer reviews the PCN and determines that the NWP activity will cause no more than minimal adverse environmental effects and complies with all applicable terms and conditions, he or she will issue the NWP verification without requiring compensatory mitigation.

One commenter suggested that the entire project should be considered when determining compensatory mitigation requirements. A few commenters said there should not be a threshold for requiring compensatory mitigation, but compensatory mitigation should be required regardless of the impact amount. One commenter objected to increasing compensatory mitigation requirements for the NWPs. One commenter said that compensatory mitigation requirements should be based on impacts to functions, not on a limit threshold.

Compensatory mitigation must be ''directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable'' (33 CFR 320.4(r)(2)). The term ''proposal'' refers to the activity that requires DA authorization. The Corps does not have the authority to enforce permit conditions, including compensatory mitigation requirements, for activities it does not regulate. For the NWP program, the threshold for requiring compensatory mitigation is in 33 CFR 330.1(e)(3), and under that regulation compensatory mitigation is only required when necessary to ensure the authorized activity will cause no more than minimal individual and cumulative adverse environmental effects. The June 1, 2016, proposed rule did not propose to increase compensatory mitigation requirements for the NWPs, but we did seek comments on how to improve compensatory mitigation in the NWP program (see 81 FR 35211). Compensatory mitigation requirements are based on the functions lost as a result of the NWP activity. For wetland losses greater than 1/10-acre, district engineers have the discretion to not require compensatory mitigation, if those wetland losses will result in no more than minimal adverse environmental effects without compensatory mitigation. District engineers also have discretion to require compensatory mitigation for losses of less than 1/10-acre, such as when the wetlands lost as a result of the NWP activity are highly functional.

Several commenters said that if a district engineer issues a written waiver of a linear foot limit or other NWP limit, then compensatory mitigation should not be required for the waiver because the district engineer already determined that the authorized activity results in no more than minimal adverse environmental effects because of best management practices and other minimization techniques. Another commenter stated that mitigation should always be required for activities that are authorized by a waiver. One commenter said that compensatory mitigation should not be required to receive a waiver. One commenter stated that if compensatory mitigation is required for a district engineer's waiver of the 300 linear foot limit for losses of intermittent or ephemeral stream bed, compensatory mitigation should only be required for the linear feet of losses of stream bed that exceed the 300 linear foot limit.

For a district engineer to issue a waiver, it may be necessary to require compensatory mitigation so that the adverse environmental effects caused by the activity are no more than minimal, individually and cumulatively. The district engineer evaluates the waiver request, and if agency coordination is required for the waiver request, the agency comments to make the determination whether the adverse environmental effects will be no more than minimal. If the district engineer decides the adverse environmental effects will be more than minimal, he or she will offer the project proponent the opportunity to submit a mitigation plan to reduce the adverse environmental effects so that they are no more than minimal. If the district engineer determines the mitigation proposal will reduce the adverse environmental effects so that NWP authorization is appropriate, and add conditions to the NWP authorization to require the permittee to implement the mitigation proposal. If the district engineer decides the mitigation proposal will not sufficiently reduce the adverse environmental effects so that they are no more than minimal, he or she will exercise discretionary authority and require an individual permit. Therefore, whether a waiver request requires compensatory mitigation is at the discretion of the district engineer. The district engineer will decide how much compensatory mitigation is necessary to ensure that the NWP activity with the written waiver of the applicable NWP limit will cause no more than minimal individual and cumulative adverse environmental effects.

Several commenters stated that when district engineers make compensatory mitigation decisions for NWP activities, they should take into consideration whether the affected waters are man-made or natural. One commenter said that mitigation should not be required

for man-made storm water conveyance systems. This commenter stated that if wetlands develop in these features and mitigation is required, the permittee should not be required to prepare a mitigation plan that fulfills the requirements of 33 CFR 332.4(c). One commenter suggested that compensatory mitigation requirements should be reduced when the regulatory requirements of another agency cause a linear transportation project to impact aquatic resources.

District engineers can take into account the type of aquatic resource, and whether it is natural or man-made, when deciding if compensatory mitigation should be required. If the man-made stormwater conveyance systems are not waters of the United States under the current regulations and guidance for identifying waters of the United States, then mitigation should not be required for activities in those systems, especially if the Corps does not regulate those activities. The Corps determines, on a case-by-case basis, when compensatory mitigation is to be required for NWP activities in a linear transportation project, regardless of whether another agency's requirements precluded alternatives for that linear transportation project that would have avoided or minimized impacts to jurisdictional waters or wetlands.

This general condition is adopted with the modifications discussed above.

GC 24. *Safety of Impoundment Structures.* We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 25. *Water Quality.* We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 26. *Coastal Zone Management.* We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 27. *Regional and Case-by-Case Conditions.* We did not propose any changes to this general condition. We did not receive any comments on it. This general condition is adopted as proposed.

GC 28. *Use of Multiple Nationwide Permits.* We did not propose any changes to this general condition. One commenter said that combining NWPs should be prohibited. One commenter suggested adding regional general permits to this general condition. Two commenters recommended prohibiting the use of multiple NWPs and other DA permits that authorize numerous encroachments in close proximity to navigable waters. One of these commenters stated that regardless of whether project components are independent of one another, they are likely to cause cumulative impacts within the navigable waterway, and those impacts need to be evaluated together.

The purpose of this general condition is to ensure that acreage limits are not exceeded when two or more NWPs are combined to authorize a single and complete project. When an NWP is combined with a regional general permit to authorize a single and complete activity, it is the district engineer's determination whether the adverse environmental effects will be no more than minimal. Both NWPs and regional general permits must comply with the same standard established under section 404(e) of the Clean Water Act. When district engineers evaluate proposed NWP activities, they consider the cumulative effects of the use of those NWPs on a regional basis. They also consider the cumulative effects of activities authorized by their regional general permits, and may modify, suspend, or revoke their regional general permits when they determine those general permits are resulting in activities that have more than minimal cumulative adverse environmental effects. During the evaluation of applications for individual permits, district engineers conduct cumulative impact analyses to comply with NEPA requirements, if they are preparing environmental assessments or environmental impact statements. If the proposed activity requires an individual permit and involves discharges of dredged or fill material into waters of the United States, the district engineer will also conduct a cumulative effects analysis under the 404(b)(1) Guidelines.

This general condition is adopted as proposed.

GC 29. *Transfer of Nationwide Permit Verifications.* We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 30. *Compliance Certification.* We proposed to modify this general condition to add a timeframe for submitting the completed certification document. The proposed modification states that the completed certification should be sent to the district engineer within 30 days of completing the authorized activity or the completion of the implementation of any required compensatory mitigation.

Several commenters said they supported the proposed modification, and some suggested an extension to the 30-day timeframe. Two commenters stated that the 30-day timeframe is not long enough and should be extended to 90 days because permittees have internal reviews and need more time to carefully certify the compliance certification document. One of these commenters asked what is considered ''implementation'' of the compensatory mitigation project. One commenter said the proposed modification would provide important information to the Corps to ensure that the program is causing no more than minimal adverse environmental impacts. One commenter recommended assigning a timeframe to ensure the receipt of a compliance certification. One commenter agreed with the 30-day timeframe but expressed concerns regarding what would happen if the due date is missed.

We believe that 30 days is sufficient time for permittees to submit their compliance certifications to district engineers. These certifications should be simple statements that do not require much work to prepare. If the proposed 30-day period would be increased to 90 days, it is likely that it would result in more permittees forgetting to submit their certifications. For the purposes of this general condition, implementation of the required compensatory mitigation refers to the completion of construction of the permittee-responsible mitigation project. If the permittee-responsible mitigation project is solely preservation of aquatic resources, then it would be the execution of the site protection mechanism and other required measures for the preservation compensatory mitigation. If mitigation bank or in-lieu fee program credits will be used to fulfill compensatory mitigation requirements, the implementation refers to securing those credits. If the permittee fails to submit the compliance certification on time, there would be non-compliance with this general condition. The district engineer may take appropriate action to address that non-compliance.

One commenter stated that this general condition should be modified to state that the completed certification should be submitted within 30 days of completing the authorized activity or completing the implementation of the required compensatory mitigation. One commenter said the 2012 general condition should be retained and require submission of the certification within 30 days of project completion. This commenter remarked that there is frequently a time lapse between completing the compensatory mitigation requirement and completing the NWP activity.

In general, the required compensatory mitigation should be implemented in

advance of, or concurrent with, the authorized activity (see 33 CFR 332.3(m)). However, if the district engineer allows the required compensatory mitigation to be constructed or otherwise implemented after the authorized activity occurs, then the compliance certification would have to be sent to the district engineers within 30 days of completing the required compensatory mitigation. In 2012, general condition 30 did not have a timeframe for submitting the compliance certification. That is why we proposed to add a timeframe so that the compliance certification process would no longer be open-ended with no due date. We have modified this general condition to add the phase ''whichever occurs later'' to the end of the last sentence, to make it clear that the compliance certification must be submitted within 30 days of whatever action occurs last. For example, if the permittee implements the required compensatory mitigation before conducting the NWP activity, the compliance certification would be required to be submitted to the district engineer within 30 days of the NWP activity being constructed.

This general condition is adopted with the modification discussed above.

GC 31. *Activities Affecting Structures or Works Built by the United States.* We proposed this new general condition to address activities that are required under Section 14 of the Rivers and Harbors Act of 1899 (33 U.S.C. 408) to secure permission from the Secretary of the Army for the alteration or occupation or use of structures or works built by the United States (*i.e.,* U.S. Army Corps of Engineers federally authorized Civil Works projects). The authority to issue these section 408 permissions has been delegated to Corps Headquarters, Corps divisions, or Corps districts depending on the case-specific circumstances for a 408 permission request. Some of these activities also require authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, and may be eligible for one or more NWPs.

Several commenters said they support the proposed new general condition and several commenters said they opposed the new general condition. One commenter asked how long a typical section 408 permission review takes and how it would affect the 45-day default authorization for the NWPs. One commenter requested clarification on when the 45-day clock starts for PCNs submitted under general condition 31. Several commenters stated that the general condition should be modified so that it only applies to major section 408 reviews, not to minor section 408 reviews. A few commenters said that a PCN should not be required for an activity that requires section 408 permission, if the NWP activity does not otherwise require a PCN.

We do not have any statistics on how long section 408 reviews typically take. As stated in the text of this general condition, the proposed NWP activity is not authorized by NWP until the appropriate Corps office issues the 408 permission. In other words, if the proposed NWP activity requires section 408 permission the 45-day default authorization does not apply. If a PCN is required under general condition 31, the activities cannot be authorized by NWP until the Corps issues the 408 permission, or determines that a 408 permission is not required. We have modified the last sentence of this general condition to change ''Corps district office'' to ''Corps office'' because some section 408 permissions are issued by Corps Headquarters. To ensure that NWP activities that will alter or temporarily or permanently occupy or use USACE projects obtain the required 408 permissions before the project proponent conducts those NWP activities, the general condition must apply to both major and minor section 408 reviews. The PCN requirement is necessary to give district engineers the opportunity to add conditions to the NWP authorization to protect the USACE project and to ensure that any needed internal coordination is done.

One commenter said that Engineer Circular 1165–2–216 should not be treated as a binding rule in the final NWPs. One commenter stated that guidance should be issued to Corps districts on ways to streamline 408 reviews so that they do not delay NWP verifications. One commenter asked whether section 408 and section 404 reviews could be concurrent with each other. One commenter said that section 408 and section 404 reviews should be independent of each other.

The NWP regulations already state that the ''NWPs do not authorize interference with any existing or proposed Federal project'' (see 33 CFR 330.4(b)(5)). Engineer Circular 1165–2–216 provides the procedures to ensure that activities, including NWP activities, do not interfere with USACE projects. It has been extended for one year while the Corps considers updates and revisions to the Engineer Circular. General condition 31 adds further assurance that activities authorized by the NWPs will not interfere with existing or proposed USACE projects. The 408 permission process must be completed before the NWP verification can be issued. The 408 permission process might require the project proponent to modify his or her proposed activity to avoid or reduce its impact on the USACE project. Where possible, the section 408 and the NWP PCN reviews are conducted concurrently. The section 408 and NWP PCN reviews are independent of each other and they often occur in different Corps offices.

One commenter requested a list of rivers where section 408 permissions are required. One commenter said that the Corps should establish a Web site with a list of federal projects so applicants can determine when section 408 permissions are required. Additional information on the section 408 permission process and the timing of the issuance of authorizations by Regulatory Program offices is provided in Engineer Circular 1165–2–216, which is available at: *http://www.usace.army.mil/Missions/CivilWorks/Section408.aspx*.

The project proponent should contact the appropriate Corps district office if he or she is uncertain whether the proposed activity might alter or temporarily or permanently occupy or use a USACE project.

This general condition is adopted with the modification discussed above.

GC 32. *Pre-Construction Notification.* We proposed to modify paragraph (b) by adding a new paragraph (b)(3) to state that the PCN should identify the specific NWP(s) the project proponent wants to use to authorize the proposed activity. In addition, we proposed to modify paragraph (b)(4) to require a description of mitigation measures the applicant intends to use to reduce adverse environmental effects caused by the proposed activity. For linear projects, we proposed to change paragraph (b)(4) to make it clear that the PCN should identify all crossings of waters of the United States that require DA authorization. We also proposed to modify paragraph (b)(4) to require, for linear projects, that the PCN include the quantity of proposed losses of waters of the United States for each single and complete crossing of those waters. Please see the June 1, 2016, proposed rule for additional discussion on the proposed changes to this general condition.

Several commenters said they supported the proposed changes to general condition 32 and several commenters said they objected to those proposed changes. One commenter stated that the Corps should avoid changes to the PCN requirements that would result in delays. A few

commenters stated that mitigation and single and complete project requirements should not be included in general condition 32. A couple of commenters stated that without detailed information provided in PCNs, district engineers will not be able to assess whether or not adverse impacts from proposed NWP activities are no more than minimal, and the public has no ability to assess the full extent of impacts resulting from the NWP program.

Other than new general condition 31, we have not made any changes to the PCN requirements for the NWPs that would increase the time it takes for district engineers to make decisions on those PCNs. Some of the proposed changes, such as providing the opportunity for the project proponent to describe mitigation measures in the PCN that would help the district engineer reach a ''no more than minimal adverse environmental effects'' determination, will help reduce PCN processing times. The proposed changes to general condition 32 regarding linear projects are also intended to provide information that would facilitate the district engineer's review.

One commenter said that PCNs should be required for all NWP activities to provide the public with the opportunity to comment on those activities, to provide information on other proposed activities that may contribute to cumulative impacts. One commenter stated that PCNs should be required for all activities in Clean Water Act section 303(d) impaired waters, and each of those PCNs should include a statement explaining how the proposed activity avoids contributing to the existing water quality impairment. One commenter said that PCNs should be required for all proposed NWP activities located in 100-year floodplains.

Activities authorized by NWPs and other general permits do not require a public notice and comment process; the public notice and comment process occurs during the development of the NWP, regional general permit, or programmatic general permit. Requiring the solicitation of public comment on case-specific NWP activities would be contrary to the streamlined process envisioned by section 404(e) of the Clean Water Act. The Corps tracks the use of the NWPs, especially the NWP PCNs and the activities voluntarily reported to Corps district offices that do not require PCNs, to assess the NWP program's incremental contribution to cumulative environmental effects. Division engineers can add regional conditions to one or more NWPs for activities in Clean Water Act section 303(d) waters, for those NWPs that might contribute further to the impairment of those waters. Fills in 100-year floodplains must comply with the requirements of general condition 10 and do not require additional PCNs.

A few commenters stated that the PCN process should not be used to ensure that NWP activities will result in no more than minimal adverse environmental effects. One commenter said that there no evidence that PCNs will ensure that project impacts are no more than minimal. Two commenters stated that PCNs are an essential mechanism for ensuring NWP activities result in only minimal impacts.

The PCN process has been used for many years to provide flexibility in the NWP program and to ensure that NWP activities have no more than minimal individual and cumulative adverse environmental effects. Nothing in the text of section 404(e) of the Clean Water Act indicates that the Corps cannot use a PCN process for general permits. The PCN process provides an opportunity for the district engineer to do a site- and activity-specific evaluation of a proposed NWP activity, and take into account the characteristics of the project site and proposed activity to determine whether the proposed NWP activity will cause no more than minimal individual and cumulative adverse environmental effects. The PCN process also gives the district engineer the opportunity to add activity-specific conditions to the NWP authorization to satisfy the ''no more than minimal adverse environmental effects'' requirement for the NWPs. If there was no PCN process available for the NWPs, then there would be no activity-specific conditions added to the NWP authorization, including no compensatory mitigation or other mitigation requirements. In addition, there would be no opportunity to comply with section 7 of the Endangered Species Act or section 106 of the National Historic Preservation Act.

One commenter asked whether the Corps would notify the applicant in circumstances when individual water quality certifications are required for NWP activities. One commenter stated that NWP activities that require PCNs and NWP activities that do not require PCNs are not ''similar in nature'' and should not be authorized by the same NWP.

If water quality certification has not been previously issued by the state, tribe, or U.S. EPA for the NWP, an individual water quality certification is required (see general condition 25). The district engineer may issue a provisional NWP verification, which explicitly states to the prospective permittee that the proposed activity is not authorized by NWP until he or she obtains an individual water quality certification or a waiver. An NWP authorizes a category of activities that is similar in nature, and whether a PCN is required or not does not alter that category. The PCN process is simply a process whereby district engineers review proposed activities that have the potential to result in more than minimal adverse environmental effects. In response to a PCN, the district engineer can conditions, including mitigation requirements, to ensure that authorized activities cause no more than minimal adverse environmental effects. The district engineer can also exercise discretionary authority and require an individual permit for the proposed activity.

A few commenters said that the final NWPs should provide clear direction to Corps districts to not use additional information requests to delay reviews. A few commenters stated that the Corps should adhere to a 45-day review period for all PCNs that are not subject to activity-specific conditions requiring additional procedures. One commenter stated that PCN review periods should be expedited for time-sensitive maintenance and inspection work for energy projects. Another commenter said that the Corps should allow emergency projects to proceed immediately and conduct after-the-fact review and approvals.

Paragraph (a) is written to provide direction to district engineers to make only one additional information request. Except for certain NWPs (*i.e.,* NWPs 21, 49, and 50) and for the requirements of certain general conditions (*e.g.,* general conditions 18, 20, and 31), activities that require PCNs are authorized after 45 days have passed after district engineers receive complete PCNs unless the district engineer exercises his or her authority to modify, suspend, or revoke the NWP authorization (see 33 CFR 330.1(e)(1)). District engineers can place priority on processing NWP PCNs for time-sensitive maintenance and inspection activities associated with energy projects. There are other regulatory program procedures for emergency situations and those procedures are found 33 CFR 325.2(e)(4).

One commenter said that Corps Headquarters should provide district offices with more guidance and direction on complying with the review timelines for NWP PCNs. A few commenters stated that Corps Headquarters should issue guidance to its districts to make it clear that requests for additional information are limited to

one request, and limited to the information required by paragraph (b) of general condition 32. One commenter said that the final rule should state that district engineers are limited to a single information request. One commenter suggested adding a provision to general condition 32 to require PCN completeness determinations to be made within 15 days.

We do not believe that any additional guidance is necessary. General condition 32 and Section D, District Engineer's decision, clearly articulate the process for reviewing PCNs. Paragraph (a) of general condition 32 describes the process for requesting additional information for PCNs to make them complete. Additional information may be required from the applicant to conduct other procedures associated with the PCN process, such as information necessary to conduct ESA section 7 consultation or information needed for NHPA section 106 consultation. General condition 32 states that, as a general rule, the district engineer should make only one request for information to make the PCN complete. We recognize that there may be some situations where a piece of information needed to make the PCN complete was not identified, and the district engineer can request that information to proceed with the evaluation of the PCN. If that flexibility is not provided, the district engineer may be left with the option of suspending or revoking the NWP authorization because he or she was not allowed by the NWP rule to request that piece of additional information. We believe that 30 days is necessary to make completeness determinations for PCNs.

One commenter said that applicants should not be allowed to proceed with NWP activities that require PCNs without receiving a written verification from the Corps. A few commenters said that the statement explaining that the 45-day PCN review period may be extended if general conditions 18, 20, and/or 31 apply to an NWP activity leaves the PCN review period open ended, and disagreed with that approach. One commenter stated that extending the PCN review period beyond 45 days does not follow the congressional mandate to provide a streamlined permitting process. This commenter stated that extensions to the PCN review period should require documentation and substantiation as to why an extension is necessary, and then only be granted for specific and predictable periods of time. This commenter suggested creating timelines for the consultations and coordination procedures that extend the PCN review period to ensure that they occur in a timely manner.

The NWP regulations at 33 CFR part 330 provide a 45-day default authorization for most NWP activities. There are exceptions for certain NWPs, such as NWPs 21, 49, and 50, and for certain general conditions. If ESA section 7 consultation and/or NHPA section 106 consultation is required for a proposed NWP activity, the project proponent cannot proceed with the NWP activity until after those consultations have been completed and the district engineer notifies the project proponent. Activities authorized by the Corps are required to comply with ESA section 7 and NHPA section 106, and those consultations will be completed as soon as practicable. Section 404(e) of the Clean Water Act does not provide any exemptions from complying with ESA section 7 and/or NHPA section 106. The Corps only conducts those consultations where it is required to do so, and the consultation documentation is included in the administrative record for those NWP PCNs. For ESA section 7 consultations, the consultation process does not end until the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service issues their biological opinion for a formal consultation or its written concurrence for a request for informal consultation. For NHPA section 7 consultations, the consultation process does not end until after the applicable steps in the consultation process identified in 36 CFR part 800 have been completed.

One commenter said that the 45-day review should include a pre-application meeting to determine if NWP authorization is appropriate for a proposed activity. One commenter suggested that to avoid delays in PCN reviews, Corps districts should assign one project manager to an individual company to review all of that company's permit applications, and that the project manager would be funded by that company. One commenter recommended applying the 2001 memorandum entitled ''Fees in the Section 106 Process'' to the PCN coordination process, if the Corps intends to maintain the current coordination timelines.

Pre-application meetings can provide information that will be helpful in processing the NWP PCN, when the PCN is submitted to the district engineer. However, pre-application meetings are optional. Under 33 U.S.C. 2352, the Corps may accept and expend funds contributed by a non-federal public entity or a public-utility company or natural gas company to expedite the evaluation of applications for Department of the Army permits for that entity or company. Guidance on that process is provided in guidance issued by the Corps on August 14, 2015, that is entitled: ''Implementation Guidance for Section 1006 of the Water Resources Reform and Development Act of 2014 and Guidance on the Use of Funding Agreements within the Regulatory Program.'' A copy of that guidance is available at: *http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/WRDA_214_reg_guide_2015.pdf*. As stated in the Advisory Council on Historic Preservation's June 6, 2001, memorandum, neither the National Historic Preservation Act nor the Advisory Council's regulations for implementing the act requires federal agencies to pay for any aspect of consultation, including consultation with tribes, for the purposes of the NHPA section 106 process.

One commenter said that the information requirements for PCNs make the NWPs more like individual permits in terms of the amount of information required. Several commenters recommended requiring more project-specific information requirements for PCNs. One commenter stated that PCNs should include a requirement for alternatives information. One commenter said that PCNs should include detailed mitigation plans. A couple of commenters stated that PCNs should include information about drinking water intakes in the vicinity of proposed NWP activities.

While the NWPs may require a moderate amount of information for a complete PCN, that information is necessary for the district engineer to make his or her determination whether a proposed NWP activity will result in no more than minimal adverse environmental effects. Providing this information to the district engineer early in the NWP authorization process means that little or no information should be needed later in the process, in contrast to individual permits in which a minor amount of information is required to issue public notices, and additional information is provided during the individual permit evaluation process to assist the district engineer in making his or her decision. Pre-construction notifications do not require alternatives analyses because specific activities authorized by general permits do not require alternatives analyses under the 404(b)(1) guidelines (see 40 CFR 230.7(b)(1)). In addition, NEPA documentation, including a NEPA alternatives analysis, is not required for

a specific general permit activity because NEPA compliance was completed by Corps Headquarters when it issued the general permit. Detailed mitigation plans are not required for NWP PCNs because the district engineer first reviews the PCN to determine whether the proposed activity is authorized by NWP, or whether compensatory mitigation or other mitigation is necessary to ensure that the proposed activity will result in no more than minimal adverse environmental effects. If the district engineer decides that compensatory mitigation is needed for the proposed activity to qualify for NWP authorization, then he or she will tell the project proponent that a mitigation plan that satisfies the requirements of 33 CFR 332.4 is required. When district engineers review PCNs, they ensure that the proposed activities comply with all applicable general conditions, including general condition 7, water supply intakes. Because of that review process, we do not believe it is necessary to require PCNs to identify water supply intakes in proximity of proposed NWP activities.

Three commenters expressed support for having the applicant identify which NWP they are applying for. One of these commenters said that this will allow for streamlining the permitting process, and avoid delays in processing. One commenter said that the district engineer should be required to verify the particular NWP identified in the PCN, instead of saying that the district engineer should verify the activity under that NWP. One commenter suggested that applicant's choice of NWP that most readily authorizes the activity should be added to paragraph (b)(3). One commenter asked whether or not the Corps would notify the applicant that the district engineer is evaluating the proposed activity under a different NWP than what the applicant identified in the PCN. One commenter said that paragraph (b)(3) should state that the district engineer can or should advise the permittee of another NWP that could allow the proposed activity to be authorized more efficiently.

We are retaining proposed paragraph (b)(3), to identify the specific NWP or NWPs that the project proponent wants to use. The district engineer is not required to verify the specific NWP(s) identified in the PCN if any of the specific NWP(s) are clearly not applicable. For example, if the prospective permittee request NWP 27 authorization for a bank stabilization activity then the district engineer can issue an NWP 13 verification if the proposed activity complies with the terms and conditions of NWP 13. An applicant will normally specify the NWP or NWPs that will most readily authorize his or her proposed activity, unless there is reason for requesting verification under another NWP or NWPs. If the district engineer decides after reviewing the PCN that the proposed activity does not qualify for the NWP identified by the project proponent, he or she does not have to notify the applicant that the PCN is being evaluated under another NWP. If the district engineer decides that the proposed activity does not qualify for authorization under any NWP, he or she will notify the applicant and provide instructions on how to apply for authorization under an individual permit or a regional general permit.

Two commenters stated that there is no benefit to having the applicant identify in their PCNs which NWP he or she is proposing to use. These commenters said that regardless of which NWP the applicant identifies, the Corps should authorize the activity under the NWP most appropriate to the project purpose. A couple of commenters said proposed paragraph (b)(3) is unclear whether the proposed activity will be verified under the NWP identified by the applicant because it has less stringent conditions, or whether it would be verified under the most appropriate NWP based on the purpose of the proposed activity and the most pertinent conditions. A few commenters said that the Corps should evaluate proposed activities under the most pertinent NWP(s), even if the applicant has specified a different NWP.

There is some degree of redundancy in the NWPs, where a proposed activity is eligible for authorization more than one NWP. At the end of the day, the standard is the same for all NWPs: NWP activities must result in no more than minimal individual and cumulative adverse environmental effects. So if a proposed activity meets the terms of the requested NWP, and any applicable regional conditions, then the district engineer should issue the NWP verification under the NWP identified in the PCN. In the NWP regulations at 33 CFR 330.2(h), ''terms'' are defined as: ''. . . the limitations and provisions included in the description of the NWP itself'' (see 33 CFR 330.2(h)). The NWP general conditions are the same for all of the NWPs. The category of activity authorized by the NWP is the relevant consideration, not the project purpose.

One commenter said that PCNs for proposed NWP activities in FEMA-mapped floodways should require a floodway analysis. Another commenter stated that PCNs for proposed NWP activities located within 100-year floodplains should include require information on floodplain values, hazards, and FEMA-approved maps, and any applicable FEMA-approved state or local floodplain management requirements. One commenter suggested that PCNs should require certification by individuals that meet the Secretary of the Interior's Professional Qualifications Standards to state whether the proposed activity has potential to cause effects to historic properties or whether consultation with tribes needs to be conducted.

We do not believe that it is necessary for a PCN to include a floodway analysis if the proposed NWP activity is located in a FEMA-mapped floodway. That information can be requested and analyzed by the appropriate federal, tribal, state, or local floodplain management authority. District engineers will review PCNs to determine whether they will have more than minimal adverse effects to floodplain values, or cause more than minimal increases in flood hazards. Such information does not need to be provided in the PCN. In accordance with general condition 20, non-federal permittees are required to submit PCNs if the proposed NWP activity might have the potential to cause effects to historic properties. Because the requirement to comply with the consultation requirements of section 106 of the NHPA fall on the Corps for its undertakings, and to consult with tribes when necessary to fulfill its trust obligations to tribes, the PCN does not need to include the certification suggested by the commenter.

A few commenters objected to including proposed mitigation measures in PCNs. Three commenters said that requiring the PCN to include mitigation measures is unnecessary, burdensome, and duplicative. Two commenters requested removal of the proposed requirement, because this information is applicable to proposed activities reviewed under individual permit procedures, instead of NWP activities. One commenter requested flexibility in the amount of detail required for describing mitigation measures in the PCN. One commenter said paragraph (b)(4) should refer to on-site mitigation measures and define those measures as avoidance, minimization, repair, restoration, or reduction of impacts over time to avoid confusion with compensatory mitigation. Two commenters stated that for restoration projects that qualify for NWP authorization, compensatory mitigation should not be required.

The mitigation measures in paragraph (b)(4) may include describing avoidance and minimization of impacts to jurisdictional waters and wetlands on the project site. The prospective permittee is not required to propose any mitigation measures in his or her PCN. The prospective permittee can choose not to propose any mitigation measures. A description of mitigation measures is optional, and the project proponent is encouraged to describe, in the PCN, mitigation measures that will assist the district engineer in reaching a decision, earlier in the process, that the proposed activity will result in no more than minimal adverse environmental effects. The level of detail for the proposed mitigation measures described in the PCN is up to the project proponent. Otherwise, the district engineer may review the PCN and determine that mitigation is necessary to ensure that the proposed activity will cause no more than minimal adverse environmental effects and notify the prospective permittee that a mitigation plan is required. That will add more time to the district engineer's review process. It is the prospective permittee's decision whether to suggest mitigation measures up front in the PCN or wait for the district engineer's request for a mitigation proposal.

The term ''mitigation measures'' in paragraph (b)(4) refer to all five forms of mitigation identified in paragraph (b) of general condition 23, mitigation. The prospective permittee also has the option of proposing to do compensatory mitigation, especially if he or she believes that the district engineer will require compensatory mitigation for the proposed NWP activity. As stated in NWPs 27 and 54, compensatory mitigation is not required for the restoration activities authorized by those NWPs.

A few commenters objected to a requirement to state the proposed quantity of losses of waters of the United States for each single and complete crossing of waters of the United States for linear projects. One commenter said that for linear projects that have multiple crossings of waterbodies, and only some of those crossings require PCNs, the applicant must discuss the impacts of all crossings, not just those that require PCNs. This commenter also stated that the applicant should not be allowed to construct crossings that do not require PCNs until the Corps district issues its verification for the crossings that require PCNs.

In paragraph (b)(4), we have changed the phrase ''waters of the United States'' to ''wetlands, other special aquatic sites, and other waters'' to be consistent with paragraph (b)(5) of this general condition. As discussed below, neither approved jurisdictional determinations or preliminary jurisdictional determinations are not required for NWP PCNs, and if the project proponent wants an approved or preliminary jurisdictional determination for the project site, he or she should request and receive that approved or preliminary jurisdictional determination prior to submitting an NWP PCN.

Two commenters said there is inconsistent language in the PCN requirements for linear projects. They said the paragraph (b)(4) first states that the PCN must include ''the anticipated amount of loss of water of the United States expected to result from the NWP activity'' and later states that for single and complete linear projects, the PCN ''must include the quantity of proposed losses of waters of the United States for each single and complete crossing of waters of the United States.'' In the third sentence of paragraph (b)(4), we have changed the word ''proposed'' to ''anticipated'' to be consistent with the first sentence of this paragraph.

One commenter stated that an approved jurisdictional determination should not be required for an NWP PCN, and that the final NWPs should clarify how approved and preliminary jurisdictional determinations relate to the NWP PCN process. One commenter said that the Corps' jurisdictional determination process under Regulatory Guidance Letter 08–02 should not require a jurisdictional determination to be performed prior to starting the NWP PCN review process. One commenter stated that the requirement for a full delineation of waters of the United States is a significant cause of delay and cost in light of the uncertainties regarding the 2015 final rule defining waters of the United States. This commenter also said that because delineations are only required to be included with a PCN when proposed impacts are 1/10-acre or greater, all of the wetland impacts cannot be evaluated. One commenter said the Corps should field verify every delineation it receives with a PCN. This commenter also stated that if the Corps cannot verify every delineation, we should randomly select delineations to verify.

An approved or preliminary jurisdictional determination is not required for a complete PCN, or for the district engineer to issue an NWP verification. For a complete PCN, the prospective permittee must submit a delineation of wetlands, other special aquatic sites, and other waters on the project site. The project site is not necessarily the entire parcel of land; it may be a portion of that land if the proposed NWP activity is limited to that portion of the parcel. The delineation of wetlands, other special aquatic sites, and other waters on the project site is necessary for the Corps' evaluation of the NWP PCN and its determination on whether the proposed activity will result in no more than minimal adverse environmental effects. The need for the delineation is independent of whatever regulation defining ''waters of the United States'' is in place at the time the PCN is submitted. As stated above, neither an approved jurisdictional determination nor a preliminary jurisdictional determination is required to process the PCN, and requests for approved and preliminary jurisdictional determinations will be processed by Corps districts as separate actions. Since 1991, the NWPs have had a requirement for submission of a delineation of affected special aquatic sites, including wetlands (see 56 FR 59145). All NWP PCNs require a delineation of wetlands, other special aquatic sites, and other waters. There is not a 1/10-acre threshold for requiring a delineation with the PCN. District engineers have the option of verifying the accuracy of the delineation, or making the decision on the NWP verification without doing a verification of the delineation.

Paragraph (b)(5) only requires a delineation of wetlands, other special aquatic sites, and other waters to provide information to the district engineer to make his or her determination whether the proposed activity qualifies for NWP authorization. In the third sentence of this paragraph, we have replaced the phrase ''waters of the United States'' with ''wetlands, other special aquatic sites, and other waters'' to make it clear that the delineation submitted with the PCN does not require a jurisdictional determination. The delineation only needs to identify wetlands, other special aquatic sites, and other waters on the site and their approximate boundaries, so that the district engineer can evaluate the proposed activity's impacts to those wetlands, other special aquatic sites, and other waters. For a complete PCN, that delineation does not have to be verified by the Corps district. If the district engineer finds errors in the delineation, he or she may make corrections to the delineation or require the applicant to make those corrections, but those corrections should not delay the decision on the NWP verification or the decision to exercise discretionary authority.

If the project proponent wants an approved jurisdictional determination to help him or her determine whether the proposed activity might qualify for NWP authorization, to identify jurisdictional waters and wetlands to provide in support of his or her PCN, or to avoid having to do compensatory mitigation for losses of wetlands, other special aquatic sites, or other waters that are not subject to Clean Water Act jurisdiction, the project proponent must submit a separate request for an approved jurisdictional determination. An NWP PCN and a request for an approved jurisdictional determination are separate actions, and if a project proponent submits a request for an approved jurisdictional determination with his or her NWP PCN, the district engineer will process those requests separately. General condition 32 does not require an approved jurisdictional determination for NWP PCNs; only a delineation of wetlands, other special aquatic sites, and other waters is required to make the PCN. With certain exceptions identified in the NWPs (*e.g.,* NWPs 21, 49, and 50) and some general conditions (*e.g.,* general conditions 18 and 20), the decision on an NWP PCN must be made within 45 days of receipt of a complete PCN. There is no required timeframe for responding to requests for approved jurisdictional determinations, although the Corps strives to respond to those requests within 60 days.

One commenter said that paragraph (b)(5) should be modified to state that National Wetland Inventory mapping is not appropriate for determining wetland boundaries, every wetland delineation submitted with a PCN must be based on an actual field investigation, and streams identified on a U.S. Geological Survey (USGS) map are not adequate documentation for a delineation. One commenter suggested adding text to paragraph (b)(5) to state that a USGS topographic quadrangle shall be sufficient to delineate intermittent and ephemeral streams on the project site, and that failure to list or map any stream bed that is not shown on a USGS topographic quadrangle as an intermittent or ephemeral stream shall not be a reason for the district engineer determining the delineation is not complete. This commenter asserted that if a stream is not mapped on a USGS topographic quadrangle map, it should not be considered jurisdictional under the Clean Water Act.

We understand that various published maps, especially published maps generated by remote sensing, do not show all wetlands or accurately depict wetland boundaries, or show all streams. The remote sensing approaches used by the U.S. FWS for its National Wetland Inventory maps result in errors of omission that exclude wetlands that are difficult to identify through photointerpretation (Tiner 1997). These errors of omission are due to wetland type and the size of target mapping units (Tiner 1997). Likewise, many small streams, especially headwater streams, are not mapped on 1:24,000 scale U.S. Geological Survey (USGS) topographic maps (Leopold 1994) or included in other inventories (Meyer and Wallace 2001), including the National Hydrography Dataset (Elmore et al. 2013). Many small streams and rivers are not identified through maps produced by aerial photography or satellite imagery because of inadequate image resolution or trees or other vegetation obscuring the visibility of those streams from above (Benstead and Leigh 2012). However, we do not believe it is necessary to explicitly state in the text of paragraph (b)(5) that National Wetland Inventory maps or USGS topographic maps may, or may not, be adequate for preparing the delineation of wetlands, other special aquatic sites, or other waters for the PCN. A stream may be a jurisdictional water of the United States even if it is not shown on a USGS topographic map.

One commenter suggested adding the term ''natural'' before ''lakes and ponds'' in paragraph (b)(5), stating that there is no need to delineate artificial waterbodies or any area that is wet due to irrigation, whether or not they are prior converted cropland. One commenter suggested adding text to this paragraph to state that a jurisdictional determination is not required to make a PCN complete, because a jurisdictional determination is not necessary for the Corps to issue an NWP verification.

Some artificial waterbodies may be waters of the United States. For example, a lake that was created by impounding a jurisdictional river would likely be subject to Clean Water Act jurisdiction. If an area is not a wetland, another type of special aquatic site, or other water, then it does not need to be included in the delineation for the PCN. If the project proponent is uncertain whether a particular artificial waterbody or area of irrigated land is subject to Clean Water Act jurisdiction, and wants a definitive determination from the Corps, then he or she can request an approved jurisdictional determination. Areas of prior converted cropland will be identified on a case-by-case basis. As explained above, we modified paragraph (b)(5) to remove the term ''waters of the United States'' so that there is no implication that a jurisdictional determination is necessary before the Corps issues an NWP verification.

One commenter expressed support for requiring PCNs to include a mitigation statement. One commenter stated that the mitigation information for a PCN should state that mitigation includes on-site avoidance and minimization measures.

We have not made any changes to paragraph (b)(6). The delineation required by paragraph (b)(5) will document the on-site avoidance and minimization measures on the project site.

One commenter stated that proposed paragraph (b)(8) does not address undiscovered historic properties. Undiscovered historic properties are addressed by general condition 21. If the historic properties are unknown at the time the PCN is submitted, then the prospective permittee cannot be expected to include that information in the PCN. If the non-federal project proponent thinks there might be historic properties that could potentially be affected by the NWP activity, then he or she should submit a PCN and the district engineer will determine whether NHPA section 106 consultation is necessary. We have modified paragraph (b)(10) by changing ''Corps district'' to ''Corps office'' because a 408 permission might be issued by Corps Headquarters.

Several commenters encouraged the Corps to develop and use an online PCN application tool for electronic submission of PCNs and supporting documents. A few commenters recommended that the Corps develop an on-line PCN submittal tool and that the tool be made available to states agencies such as water quality certification agencies. One commenter stated that the Corps should continue to allow paper PCNs to be submitted to Corps districts.

At this time, we are not prepared to develop and deploy a national on-line PCN application. Some Corps districts have developed local tools that allow electronic submission of NWP PCNs and supporting documentation. We have modified the last sentence of paragraph (c) as follows: ''Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.'' The general condition still allows for paper PCNs to be submitted to Corps districts.

A few commenters stated that agency coordination should be completed within 30 or 60 days. One commenter suggested increasing the agency coordination period to 30 days, and to require an individual permit for any proposed NWP activity that requires a waiver and any agency objects to the

district engineer issuing that waiver. One commenter said that local government agencies should be included in the agency coordination procedures in paragraph (d). Another commenter recommended including tribes in agency coordination procedures.

The purpose of the agency coordination process in paragraph (d) is seek input from other federal and state agencies for certain proposed NWP activities to determine whether those activities will result in no more than minimal individual and cumulative adverse environmental effects. We believe that the current timeframe (up to 25 days) is sufficient for federal and state agencies to provide their views for the ''no more than minimal adverse environmental effects'' determination. The final decision whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects lies solely with the district engineer. District engineers can include local government agencies in agency coordination for proposed NWP activities. As a result of the consultations Corps districts are conducting with tribes on the 2017 NWPs, Corps districts can include interested tribes in agency coordination on proposed NWP activities.

Two commenters stated that under paragraph (d)(3) of general condition 32, the Corps cannot unilaterally impose timelines on State Historic Preservation Officers (SHPOs) or Tribal Historic Preservation Offices (THPOs), because section 106 consultation is not limited to 15 days. A couple of commenters said that 10 calendar days for the SHPO or THPO to submit comments back to the Corps is not reasonable, and that timeframe is in compliance with 36 CFR part 800, which provides 30 days for SHPOs and THPOs to provide their comments. One commenter stated that the Corps does not have the authority to impose a 10-day review period on THPOs, and cannot assume that a tribe has no comments or objections based on a lack of response within that 10-day period. One commenter stated that paragraph (d)(3) should read, ''State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative.''

If NHPA section 106 consultation is required, that consultation will be conducted under the requirements in general condition 20, historic properties. For NHPA section 106 consultations conducted to comply with general condition 20, the Corps will comply with the timeframes in 36 CFR part 800, consistent with the Corps' 2005 and 2007 interim guidance. Because paragraph (d) is limited to minimal adverse environmental effects determinations, we are removing coordination with SHPOs and THPOs from this paragraph. As discussed above, district engineers can adopt and implement coordination procedures with tribes to seek their views on proposed NWP activities that require PCNs.

One commenter stated that agency coordination should be required for bank stabilization projects over 200 linear feet. One commenter stated that agency coordination should continue to be required for NWP 48 activities that require PCNs.

We are retaining the agency coordination threshold of 500 linear feet for NWP 13 activities, because that is consistent with the applicable waiver provision in paragraph (b) of NWP 13. We have removed the agency coordination requirement for NWP 48 activities, as we proposed to do in the June 1, 2016, proposed rule.

One commenter noted that paragraph (d) uses the term ''activity'' instead of ''single and complete project'' and said that the district engineer would be required to do agency coordination when verifying a linear project with an overall loss greater than 1/2-acre.

Each separate and distant crossing that qualifies for NWP authorization is considered to be a separate NWP authorization. Therefore, the aggregate total of losses of waters of the United States is not used to determine whether agency coordination is required under paragraph (d) of general condition 32. Since each single and complete project authorized by NWPs 12 or 14 has a ½-acre limit (or a 1/3-acre limit for losses of tidal waters authorized by NWP 14), then NWP 12 or 14 activities will not require agency coordination.

A few commenters expressed their support for the proposed PCN form. Several commenters said that the Corps should have included the proposed PCN form with the proposed rule to issue and reissue the NWPs, so that the public can provide comments on the proposed form. One commenter stated that the comment period for the proposed PCN form should be extended by 60 days following the availability of the proposed form.

The proposed PCN form is a separate action from this rulemaking to issue and reissue NWPs. In the June 1, 2016, the public was provided the opportunity to submit comments on the proposed PCN form and we received several comments. The comment period for the proposed PCN form was 30 days while the comment period on the proposed NWPs was 60 days.

One commenter noted that some districts have joint application forms with state agencies, and this commenter said that these districts should find a way to integrate the information required for NWP PCNs on the NWP PCN form with their current joint application forms.

If the NWP PCN form is approved, districts that have joint application forms with state agencies can continue to provide applicants the option to use those joint application forms. Those joint application forms can also be modified to incorporate features of the approved NWP PCN form.

This general condition is adopted with the modifications discussed above.

District Engineer's Decision

Discussion of Proposed Modifications to Section D, ''District Engineer's Decision''

We proposed to modify paragraph 1 to state that if an applicant requests authorization under one or more specific NWPs, the district engineer should issue the verification letter for those NWPs, if the proposed activity meets the terms and conditions of those NWP(s), unless he or she exercises discretionary authority to require an individual permit. We proposed to modify paragraph 2 to clarify that a condition assessment can also be used to help determine whether a proposed activity will result in no more than minimal adverse environmental effects. In the second sentence of paragraph 3, we proposed to change the text to state that applicants may also propose compensatory mitigation to offset impacts to other types of waters, such as streams. We also proposed to clarify that mitigation measures other than compensatory mitigation may also be used to ensure that a proposed NWP activity results in no more than minimal adverse environmental effects.

A number of commenters objected to the proposed change, stating that the district engineer should be able to determine which NWP should be used to authorize the proposed activity. One commenter said it was unclear what a condition assessment involves and whether the Corps or the applicant would prepare the condition assessment. One commenter said that there should be additional time to comply with general conditions 18 and 20. One commenter stated that paragraph 2 of Section D should include cumulative effects as one of the factors that the district engineer considers when making an adverse environmental

effects determination. The current wording implies that only direct and indirect effects are to be considered. One commenter said that district engineers should be required to evaluate entire pipelines and conduct an analysis of cumulative effects that is posted for public comment.

The modification of paragraph 1 of this section states that the district engineer should issue the NWP verification under the NWP requested by the applicant, if the proposed activity meets the terms and conditions of that NWP. If the proposed activity does not meet the terms and conditions of the NWP identified in the PCN, and another NWP would authorize the proposed activity, then the district engineer can authorize the proposed activity under the NWP that he or she identified. However, if the proposed activity meets the terms and conditions of two different NWPs, and the applicant submitted a PCN that identified one of those NWPs, then the district engineer should issue the NWP verification under the NWP the applicant identified in his or her PCN. We have modified paragraph 1 to add a reminder that for those NWPs that have a 1/2-acre limit with a waivable 300 linear foot limit for losses of intermittent or ephemeral stream bed, then the loss of stream bed plus any other losses of jurisdictional waters and wetlands cannot exceed 1/2-acre.

A condition assessment is a type of rapid ecological assessment that examines the relative ability of an aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region (see 33 CFR 332.2). In most circumstances, the prospective permittee would conduct the condition assessment and provide the results to the district engineer. In some cases, the district engineer may conduct the condition assessment. The extended time frames for complying with general conditions 18 and 20 are already addressed by paragraph 4.

We have modified paragraphs 1 and 2 of this section to state that the district engineer will consider, in addition to the direct and indirect effects, the cumulative effects of the NWP activities. The district engineer may require mitigation, including compensatory mitigation, to ensure that the cumulative adverse effects of the NWP activity or activities or no more than minimal. The district engineer's cumulative effects analysis does not have to be an exhaustive analysis, because the required NEPA cumulative effects analysis was done by Corps Headquarters in the decision document supporting the issuance or reissuance of the applicable NWP(s). If the applicable NWP(s) authorize discharges of dredged or fill material into waters of the United States, in the national decision document issued by Corps Headquarters there is a cumulative effects analyses to satisfy the requirements of the 404(b)(1) Guidelines. For pipelines and other linear projects, the cumulative effects of the activities authorized by NWPs for the overall project, within an appropriate geographic region, will be evaluated by district engineers. Unless the pipeline is constructed entirely in waters of the United States and involves activities that require DA authorization, the Corps is not required to evaluate the entire pipeline, or linear project. If the Corps is only authorizing the segments of the linear project, such as a pipeline, that cross jurisdictional waters and wetlands and involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States, then its analysis will focus on the regulated crossings of waters of the United States.

Further Information

In item 5, we proposed to add a cross-reference to proposed new general condition 31. If the Corps issues a section 408 permission, then the NWP activity would not be considered as interfering with the federal project. We received no comments on the proposed change, and we have adopted that change.

Definitions

In the June 1, 2016, proposed rule, we proposed changes to some of the NWP definitions. One commenter recommended removing the definitions from the NWPs and adding them to the Code of Federal Regulations so that they would apply to the entire regulatory program. One commenter stated that the definition of ''independent utility'' should be added to NWP 12 because this commenter said there is no rational basis for treating linear and non-linear projects differently.

The definitions in Section F were developed for use with the NWPs that are issued or reissued for the 5-year period those NWPs will be in effect. Incorporating those definitions into the Code of Federal Regulations so that they would apply to individual permits, regional general permits, and programmatic general permits would reduce flexibility in the regulatory program. Regional general permits and programmatic general permits may take different approaches to administering general permit programs, especially general permits intended to reduce duplication with other federal, tribal, state, or local agency regulatory programs.

There is a rational basis for distinguishing between linear projects and non-linear projects. For linear projects, impacts to jurisdictional waters and wetlands caused by activities authorized by NWPs are scattered throughout a large landscape that encompasses the point of origin and terminal point of the linear projects, and all of the crossings of jurisdictional waters and wetlands in between the origin and terminus. Under most circumstances, those crossings impact distinctly different waterbodies, although there may be cases where there are multiple crossings of the same waterbody at separate and distant locations. For a long linear project, a large number different waterbodies may be impacted by crossings that are a substantial distance from each other. In contrast, for a non-linear project, the impacts to jurisdictional waters and wetlands are concentrated within a much smaller landscape unit (usually a single parcel of land) that is defined by the boundaries of the non-linear project (*e.g.,* the boundaries of the residential or commercial development). For a non-linear project, the impacts of activities authorized by NWPs or other DA permits usually occur to a single waterbody and its tributaries and adjacent wetlands. As a general concept, cumulative impacts accrue to a single waterbody as a result of multiple impacts occurring over time, which include direct impacts to the waterbody and the indirect effects of activities occurring in the watershed of that waterbody. For a linear project, the incremental contribution of a linear project crossing of a waterbody to the cumulative impacts for that particular waterbody is small. For a linear project, the sum of the authorized impacts occur to the various waterbodies crossed by that linear project. A non-linear project may have a larger incremental contribution to the cumulative impacts for a particular waterbody, because all of the authorized impacts will occur in or near that waterbody.

We received a few comments suggesting that we provide a definition of ''temporary.'' We believe that district engineers should have the discretion to determine on a case-by-case basis what constitutes a temporary impact versus a permanent impact. A district engineer can issue guidelines for his or her district on what constitutes a temporary fill or a temporary structure or work.

The length of time to consider an impact to be ''temporary'' depends on a variety of factors, including how soon the temporary structures and fills need to be removed after construction has been completed. In some cases they might need to be removed shortly after construction is completed. In other cases more time might be necessary to allow the completed structures and fills to stabilize prior to removing any temporary structures or fills. The appropriate length of time would depend on various factors, such as resource type, hydrodynamics, soils, geology, plant communities, and season. Providing a national definition of ''temporary'' would be less protective of the environment because it would constrain local decision making. For example, if the authorized structure or fill is not allowed sufficient time to stabilize, it may collapse or be washed away after the temporary structures or fills are removed.

A couple of commenters asked for definitions of ''repair,'' ''replacement,'' and ''previously authorized.'' One of these commenters also requested definitions of ''modification'' and ''riprap.'' One commenter requested a definition of ''minimal adverse effect.''

We do not see a need to define the terms ''repair,'' ''replacement,'' ''previously authorized,'' ''modification,'' and ''riprap.'' The commonly understood definitions of these terms apply to the NWPs, and they do not warrant the development of new definitions. The term ''minimal adverse effect'' cannot be defined because it is a subjective term, with ''minimal'' and ''adverse effect'' dependent on the perspective of the person conducting the evaluation or assessment. In paragraph 2 of Section D, District Engineer's Decision, we have provided a list of factors district engineers should consider when making their ''no more than minimal adverse environmental effects'' determinations for proposed NWP activities.

Best management practices (BMPs). We did not propose any changes to this definition. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Compensatory mitigation. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Currently serviceable. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Direct effects. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Discharge. We proposed to modify this definition to make it clear that the use of the term ''discharge'' in the NWPs refers to ''discharges of dredged or fill material'' and not to discharges of other types of pollutants. Point source discharges of other types of pollutants are regulated under Section 402 of the Clean Water Act.

Several commenters said they support the proposed change. One commenter stated that the Corps regulates under section 404 of the Clean Water Act, some but not all excavation activities. One commenter said that the 2015 final rule defining ''waters of the United States'' should not be referenced in this definition.

Under the definition of ''discharge of dredged material'' at 33 CFR 323.2(d), we regulate certain excavation activities in waters of the United States. The NWP definition of ''discharge'' refers to regulated discharges of dredged or fill material into waters of the United States. The definition of ''discharge'' does not refer to the 2015 final rule.

Ecological reference. To help implement the new provision of NWP 27 that requires aquatic habitat restoration, enhancement, and establishment activities to result in aquatic habitat that resembles an ecological reference, we are adding a definition of ''ecological reference'' using the concepts discussed in the preamble discussion of NWP 27.

Enhancement. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ephemeral stream. We did not propose any changes to this definition. One commenter requested clarification on how ephemeral streams are to be identified and the mitigation requirements for impacts to ephemeral streams.

Ephemeral streams are distinguished from perennial and intermittent streams by their flow regimes, which are explained in the definition (*i.e.,* they have flowing water only during, and for a short duration after, precipitation events in a typical year). Compensatory mitigation requirements for losses of ephemeral streams authorized by NWPs are determined on a case-by-case basis by district engineers. This definition is adopted as proposed.

Establishment (creation). We did not receive any comments on the proposed definition. The definition is adopted as proposed.

High Tide Line. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Historic property. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Independent utility. We did not propose any changes to this definition. A few commenters requested clarification that the concepts of independent utility and ''single and complete'' applies to both linear and non-linear projects. One commenter recommended including linear projects in this definition. One commenter said that the test to determine a ''single and complete non-linear project'' in this definition conflicts with proposed Note 2 in NWP 12 and proposed Note 1 in NWP 14.

The concept of independent utility does not apply to the definition of ''single and complete linear project'' because the crossings of waters of the United States between the point of origin of a linear project and its terminal point are necessary for the linear project to fulfill its purpose of transporting goods, services, and/or people from the point of origin to the terminal point. In other words, each of those crossings of waters of the United States for the single and complete linear project does not have independent utility. Therefore, It would not be appropriate to include linear projects in this definition, for the reasons explained above. This definition does not conflict with Note 2 of NWP 12 or Note 1 of NWP 14. The term ''independent utility'' was removed from both of those Notes.

This definition is adopted as proposed.

Indirect effects. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Intermittent stream. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Loss of waters of the United States. We proposed to modify this definition to clarify that loss of stream bed can be measured by area (*e.g.,* acres, square feet) or by linear feet. For the NWPs that authorize discharges of dredged or fill material into waters of the United States that result in the loss of stream bed through filling or excavation, specified NWP limits may be expressed in acres, linear feet, or both.

One commenter supported the proposed changes to this definition. A few commenters said they support the proposed modification on quantification of losses of stream bed in acres. A few commenters objected to that proposed modification. A few commenters expressed disagreement that excavation in stream beds results in a loss of waters of the United States. One commenter said that this definition should not

include stream modification and bank stabilization. One commenter asked whether the use of timber mats in waters of the United States counts towards the limits of the NWPs.

We have retained acres as an option for quantifying loss of stream bed. The physical, chemical, and biological processes that occur in aquatic ecosystems and other types of aquatic resources take place over the area of stream bed. For example, gross primary production and ecosystem respiration in rivers and streams is represented in grams per square meter per day, secondary production in rivers and streams is quantified in grams per square meter per year, and river nitrogen and phosphorous yields are expressed in kilograms per hectare per year. (Allan and Castillo 2007). For streams, quantifying impacts and compensatory mitigation as linear feet does not take into account the width of the stream, which is important to indicate the area of stream that performs ecological functions and services (*e.g.,* Bronner et al. 2013). The definition of ''loss of waters of the United States'' is intended to assist in the determination whether a proposed NWP activity will result in more than minimal adverse environmental effects, so it examines activities that cause adverse effects to jurisdictional waters and wetlands, even if those activities do not convert those waters or wetlands to uplands so that those wetlands area lost. Excavation of stream bed changes the stream bed and the functions it provides. Stream modification and bank stabilization activities can cause losses of stream bed, such as the filling of stream bed to construct the bank stabilization activity. Temporary use of timber mats in waters of the United States as a best management practice to minimize the adverse effects of activities authorized by NWPs does not count towards the NWP limits because that use of timber mats does not result in a loss of waters of the United States.

One commenter said that the word ''excavation'' should be deleted from this definition. One commenter asked for clarification whether excavation activities that remove material from waters of the United States, but do not restore the impact area to pre-construction contours and elevations, cause a loss of waters of the United States. One commenter asked how excavation activities are considered in the first sentence of this definition, which refers to waters of the United States that are temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations. A few commenters asserted that the proposed definition is arbitrary and capricious, particularly if it is applied to NWP 12 activities.

Excavation activities in jurisdictional waters and wetlands may require DA authorization, if they result in regulable discharges of dredged or fill material. District engineers apply the definitions at 33 CFR 323.2(c)–(f) to determine whether an excavation activity results in a discharge of dredged or fill material that requires DA authorization. For the purposes of this definition, regulated excavation activities in rivers and streams cause a loss of waters of the United States. The fifth sentence of this definition states that waters of the United States that are temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not considered to result in a loss of waters of the United States. Nationwide permit 12, as well as the other NWPs issued under section 404 of the Clean Water Act, authorizes discharges of dredged or fill material into waters of the United States that can result in permanently or temporarily filling, flooding, excavation, or draining waters of the United States. In other words, NWP 12 is treated no differently than other section 404 NWPs when it comes to applying the definition of ''loss of waters of the United States.''

A few commenters agreed with the proposed clarification that states that non-regulated activities are not to be included when calculating losses of waters of the United States. Several commenters said this definition should include the conversion of forested wetlands. One commenter stated that the definition should be modified to state that vegetation cutting does not cause a loss of waters of the United States. One commenter stated that this definition should include permanent losses of wetlands from conversion activities as losses of waters of the United States.

The conversion of forested wetlands to emergent wetlands, other types of wetlands, or to open waters may be a loss of waters of the United States if that conversion involves activities that require DA authorization. For example, mechanized landclearing in a forested wetland that results in a regulated discharge of dredged material and converts the forested wetland to an emergent wetland requires DA authorization. In contrast, if a forested wetland is altered by cutting the trees above their crowns without removing the tree trunks and roots and causing a regulated discharge of dredged material, then that activity would not be considered a ''loss of waters of the United States'' under this definition.

This definition is adopted as proposed.

Navigable waters. We are adding this definition to clarify that if the term ''navigable waters'' is used in the text of an NWP, then the NWP authorizes activities in navigable waters of the United States subject to section 10 of the Rivers and Harbors Act of 1899. Navigable waters of the United States are defined at 33 CFR part 329.

Non-tidal wetland. We proposed to modify this definition to refer to 33 CFR 328.3(c)(4). One commenter said that the 2015 final rule defining ''waters of the United States'' should not be referenced in this definition.

We have removed the second sentence of this definition, which cited the definition of ''wetland'' promulgated in the 2015 final rule defining ''waters of the United States.'' This definition is adopted with the modification discussed above.

Open water. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ordinary high water mark. We proposed to change the regulation citation in this definition to 33 CFR part 328.3(c)(6), which was based on the 2015 final rule defining ''waters of the United States.'' One commenter supported the proposed change, and one commenter did not agree with the proposed change. One commenter said that the 2015 final rule defining ''waters of the United States'' should not be referenced in this definition.

We have removed the reference to 33 CFR 328.3(c)(6) from this definition. This definition is adopted with the modification discussed above.

Perennial stream. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Practicable. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Pre-construction notification. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Preservation. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Protected tribal resources. We have added this definition to assist with compliance with general condition 17, tribal rights. This definition was taken from the 1998 Department of Defense American Indian and Alaska Native Policy.

Re-establishment. We did not receive any comments on the proposed

definition. The definition is adopted as proposed.

Rehabilitation. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Restoration. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Riffle and pool complex. We did not propose any changes to this definition. One commenter stated that a more specific definition should be provided for the NWPs because this definition should not apply to a single pool in the vicinity of a bridge, with some cobbles near the pool.

This definition was taken from the 404(b)(1) Guidelines (40 CFR 230..45). This definition refers to ''riffle and pool complexes.'' A single pool with some cobbles is not a riffle and pool complex. This definition is adopted as proposed.

Riparian areas. We proposed to change the word ''adjacent'' to ''next'' in the first sentence of this definition because riparian areas border rivers, streams, and other bodies of water.

One commenter supported the proposed modification and one commenter opposed the proposed modification. One commenter asked for further explanation why we proposed to change ''adjacent'' to ''next'' and ask whether this modification would change the meaning of ''riparian area.'' This commenter said she was uncertain whether the proposed change would result in more or fewer riparian areas requiring mitigation or alter the type of mitigation required.

The proposed modification is intended to make this definition clearer, because riparian areas abut streams, lakes, and estuarine-marine shorelines. The Corps regulatory program has long defined adjacent wetlands as wetlands that are bordering, contiguous, or neighboring. Riparian areas are bordering or contiguous to streams, lakes, and estuarine-marine shorelines. Because ''neighboring'' ecosystems or habitats features may be adjacent to, but separated from, streams, lakes, and estuarine-marine shorelines by roads, levees, or other man-made features we believe the work ''next'' is a more precise term than ''adjacent.'' This change will not alter the mitigation requirements for the NWPs, or change the implementation of paragraph (e) of general condition 23, mitigation. That paragraph addresses the restoration, enhancement, and protection/maintenance of riparian areas as compensatory mitigation for NWP activities.

This definition is adopted as proposed.

Shellfish seeding. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Single and complete linear project. We did not propose any changes to this definition. One commenter recommended changing this definition so that it is the same as the definition of ''single and complete non-linear project.'' One commenter stated that use of the term ''single and complete'' indicates that if one crossing depends on another crossing being constructed, then those crossings will be considered together. One commenter said that the term ''separate and distinct'' should be used instead of ''separate and distant.''

The Corps' regulations at 33 CFR 330.2(i) provide different approaches to applying the concept of ''single and complete project'' to linear projects versus non-linear projects. These differences are explained in the definitions of ''single and complete linear project'' and ''single and complete non-linear project'' in Section F of the NWPs. For linear projects, the concept of ''single and complete project'' means that each separate and distant crossing may be authorized by an NWP. When the district engineer evaluates the PCN for a linear project, he or she considers the cumulative effects of those crossings that require DA authorization (see paragraph 1 of Section D, ''District Engineer's Decision''). The correct terminology is ''separate and distant,'' ''not separate and distinct'' (see 33 CFR 330.2(i)).

Several commenters said that the definition of ''distant'' is ambiguous and should be further defined. Several commenters requested that the Corps define ''separate and distant,'' and requested that the Corps provide thresholds for determining when crossings are separate and distant. One commenter asked how the term ''separate and distant'' would be applied to determine if the linear project requires an individual permit. One commenter stated that allowing authorization of ''separate and distant crossings'' under one NWP or separate NWPs is dependent on how the prospective permittee determines the end points of each waterbody crossing.

District engineers will use their discretion to determine what constitutes ''distant'' for the purposes of determining that separate and distant crossings of waters of the United States qualify for separate NWP authorization. We cannot establish thresholds at a national level because ''separate and distant'' depends on a variety of factors and is best determined on a case-by-case basis. Factors considered by district engineers may include topography, local hydrology, the distribution of waters and wetlands in the landscape, geology, soils, and other appropriate factors. District engineers will determine when proposed crossings of waters of the United States are not separate and distance and require individual permits because they exceed the acreage or other limits for an NWP. The district engineer's determination that crossings of waters of the United States are separate and distant is dependent on landscape factors, including the distribution of jurisdictional waters and wetlands in the landscape, and not on the prospective permittee's identification of end points for each waterbody crossing.

One commenter stated that the ability to use multiple NWPs to authorize individual segments of linear projects should be eliminated, including pipelines and bank stabilization activities, because that practice violates numerous laws. One commenter stated that the Corps violates the Clean Water Act by treating each crossing of waters of the United States as a single and complete project. That commenter said that a small segment of a pipeline or transmission line crossing a water of the United States would have no independent utility. One commenter said that the definition of ''single and complete linear project'' should be amended to prohibit piecemealing of activities to meet NWP limits. Two commenters asserted that authorizing each single and complete crossing with an NWP fails to account for cumulative impacts of the linear project.

The Corps' practices for authorizing linear projects by NWP does not violate any laws. The NWP regulations for the Corps' practices were promulgated in 1991 and are still in effect. The definitions in the NWPs are consistent with the NWP regulations issued in 1991. Section 404(e) of the Clean Water Act does not provide any direction on general permit authorization for regulated activities for crossings of waters of the United States for linear projects. As explained elsewhere in this preamble, for a single and complete linear project the separate and distant crossings of waters of the United States do not have independent utility because they are necessary for transporting the goods or services from the point of origin to the terminal point. The definition of ''single and complete linear project'' does not allow piecemealing. Under paragraph (b)(4) of general condition 32, PCNs for linear projects are required to include those crossings of waters of the United States that require NWP PCNs as well as those

crossings that will utilize the NWPs and do not require PCNs. When the district engineer reviews the PCN, he or she considers the cumulative effects of both the NWP activities that require PCNs and the NWP activities that do not require PCNs.

One commenter stated that there should be no changes to the way ''single and complete'' and ''separate and distant'' are applied to the NWPs, because any change may result in more individual permits being required for linear projects that have previously been authorized by a NWP.

We have not made any changes to the proposed definition. This definition is adopted as proposed.

Single and complete non-linear project. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management facilities. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream bed. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream channelization. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Structure. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Tidal wetland. We proposed to change the regulation citations to refer to the provisions in the 2015 final rule defining ''waters of the United States.'' One commenter supported the proposed change and one commenter opposed the proposed change. One commenter said this definition should not reference the 2015 final rule.

We have modified this definition by removing the second sentence from the proposed definition. We also deleted the phrase '', which is defined at 33 CFR 328.3(c)(7)'' from the end of the last sentence. These two changes remove the regulation references that were in the 2015 final rule. We also modified the first sentence of this definition by adding the word ''jurisdictional'' before the second use of the word ''wetland'' and deleting the parenthetical (*i.e.,* water of the United States). This definition is adopted with these modifications.

Tribal land. We have added this definition to assist with compliance with general condition 17, tribal rights. This definition was taken from the 1998 Department of Defense American Indian and Alaska Native Policy.

Tribal rights. We have added this definition to assist with compliance with general condition 17, tribal rights. This definition was taken from the 1998 Department of Defense American Indian and Alaska Native Policy, but uses the term tribal lands instead of Indian lands.

Vegetated shallows. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Waterbody. We proposed to modify this definition by revising the second sentence as follows to reference the 2015 final rule defining ''waters of the United States'': ''If a wetland is adjacent to a waterbody determined to be a water of the United States under 33 CFR part 328.3(a)(1)–(5), that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR part 328.4(c)(2)).''

Several commenters said that if the Corps intends to use the term ''waterbody'' interchangeably with ''water of the United States'' in the NWP program, then we should delete the definition of ''waterbody'' from the NWPs and use the term ''waters of the United States'' instead. In the alternative, these commenters stated that this definition could be modified to avoid using concepts from the 2015 final rule defining ''waters of the United States'' and removing those regulation references. Several commenters said that this definition should not utilize the 2015 final rule's definitions of ''adjacent'' and ''neighboring.'' One commenter asserted that the term ''waterbody'' should be removed from the NWPs.

We have modified this definition by removing the phrase ''under 33 CFR 328.3(a)(1)–(5)'' from the second sentence. We have retained the reference to 33 CFR 328.4(c)(2) because that provision of the Corps' regulations was not addressed by the 2015 final rule. The definition of ''waterbody'' needs to be retained because either the terms ''waterbody'' or ''waterbodies'' are used 18 times in the text of the NWPs and general conditions. A waterbody is a single aquatic unit and for a river or stream it includes wetlands adjacent to the river or stream.

This definition is adopted with the modification discussed above.

Administrative Requirements

Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31855) regarding plain language, this preamble is written using plain language. The use of ''we'' in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

The paperwork burden associated with the NWP relates exclusively to the preparation of the PCN. The Corps estimates that applicants will submit 31,448 PCNs per year. Paragraph (b) of general condition 32 identifies the information that should be submitted with a PCN, and some NWPs identify additional information to be included in the PCN. While different NWPs require different information be included in a PCN, the Corps estimates that a PCN takes, on average, 11 hours to complete. That results in an average, annual paperwork burden of 345,928 hours.

The NWPs would increase the total paperwork burden associated with this program but decrease the net burden on the public. This is due to the fact that there is new paperwork burden associated with the inclusion of two new NWP (both of which have PCN requirements). Since, however, this time would otherwise be spent on completing an individual permit application, which we estimate also takes, on average, 11 hours to complete, the net effect on the public is zero.

The only real change to the public's paperwork burden from this final rule is a decrease due primarily to a modification to the PCN requirements for NWPs 33 and 48, the modification to paragraph (b) of NWP 3, and, to a lesser extent, a minor increase associated with the minor changes we made to the content required for a complete PCN (see paragraph (b) of general condition 32).

Specifically, we anticipate a reduction in paperwork burden from the final rule to require PCNs only for NWP 33 activities in section 10 waters. There will also be a paperwork reduction because of the change to the PCN thresholds for NWP 48, by eliminating the requirement to submit a PCN for dredged harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation. We estimate that the changes to NWP 33 would result in 210 fewer PCNs, with an estimated reduction of paperwork burden of 2,310 hours. The changes to the PCN thresholds for NWP 48 are expected to result in a reduction of 50 PCNs per year in waters where there are no listed species or critical habitat that would otherwise trigger the requirement to submit PCNs because of general condition 18. We estimate that 50 fewer PCNs will be required for NWP

48 activities, with a reduction of paperwork burden of 550 hours. We estimate that 50 fewer PCNs will be required for NWP 3(b) activities because the placement of riprap to protect the structure or fill will be authorized by NWP 13 and will not likely require a PCN. Therefore, the estimated net change in paperwork burden for this rule is an increase of 792 hours per year. Prospective permittees who are required to submit a PCN for a particular NWP, or who are requesting verification that a particular activity qualifies for NWP authorization, may use the current standard Department of the Army permit application form.

The following table summarizes the projected changes in paperwork burden for two alternatives relative to the paperwork burden under the 2012 NWPs. The first alternative is to reissue 50 NWPs and issue two new NWPs. The second alternative would result if these NWPs are not issued and reissued and regulated entities would have to obtain standard individual permits to comply with the permit requirements of section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899. The 302 standard individual permits included in the row for the 2012 NWPs represent the standard individual permits that would be required for activities that would be authorized by the changes to NWPs 3, 43, 45, and 52 and the two new NWPs (NWPs 53 and 54). The estimated 15 activities that would require authorization by standard individual permit under the 2017 NWPs represent surface coal mining activities that were authorized by paragraph (a) of the 2012 NWP 21 that will not be completed before the 2012 NWP expires and would thus require standard individual permits to complete the surface coal mining activity. We estimate that imposing a cap of 1,000 linear feet on bulkheads in NWP 13 will result in 10 bulkheads requiring individual permits each year. The modification of NWP 13 to make it clear that it authorizes stream barbs will reduce the number of individual permits by an estimated 10 per year. Those two changes to NWP 13 will result in no net changes in number of the number of individual permits required for bank stabilization activities each year.

	Number of NWP PCNs per year	Number of NWP activities not requiring PCNs per year	Number of SIPs per year	Estimated changes in NWP PCNs per year	Estimated changes in number of NWP activities not requiring PCNs per year	Estimated changes in number of SIPs per year
2012 NWPs	31,555	31,415	302			
2017 NWPs	31,448	31,979	15	−82	+492	−292
SIPs required if NWPs not reissued	0	0	49,838			

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is ''significant'' and therefore subject to review by OMB and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, we have determined under item (4) that this rule is a ''significant regulatory action'' and the draft final rule was submitted to OMB for review.

Executive Order 13132

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' The issuance and modification of NWPs does not have federalism implications. We do not believe that the final NWPs will have substantial direct effects on the States, on the relationship between the federal government and the States, or on the distribution of power and responsibilities among the various levels of government. These NWPs will not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to this rule.

One commenter stated that completing PCNs puts an administrative and financial burden on local governments, and requested that the Corps evaluate this impact in accordance with the National Environmental Policy Act, or revise the PCN requirements.

Local governments that want to do activities that require DA authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899 must apply for permits from the Corps unless the proposed activity qualifies for authorization under a general permit that does not require notification to the Corps. If the proposed activity does not qualify for general permit authorization, the local government must submit an individual permit application. If the proposed activity potentially qualifies for NWP authorization, but requires submission of a PCN to the district engineer, then the local government must submit a PCN. As stating in our Regulatory Impact Analysis, the direct costs to permit applicants for obtaining NWP authorization are less than the direct costs of obtaining individual permit authorization.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment

rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of the issuance and modification of NWPs on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The statutes under which the Corps issues, reissues, or modifies nationwide permits are section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)) and section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). Under section 404 of the Clean Water Act, Department of the Army (DA) permits are required for discharges of dredged or fill material into waters of the United States. Under section 10 of the Rivers and Harbors Act of 1899, DA permits are required for any structures or other work that affect the course, location, or condition of navigable waters of the United States. Small entities proposing to discharge dredged or fill material into waters of the United States and/or construct structures or conduct work in navigable waters of the United States must obtain DA permits to conduct those activities, unless a particular activity is exempt from those permit requirements. Individual permits and general permits can be issued by the Corps to satisfy the permit requirements of these two statutes. Nationwide permits are a form of general permit issued by the Chief of Engineers.

Nationwide permits automatically expire and become null and void if they are not modified or reissued within five years of their effective date (see 33 CFR 330.6(b)). Furthermore, section 404(e) of the Clean Water Act states that general permits, including NWPs, can be issued for no more than five years. If the current NWPs are not reissued, they will expire on March 18, 2017, and small entities and other project proponents would be required to obtain alternative forms of DA permits (*i.e.,* standard individual permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the NWPs may be available in some geographic areas, but small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

When compared to the compliance costs for individual permits, most of the terms and conditions of the NWPs are expected to result in decreases in the costs of complying with the permit requirements of section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act. The anticipated decrease in compliance cost results from the lower cost of obtaining NWP authorization instead of standard individual permits. Unlike standard individual permits, NWPs authorize activities without a requirement for public notice and comment on each proposed activity.

Another requirement of Section 404(e) of the Clean Water Act is that general permits, including nationwide permits, authorize only those activities that result in no more than minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWPs, such as acreage or linear foot limits, are imposed to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.

After considering the economic impacts of the NWPs on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Small entities may obtain required DA authorizations through the NWPs, in cases where there are applicable NWPs authorizing those activities and proposed activities will result in only minimal individual and cumulative adverse environmental effects. The terms and conditions of these NWPs will not impose substantially higher costs on small entities than those of the 2012 NWPs. If an NWP is not available to authorize a particular activity, then another form of DA authorization, such as an individual permit or a regional general permit, must be secured. However, as noted above, we expect a slight to moderate increase in the number of activities than can be authorized through NWPs, because we are issuing two new NWPs. Because those activities required authorization through other forms of DA authorization (*e.g.,* individual permits or regional general permits) we expect a concurrent decrease in the numbers of individual permit and regional general permit authorizations required for these activities.

In the June 1, 2016, proposed rule we requested comments on the potential impacts of the NWPs on small entities. One commenter said that the proposed NWPs do not comply with the Regulatory Flexibility Act because the Corps failed to conduct the required analysis to certify will not have a significant impact on small businesses. We believe our Regulatory Flexibility Act analysis satisfies the requirements of that Act.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the NWPs do not contain a federal mandate that may result in expenditures of $100 million or more for State, local, and

Tribal governments, in the aggregate, or the private sector in any one year. These NWPs are generally consistent with current agency practice, do not impose new substantive requirements and therefore do not contain a federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Therefore, this final rule is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that the NWPs contain no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the issuance and modification of the NWPs is not subject to the requirements of Section 203 of UMRA.

Executive Order 13045

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The NWPs are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, the NWPs do not concern an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' The phrase ''policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Tribes, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes.''

The issuance of these NWPs is generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes. Therefore, Executive Order 13175 does not apply to this final rule. However, in the spirit of Executive Order 13175, we specifically requested comments from Tribal officials on the proposed rule. Their comments were fully considered during the preparation of this final rule. We have modified general condition 17 to more fully address tribal rights. Each Corps district conducted government-to-government consultation with Tribes, to identify regional conditions or other local NWP modifications to protect aquatic resources of interest to Tribes, as part of the Corps' responsibility to protect tribal trust resources and ensure that activities authorized by NWPs do not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, and tribal lands.

One commenter stated that they disagreed with our determination that the proposal to reissue and issue the NWPs is not subject to E.O. 13175 because the NWPs are regulations under that Executive Order.

While the NWPs are regulations, we believe the final NWPs will not have substantial direct effects on tribal governments, on the relationship between the federal government and the tribes, or on the distribution of power and responsibilities between the federal government and tribes. We have taken, and will continue to take, measures (such as Corps districts consulting with tribes on specific NWP activities that may have adverse effects on tribal rights) to ensure that the NWPs will not have substantial direct effects on tribal governments, on the relationship between the federal government and the tribes, or on the distribution of power and responsibilities between the federal government and tribes. General condition 17 has been modified to state that no NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. Tribes use NWPs for activities they conduct that require DA authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. For example, tribes that conduct commercial shellfish aquaculture activities have used NWP 48, and tribes that conduct aquatic habitat restoration activities have used NWP 27.

For the 2017 NWPs, Corps districts conducted consultations with tribes to identify regional conditions to ensure that NWP activities comply with general conditions 17 and 20. Through those consultations, district engineers can also develop coordination procedures with tribes to provide opportunities to review proposed NWP activities and provide their views on whether those activities will cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. When a Corps district receives a pre-construction notification that triggers a need to consult with one or more tribes, that consultation will be completed before the district engineer makes his or her decision on whether to issue the NWP verification. If, after considering mitigation, the district engineer determines the proposed NWP activity will have more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands, he or she will exercise discretionary authority and require an individual permit. Division engineers can modify, suspend, or revoke one or more NWPs in a region to protect tribal rights. A district engineer can modify, suspend, or revoke an NWP to protect tribal rights, protected tribal resources, and tribal lands.

Environmental Documentation

A decision document, which includes an environmental assessment and Finding of No Significant Impact (FONSI) has been prepared for each NWP. The final decision documents for these NWPs are available at: *www.regulations.gov* (docket ID number COE–2015–0017). They are also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street NW., Washington, DC 20314–1000.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing the final NWPs and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days

after it is published in the **Federal Register**. The NWPs are not a ''major rule'' as defined by 5 U.S.C. 804(2).

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The NWPs are not expected to negatively impact any community, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211

These NWPs are not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because they are not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Authority

We are issuing new NWPs, modifying existing NWPs, and reissuing NWPs without change under the authority of Section 404 of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).

Date: December 21, 2016.

Donald E. Jackson,

Major General, U.S. Army, Deputy Commanding General for Civil and Emergency Operations.

Nationwide Permits, Conditions, Further Information, and Definitions

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B. Nationwide Permits

1. *Aids to Navigation.* The placement of aids to navigation and regulatory markers that are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66).

(**Authority:** Section 10 of the Rivers and Harbors Act of 1899 (Section 10))

2. *Structures in Artificial Canals.* Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)).

(**Authority:** Section 10)

3. *Maintenance.* (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This NWP also authorizes the removal of previously authorized structures or fills. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project. This NWP also authorizes the removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (*e.g.,* bridges, culverted road crossings, water intake structures, etc.). The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

(c) This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After conducting the maintenance activity, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

(d) This NWP does not authorize maintenance dredging for the primary purpose of navigation. This NWP does not authorize beach restoration. This NWP does not authorize new stream channelization or stream relocation projects.

Notification: For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals.

(**Authorities:** Section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act (Sections 10 and 404))

Note: This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Clean Water Act section 404(f) exemption for maintenance.

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and clam and oyster digging, fish aggregating devices, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks.

(**Authorities:** Sections 10 and 404)

5. *Scientific Measurement Devices.* Devices, whose purpose is to measure and record scientific data, such as staff gages, tide and current gages, meteorological stations, water recording and biological observation devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. Upon completion of the use of the device to measure and record scientific data, the measuring device and any other structures or fills associated with that device (*e.g.,* foundations, anchors, buoys, lines, etc.) must be removed to the maximum extent practicable and the site restored to pre-construction elevations.

(**Authorities:** Sections 10 and 404)

6. *Survey Activities.* Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other

exploratory-type bore holes, exploratory trenching, soil surveys, sampling, sample plots or transects for wetland delineations, and historic resources surveys. For the purposes of this NWP, the term ''exploratory trenching'' means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work and must not drain a water of the United States. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 1/10-acre in waters of the U.S. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under section 402 of the Clean Water Act.

(**Authorities:** Sections 10 and 404)

7. *Outfall Structures and Associated Intake Structures.* Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(**Authorities:** Sections 10 and 404)

8. *Oil and Gas Structures on the Outer Continental Shelf.* Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Bureau of Ocean Energy Management. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). The district engineer will review such proposals to ensure compliance with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this NWP will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f), as well as 33 CFR 322.5(l) and 33 CFR part 334. Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, nor will such structures be permitted in EPA or Corps-designated dredged material disposal areas.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(**Authority:** Section 10)

9. *Structures in Fleeting and Anchorage Areas.* Structures, buoys, floats, and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose.

(**Authority:** Section 10)

10. *Mooring Buoys.* Non-commercial, single-boat, mooring buoys.

(**Authority:** Section 10)

11. *Temporary Recreational Structures.* Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use, provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir managers must approve each buoy or marker individually.

(**Authority:** Section 10)

12. *Utility Line Activities.* Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

Utility lines: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of utility lines, including outfall and intake structures. There must be no change in pre-construction contours of waters of the United States. A ''utility line'' is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication. The term ''utility line'' does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (*e.g.,* backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead utility line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the

loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (*e.g.,* at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (*i.e.,* water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 32.)

(**Authorities:** Sections 10 and 404)

Note 1: Where the utility line is constructed or installed in navigable waters of the United States (*i.e.,* section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

Note 2: For utility line activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Utility line activities must comply with 33 CFR 330.6(d).

Note 3: Utility lines consisting of aerial electric power transmission lines crossing navigable waters of the United States (which are defined at 33 CFR part 329) must comply with the applicable minimum clearances specified in 33 CFR 322.5(i).

Note 4: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 5: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

Note 6: This NWP authorizes utility line maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

Note 7: For overhead utility lines authorized by this NWP, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Note 8: For NWP 12 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, ''District Engineer's Decision.'' The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

13. *Bank Stabilization.* Bank stabilization activities necessary for erosion control or prevention, such as vegetative stabilization, bioengineering, sills, rip rap, revetment, gabion baskets, stream barbs, and bulkheads, or combinations of bank stabilization techniques, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects (an exception is for bulkheads—the district engineer cannot issue a waiver for a bulkhead that is greater than 1,000 feet in length along the bank);

(c) The activity will not exceed an average of one cubic yard per running foot, as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by

making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(e) No material is of a type, or is placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored native trees and treetops may be used in low energy areas);

(g) Native plants appropriate for current site conditions, including salinity, must be used for bioengineering or vegetative bank stabilization;

(h) The activity is not a stream channelization activity; and

(i) The activity must be properly maintained, which may require repairing it after severe storms or erosion events. This NWP authorizes those maintenance and repair activities if they require authorization.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to construct the bank stabilization activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line. (See general condition 32.)

(**Authorities:** Sections 10 and 404)

14. *Linear Transportation Projects.* Activities required for crossings of waters of the United States associated with the construction, expansion, modification, or improvement of linear transportation projects (*e.g.,* roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than 1/2-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 32.)

(**Authorities:** Sections 10 and 404)

Note 1: For linear transportation projects crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Linear transportation projects must comply with 33 CFR 330.6(d).

Note 2: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Note 3: For NWP 14 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, ''District Engineer's Decision.'' The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

15. *U.S. Coast Guard Approved Bridges.* Discharges of dredged or fill material incidental to the construction of a bridge across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the construction of the bridge structure has been authorized by the U.S. Coast Guard under section 9 of the Rivers and Harbors Act of 1899 or other applicable laws. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit.

(**Authority:** Section 404 of the Clean Water Act (Section 404))

16. *Return Water From Upland Contained Disposal Areas.* Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs in an area that has no waters of the United States and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States.

(**Authority:** Section 404)

17. *Hydropower Projects.* Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to section 408 of the Energy Security Act of 1980 (16 U.S.C.

2705 and 2708) and section 30 of the Federal Power Act, as amended.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(**Authority:** Section 404)

18. *Minor Discharges.* Minor discharges of dredged or fill material into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than 1/10-acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 32.)

(**Authorities:** Sections 10 and 404)

19. *Minor Dredging.* Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (*i.e.,* section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

(**Authorities:** Sections 10 and 404)

20. *Response Operations for Oil or Hazardous Substances.* Activities conducted in response to a discharge or release of oil or hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) including containment, cleanup, and mitigation efforts, provided that the activities are done under either: (1) The Spill Control and Countermeasure Plan required by 40 CFR 112.3; (2) the direction or oversight of the federal on-scene coordinator designated by 40 CFR part 300; or (3) any approved existing state, regional or local contingency plan provided that the Regional Response Team (if one exists in the area) concurs with the proposed response efforts. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. This NWP also authorizes the use of temporary structures and fills in waters of the U.S. for spill response training exercises.

(**Authorities:** Sections 10 and 404)

21. *Surface Coal Mining Activities.* Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations, provided the following criteria are met:

(a) The activities are already authorized, or are currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or as part of an integrated permit processing procedure by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement;

(b) The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal individual and cumulative adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into tidal waters or non-tidal wetlands adjacent to tidal waters; and

(c) The discharge is not associated with the construction of valley fills. A ''valley fill'' is a fill structure that is typically constructed within valleys associated with steep, mountainous terrain, associated with surface coal mining activities.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

22. *Removal of Vessels.* Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 32.) If condition 1 above is triggered, the permittee cannot commence the activity until informed by the district engineer that compliance with the ''Historic Properties'' general condition is completed.

(**Authorities:** Sections 10 and 404)

Note 1: If a removed vessel is disposed of in waters of the United States, a permit from the U.S. EPA may be required (see 40 CFR 229.3). If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

Note 2: Compliance with general condition 18, Endangered Species, and general condition 20, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the possibility that shipwrecks may be historic properties.

23. *Approved Categorical Exclusions.* Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 *et seq.*), that the activity is categorically excluded from the requirement to prepare an environmental impact statement or environmental assessment analysis, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW–CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions,

including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

Notification: Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters.

(Authorities: Sections 10 and 404)

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW–CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are: the Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05–07, which is available at: *http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-07.pdf.* Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same Web site.

24. *Indian Tribe or State Administered Section 404 Programs.* Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)–(l) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899.

(Authority: Section 10)

Note 1: As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

Note 2: Those activities that do not involve an Indian Tribe or State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Public Law 94–587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.4(b)).

25. *Structural Discharges.* Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways, or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a separate section 10 permit if located in navigable waters of the United States.

(Authority: Section 404)

26. [Reserved]

27. *Aquatic Habitat Restoration, Enhancement, and Establishment Activities.* Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of non-tidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To be authorized by this NWP, the aquatic habitat restoration, enhancement, or establishment activity must be planned, designed, and implemented so that it results in aquatic habitat that resembles an ecological reference. An ecological reference may be based on the characteristics of an intact aquatic habitat or riparian area of the same type that exists in the region. An ecological reference may be based on a conceptual model developed from regional ecological knowledge of the target aquatic habitat type or riparian area.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: The removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms, are removed; the installation of current deflectors; the enhancement, rehabilitation, or re-establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to enhance, rehabilitate, or re-establish stream meanders; the removal of stream barriers, such as undersized culverts, fords, and grade control structures; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to restore or enhance wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (*e.g.,* the conversion of a stream to wetland or vice versa) or uplands. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during wetland rehabilitation activities are not considered a conversion to another aquatic habitat type. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Compensatory mitigation is not required for activities authorized by this NWP since these activities must result in net increases in aquatic resource functions and services.

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit

issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (*i.e.,* prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

Reporting. For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general condition 32), except for the following activities:

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS or their designated state cooperating agencies;

(2) Voluntary stream or wetland restoration or enhancement action, or wetland establishment action, documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(3) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSMRE or the applicable state agency.

However, the permittee must submit a copy of the appropriate documentation to the district engineer to fulfill the reporting requirement.

(Authorities: Sections 10 and 404)

Note: This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee projects. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

28. *Modifications of Existing Marinas.* Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP.

(Authority: Section 10)

29. *Residential Developments.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½-acre.

Subdivisions: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed ½-acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

30. *Moist Soil Management for Wildlife.* Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, including streams, to preclude water quality degradation due to erosion and

sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies.

(Authority: Section 404)

Note: The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

31. *Maintenance of Existing Flood Control Facilities.* Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) Were previously authorized by the Corps by individual permit, general permit, or 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the ''maintenance baseline,'' as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. To the extent that a Corps permit is required, this NWP authorizes the removal of vegetation from levees associated with the flood control project. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged and excavated material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (*e.g.,* depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the adverse environmental impacts caused by the maintenance activities are no more than minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner. A flood control facility will not be considered abandoned if the prospective permittee is in the process of obtaining other authorizations or approvals required for maintenance activities and is experiencing delays in obtaining those authorizations or approvals.

Mitigation: The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental effects are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance activities within the maintenance baseline (see Note, below). In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require mitigation and/or best management practices as appropriate.

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 32). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the disposal site for dredged or excavated material.

(Authorities: Sections 10 and 404)

Note: If the maintenance baseline was approved by the district engineer under a prior version of NWP 31, and the district engineer imposed the one-time compensatory mitigation requirement on maintenance for a specific reach of a flood control project authorized by that prior version of NWP 31, during the period this version of NWP 31 is in effect (March 19, 2017, to March 18, 2022) the district engineer will not require additional compensatory mitigation for maintenance activities authorized by this

NWP in that specific reach of the flood control project.

32. *Completed Enforcement Actions.* Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of section 404 of the Clean Water Act, provided that:

(a) The activities authorized by this NWP cannot adversely affect more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself; non-compliance of the terms and conditions of an NWP 32 authorization may result in an additional enforcement action (*e.g.,* a Class I civil administrative penalty). Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e).

(Authorities: Sections 10 and 404)

33. *Temporary Construction, Access, and Dewatering.* Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if the district engineer determines that it will not cause more than minimal adverse environmental effects. Following completion of construction, temporary fill must be entirely removed to an area that has no waters of the United States, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a separate section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the activity is conducted in navigable waters of the United States (*i.e.,* section 10 waters) (see general condition 32). The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions.

(Authorities: Sections 10 and 404)

34. *Cranberry Production Activities.* Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

Notification: The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 32.)

(Authority: Section 404)

35. *Maintenance Dredging of Existing Basins.* The removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less. All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used for the disposal site.

(Authority: Section 10)

36. *Boat Ramps.* Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the district engineer waives the 50 cubic yard limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(b) The boat ramp does not exceed 20 feet in width, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(c) The base material is crushed stone, gravel or other suitable material;

(d) The excavation is limited to the area necessary for site preparation and all excavated material is removed to an area that has no waters of the United States; and,

(e) No material is placed in special aquatic sites, including wetlands.

The use of unsuitable material that is structurally unstable is not authorized. If dredging in navigable waters of the United States is necessary to provide access to the boat ramp, the dredging must be authorized by another NWP, a regional general permit, or an individual permit.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 32.)

(Authorities: Sections 10 and 404)

37. *Emergency Watershed Protection and Rehabilitation.* Work done by or funded by:

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 2509.13);

(c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the prospective permittee should wait until the district engineer issues an NWP verification or 45 calendar days have passed before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification and any comments received as a result of agency coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

Notification: Except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32).

(Authorities: Sections 10 and 404)

38. *Cleanup of Hazardous and Toxic Waste.* Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

39. *Commercial and Institutional Developments.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, wastewater treatment facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses and new ski areas is not authorized by this NWP.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

40. *Agricultural Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any

other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Section 404)

Note: Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act section 404(f)(1)(C) exemption because of the recapture provision at section 404(f)(2).

41. *Reshaping Existing Drainage Ditches.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. The reshaping of the ditch cannot increase drainage capacity beyond the original as-built capacity nor can it expand the area drained by the ditch as originally constructed (*i.e.,* the capacity of the ditch must be the same as originally constructed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality.

This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects.

(Authority: Section 404)

42. *Recreational Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (*e.g.,* football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authority: Section 404)

43. *Stormwater Management Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other stormwater management facilities; the construction of water control structures, outfall structures and emergency spillways; the construction of low impact development integrated management features such as bioretention facilities (*e.g.,* rain gardens), vegetated filter strips, grassed swales, and infiltration trenches; and the construction of pollutant reduction green infrastructure features designed to reduce inputs of sediments, nutrients, and other pollutants into waters to meet reduction targets established under Total Daily Maximum Loads set under the Clean Water Act.

This NWP authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features. The maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features that are not waters of the United States does not require a section 404 permit.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½-acre. This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

Notification: For discharges into non-tidal waters of the United States for the construction of new stormwater management facilities or pollutant reduction green infrastructure features, or the expansion of existing stormwater management facilities or pollutant reduction green infrastructure features, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility or pollutant reduction green infrastructure feature.

(Authority: Section 404)

44. *Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities, provided the activity meets all of the following criteria:

(a) For mining activities involving discharges of dredged or fill material into non-tidal wetlands, the discharge must not cause the loss of greater than ½-acre of non-tidal wetlands;

(b) For mining activities involving discharges of dredged or fill material in non-tidal open waters (*e.g.,* rivers, streams, lakes, and ponds) the mined area, including permanent and temporary impacts due to discharges of dredged or fill material into jurisdictional waters, must not exceed ½-acre; and

(c) The acreage loss under paragraph (a) plus the acreage impact under paragraph (b) does not exceed ½-acre.

The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects.

The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½-acre.

This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction-notification to the district engineer prior to commencing the activity. (See general condition 32.) If reclamation is required by other statutes, then a copy of the final reclamation plan must be submitted with the pre-construction notification.

(Authorities: Sections 10 and 404)

45. *Repair of Uplands Damaged by Discrete Events.* This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

This NWP does not authorize beach restoration or nourishment.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 32) within 12 months of the date of the damage; for major storms, floods, or other discrete events, the district engineer may waive the 12-month limit for submitting a pre-construction notification if the permittee can demonstrate funding, contract, or other similar delays. The pre-construction notification must include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration.

(Authority: Sections 10 and 404)

Note: The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.) This NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

46. *Discharges in Ditches.* Discharges of dredged or fill material into non-tidal ditches that are: (1) Constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) determined to be waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authority: Section 404)

47. [Reserved]

48. *Commercial Shellfish Aquaculture Activities.* Discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States necessary for new and continuing commercial shellfish aquaculture operations in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is authorized to conduct commercial shellfish aquaculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any easement, lease, deed, contract, or other legally binding agreement that establishes an enforceable property interest for the operator. A ''new commercial shellfish aquaculture operation'' is an operation in a project area where commercial shellfish aquaculture activities have not been conducted during the past 100 years.

This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize:

(a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody;

(b) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990;

(c) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas, or the deposition of shell material back into waters of the United States as waste; or

(d) Activities that directly affect more than ½-acre of submerged aquatic vegetation beds in project areas that have not been used for commercial shellfish aquaculture activities during the past 100 years.

Notification: The permittee must submit a pre-construction notification to the district engineer if: (1) The activity will include a species that has never been cultivated in the waterbody; or (2) the activity occurs in a project area that has not been used for commercial shellfish aquaculture activities during the past 100 years. If the operator will be conducting commercial shellfish aquaculture activities in multiple contiguous project areas, he or she can either submit one PCN for those contiguous project areas or submit a separate PCN for each project area. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the pre-construction notification must also include the following information: (1) A map showing the boundaries of the project area(s), with latitude and longitude coordinates for each corner of each project area; (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; (3) whether canopy predator nets will be used; (4) whether suspended cultivation techniques will be used; and (5) general water depths in the project area(s) (a detailed survey is not required). No

more than one pre-construction notification per project area or group of contiguous project areas should be submitted for the commercial shellfish operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake in the project area or group of contiguous project areas during the effective period of this NWP. If an operator intends to undertake unanticipated changes to the commercial shellfish aquaculture operation during the effective period of this NWP, and those changes require Department of the Army authorization, the operator must contact the district engineer to request a modification of the NWP verification; a new pre-construction notification does not need to be submitted.

(Authorities: Sections 10 and 404)

Note 1: The permittee should notify the applicable U.S. Coast Guard office regarding the project.

Note 2: To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

Note 3: The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines ''aquatic nuisance species'' as ''a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters.''

49. *Coal Remining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. The activities must already be authorized, or they must currently be in process as part of an integrated permit processing procedure, by the Department of the Interior Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts.

As part of the project, the permittee may conduct new coal mining activities in conjunction with the remining activities when he or she clearly demonstrates to the district engineer that the overall mining plan will result in a net increase in aquatic resource functions. The Corps will consider the SMCRA agency's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area. The total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area.

Notification: The permittee must submit a pre-construction notification and a document describing how the overall mining plan will result in a net increase in aquatic resource functions to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

50. *Underground Coal Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification.

(Authorities: Sections 10 and 404)

Note: Coal preparation and processing activities outside of the mine site may be authorized by NWP 21.

51. *Land-Based Renewable Energy Generation Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. Such facilities include infrastructure to collect solar (concentrating solar power and photovoltaic), wind, biomass, or geothermal energy. Attendant features may include, but are not limited to roads, parking lots, and stormwater management facilities within the land-based renewable energy generation facility.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the discharge results in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note 1: Utility lines constructed to transfer the energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

Note 2: If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove utility lines and/or road crossings, then NWP 12 and/or NWP 14 shall be used if those activities meet the terms and conditions of NWPs 12 and 14, including any applicable regional conditions and any case-specific conditions imposed by the district engineer.

Note 3: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

52. *Water-Based Renewable Energy Generation Pilot Projects.* Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, modification, or removal of water-based wind, water-based solar, wave energy, or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to, land-based collection and distribution facilities, control facilities, roads, parking lots, and stormwater management facilities.

For the purposes of this NWP, the term ''pilot project'' means an experimental project where the water-based renewable energy generation units will be monitored to collect information on their performance and environmental effects at the project site.

The discharge must not cause the loss of greater than ½-acre of waters of the United States, including the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½-acre.

The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on the bed of a navigable water of the United States is not a loss of waters of the United States for the purposes of applying the ½-acre or 300 linear foot limits.

For each single and complete project, no more than 10 generation units (*e.g.,* wind turbines, wave energy devices, or hydrokinetic devices) are authorized. For floating solar panels in navigable waters of the United States, each single and complete project cannot exceed ½-acre in water surface area covered by the floating solar panels.

This NWP does not authorize activities in coral reefs. Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

Upon completion of the pilot project, the generation units, transmission lines, and other structures or fills associated with the pilot project must be removed to the maximum extent practicable unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Completion of the pilot project will be identified as the date of expiration of the Federal Energy Regulatory Commission (FERC) license, or the expiration date of the NWP authorization if no FERC license is required.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note 1: Utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

Note 2: An activity that is located on an existing locally or federally maintained U.S. Army Corps of Engineers project requires separate approval from the Chief of Engineers or District Engineer under 33 U.S.C. 408.

Note 3: If the pilot project generation units, including any transmission lines, are placed in navigable waters of the United States (*i.e.,* section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the generation units and associated transmission line(s) to protect navigation.

Note 4: Hydrokinetic renewable energy generation projects that require authorization by the Federal Energy Regulatory Commission under the Federal Power Act of 1920 do not require separate authorization from the Corps under section 10 of the Rivers and Harbors Act of 1899.

Note 5: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

53. *Removal of Low-Head Dams.* Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States associated with the removal of low-head dams.

For the purposes of this NWP, the term ''low-head dam'' is defined as a dam built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest on a continual and uncontrolled basis. (During a drought, there might not be water flowing over the dam crest.) In general, a low-head dam does not have a separate spillway or spillway gates but it may have an uncontrolled spillway. The dam crest is the top of the dam from left abutment to right abutment, and if present, an uncontrolled spillway. A low-head dam provides little storage function.

The removed low-head dam structure must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

Because the removal of the low-head dam will result in a net increase in ecological functions and services provided by the stream, as a general rule compensatory mitigation is not required for activities authorized by this NWP. However, the district engineer may determine for a particular low-head dam removal activity that compensatory mitigation is necessary to ensure the authorized activity results in no more than minimal adverse environmental effects.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note: This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to restore the stream in the vicinity of the low-head dam, including the former impoundment area. Nationwide permit 27 or other Department of the Army permits may authorize such activities. This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to stabilize stream banks. Bank stabilization activities may be authorized by NWP 13 or other Department of the Army permits.

54. *Living Shorelines.* Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines to stabilize banks and shores in coastal waters, which includes the Great Lakes, along shores with small fetch and gentle slopes that are subject to low- to mid-energy waves. A living shoreline has a footprint that is made up mostly of native material. It incorporates vegetation or other living, natural ''soft'' elements alone or in combination with some type of harder shoreline structure (*e.g.,* oyster or mussel reefs or rock sills) for added protection and stability. Living shorelines should maintain the natural continuity of the land-water interface, and retain or enhance shoreline ecological processes. Living shorelines must have a substantial biological component, either tidal or lacustrine fringe wetlands or oyster or mussel reef structures. The following conditions must be met:

(a) The structures and fill area, including sand fills, sills, breakwaters, or reefs, cannot extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(c) Coir logs, coir mats, stone, native oyster shell, native wood debris, and other structural materials must be adequately anchored, of sufficient weight, or installed in a manner that prevents relocation in most wave action or water flow conditions, except for extremely severe storms;

(d) For living shorelines consisting of tidal or lacustrine fringe wetlands, native plants appropriate for current site conditions, including salinity, must be used if the site is planted by the permittee;

(e) Discharges of dredged or fill material into waters of the United States, and oyster or mussel reef structures in navigable waters, must be the minimum necessary for the establishment and maintenance of the living shoreline;

(f) If sills, breakwaters, or other structures must be constructed to protect fringe wetlands for the living shoreline, those structures must be the minimum size necessary to protect those fringe wetlands;

(g) The activity must be designed, constructed, and maintained so that it has no more than minimal adverse effects on water movement between the waterbody and the shore and the movement of aquatic organisms between the waterbody and the shore; and

(h) The living shoreline must be properly maintained, which may require periodic repair of sills, breakwaters, or reefs, or replacing sand fills after severe storms or erosion events. Vegetation may be replanted to maintain the living shoreline. This NWP authorizes those maintenance and repair activities, including any minor deviations necessary to address changing environmental conditions.

This NWP does not authorize beach nourishment or land reclamation activities.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the construction of the living shoreline. (See general condition 32.) The pre-construction notification must include a delineation of special aquatic sites (see paragraph (b)(4) of general condition 32). Pre-construction notification is not required for maintenance and repair activities for living shorelines unless required by applicable NWP general conditions or regional conditions.

(Authorities: Sections 10 and 404)

Note: In waters outside of coastal waters, nature-based bank stabilization techniques, such as bioengineering and vegetative stabilization, may be authorized by NWP 13.

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. *Navigation.* (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

3. *Spawning Areas.* Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (*e.g.,* through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. *Migratory Bird Breeding Areas.* Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. *Shellfish Beds.* No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. *Suitable Material.* No activity may use unsuitable material (*e.g.,* trash,

debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

7. *Water Supply Intakes.* No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. *Management of Water Flows.* To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (*e.g.,* stream restoration or relocation activities).

10. *Fills Within 100-Year Floodplains.* The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. *Equipment.* Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. *Removal of Temporary Fills.* Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. *Proper Maintenance.* Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. *Single and Complete Project.* The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. *Wild and Scenic Rivers.* (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. The permittee shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (*e.g.,* National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: *http://www.rivers.gov/.*

17. *Tribal Rights.* No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

18. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which ''may affect'' a listed species or critical habitat, unless ESA section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the NWP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the NWP activity and are later in time, but still are reasonably certain to occur.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed activity. The district engineer will determine whether the proposed activity ''may affect'' or will have ''no effect'' to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps,

the applicant shall not begin work until the Corps has provided notification that the proposed activity will have ''no effect'' on listed species or critical habitat, or until ESA section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

(e) Authorization of an activity by an NWP does not authorize the ''take'' of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (*e.g.,* an ESA Section 10 Permit, a Biological Opinion with ''incidental take'' provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word ''harm'' in the definition of ''take'' means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide Web pages at *http://www.fws.gov/* or *http://www.fws.gov/ipac* and *http://www.nmfs.noaa.gov/pr/species/esa/* respectively.

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for ensuring their action complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting appropriate local office of the U.S. Fish and Wildlife Service to determine applicable measures to reduce impacts to migratory birds or eagles, including whether ''incidental take'' permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. *Historic Properties.* (a) In cases where the district engineer determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act. If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect. Where the non-Federal applicant has identified historic properties on which the activity might have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed.

(d) For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-

Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. *Discovery of Previously Unknown Remains and Artifacts.* If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer of what you have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (*i.e.,* on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation to ensure that the activity results in no more than minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (*e.g.,* conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. Restored riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (*e.g.,* riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the

district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f)).

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan only needs to address the baseline conditions at the impact site and the number of credits to be provided.

(6) Compensatory mitigation requirements (*e.g.,* resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of ½-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than ½-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

24. *Safety of Impoundment Structures.* To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. *Water Quality.* Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. *Coastal Zone Management.* In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. *Regional and Case-By-Case Conditions.* The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. *Use of Multiple Nationwide Permits.* The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed ⅓-acre.

29. *Transfer of Nationwide Permit Verifications.* If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

_____

(Transferee)

_____

(Date)

30. *Compliance Certification.* Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation,

including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

(a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;

(b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and

(c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

31. *Activities Affecting Structures or Works Built by the United States.* If an NWP activity also requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a ''USACE project''), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission is not authorized by NWP until the appropriate Corps office issues the section 408 permission to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. *Pre-Construction Notification.* (a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is ''no effect'' on listed species or ''no potential to cause effects'' on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:* The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. For single and complete linear projects, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (*e.g.,* a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45 day period will not start until the delineation has

been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-Federal permittees, if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed activity or utilize the designated critical habitat that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-Federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the ''study river'' (see general condition 16); and

(10) For an activity that requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408 permission from the Corps office having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification:* The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is an NWP PCN and must include all of the applicable information required in paragraphs (b)(1) through (10) of this general condition. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than ½-acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (*e.g.,* via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or email that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

D. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the individual crossings of waters of the United States to determine whether they individually satisfy the

terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, 52, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects. For those NWPs that have a waivable 300 linear foot limit for losses of intermittent and ephemeral stream bed and a ½-acre limit (*i.e.,* NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52), the loss of intermittent and ephemeral stream bed, plus any other losses of jurisdictional waters and wetlands, cannot exceed ½-acre.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (*e.g.,* partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (*e.g.,* watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than ⅒-acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters (*e.g.,* streams). The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) That the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse environmental effects, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31, or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

E. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

F. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and

practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term ''discharge'' means any discharge of dredged or fill material into waters of the United States.

Ecological reference: A model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on the structure, functions, and dynamics of an aquatic habitat type or a riparian area type that currently exists in the region where the proposed NWP 27 activity is located. Alternatively, an ecological reference may be based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the proposed NWP 27 activity. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

High Tide Line: The line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete non-linear project in the Corps Regulatory Program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the acres or linear feet of stream bed that are filled or excavated as a result of the regulated activity. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act, are not considered when calculating the loss of waters of the United States.

Navigable waters: Waters subject to section 10 of the Rivers and Harbors Act of 1899. These waters are defined at 33 CFR part 329.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (*i.e.,* spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of ''open waters'' include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas.

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may

be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Protected tribal resources: Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: Re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (*i.e.,* spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete linear project: A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term ''single and complete project'' is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (*i.e.,* a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Single and complete non-linear project: For non-linear projects, the term ''single and complete project'' is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of ''independent utility''). Single and complete non-linear projects may not be ''piecemealed'' to avoid the limits in an NWP authorization.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (*i.e.,* by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a jurisdictional wetland that is inundated by tidal waters. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line.

Tribal lands: Any lands title to which is either: (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Tribal rights: Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWPs, a waterbody is a jurisdictional water of the United States. If a wetland is adjacent to a waterbody determined to be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of ''waterbodies'' include streams, rivers, lakes, ponds, and wetlands.

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Part IV

Department of Agriculture

Food and Nutrition Service

7 CFR Parts 271, 272, 273, et al.

Supplemental Nutrition Assistance Program (SNAP): Eligibility, Certification, and Employment and Training Provisions of the Food, Conservation and Energy Act of 2008; Final Rule and Interim Final Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, and 285

[FNS 2011–0008]

RIN 0584–AD87

Supplemental Nutrition Assistance Program (SNAP): Eligibility, Certification, and Employment and Training Provisions of the Food, Conservation and Energy Act of 2008

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule and interim final rule.

SUMMARY: This final rule implements provisions of the Food, Conservation and Energy Act of 2008 (FCEA) affecting the eligibility, benefits, certification, and employment and training (E&T) requirements for applicant or participant households in the Supplemental Nutrition Assistance Program (SNAP). The rule amends the SNAP regulations to: Exclude military combat pay from the income of SNAP households; raise the minimum standard deduction and the minimum benefit for small households; eliminate the cap on the deduction for dependent care expenses; index resource limits to inflation; exclude retirement and education accounts from countable resources; clarify reporting requirements under simplified reporting; permit States to provide transitional benefits to households leaving State-funded cash assistance programs; allow States to establish telephonic and gestured signature systems; permit States to use E&T funds to provide job retention services; and update requirements regarding the E&T funding cycle. These provisions are intended to more accurately reflect needs, reduce barriers to participation, and improve efficiency in the administration of the program. This rule also replaces outdated language in SNAP certification regulations with the new program name and updates procedures for accessing SNAP benefits in drug and alcohol treatment centers and group living arrangements with use of electronic benefit transfer (EBT) cards. This rule provides States with regulatory options for conducting telephone interviews in lieu of face-to-face interviews and for averaging student work hours.

Finally, the Department is issuing an interim final rule (with a request for additional comment) that will require that drug and alcohol treatment and group living arrangements (GLA) centers to: Submit completed change report forms to the State agency when a resident leaves the center; notify the State agency within 5 days when the center is not able to provide the resident with their EBT card at departure; and return EBT cards to residents with pro-rated benefits based up on the date of their departure.

DATES: *Effective dates:* This final rule is effective March 7, 2017. The amendments to 7 CFR 273.11(e) and 273.11(f) are being issued as an interim final rule and are effective April 6, 2017. The amendments to 7 CFR 273.2(c)(1)(v) are effective January 8, 2018.

Comment date: FNS will consider comments from the public on the amendments to 7 CFR 273.11(e) and 273.11(f). Comments must be received at one of the addresses provided below on or before March 7, 2017.

ADDRESSES: FNS invites interested persons to submit comments on the interim rule provisions at 7 CFR 273.11(e) and 273.11(f). Comments may be submitted by one of the following methods:

- *Federal e-Rulemaking Portal:* Go to *http://www.regulations.gov.* Preferred method; follow the online instructions for submitting comments on docket FNS 2011–0008.
- *Fax:* Submit comments by facsimile transmission to: Sasha Gersten-Paal, Certification Policy Branch, Fax number 703–305–2486.
- *Mail:* Comments should be addressed to Sasha Gersten-Paal, Certification Policy Branch, 3101 Park Center Drive, Alexandria, VA 22302.
- *Hand Delivery or Courier:* Deliver comments to Sasha Gersten-Paal, Certification Policy Branch, 3101 Park Center Drive, Alexandria, VA 22302, Monday–Friday, 8:30 a.m.–5:00 p.m.

All comments submitted in response to the interim rule provision will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the comments publicly available on the Internet via *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Sasha Gersten-Paal, Branch Chief, Certification Policy Branch, Program Development Division, Food and Nutrition Service (FNS), 3101 Park Center Drive, Room 810, Alexandria, Virginia 22302, (703) 305–2507, *sasha.gersten-paal@fns.usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

What acronyms or abbreviations are used in this discussion?

In the discussion of this final rule, we use the following acronyms or other abbreviations to stand in for certain words or phrases:

Phrase	Acronym, abbreviation, or symbol
Code of Federal Regulations	CFR.
Electronic Benefit Transfer Card	EBT Card.
Federal Register	FR.
Federal Fiscal Year	FY.
Food and Nutrition Act of 2008	Act.
Food and Nutrition Service	FNS.
Food, Conservation and Energy Act of 2008 (Pub. L. 110–246)	FCEA.
Food, Security and Rural Investment Act of 2002 (Pub. L. 107–171)	FSRIA.
Office of Management and Budget	OMB.
Secretary of the U.S. Department of Agriculture	Secretary.
Section (when referring to Federal regulations)	§ or §§.
State Funded Cash Assistance Program	SFCA Program.
Supplemental Nutrition Assistance Program	SNAP.
Temporary Assistance for Needy Families	TANF.
United States Code	U.S.C.
U.S. Department of Agriculture	the Department or USDA.

What changes in the law triggered the need for this final rule?

The Food, Conservation and Energy Act of 2008 (Pub. L. 110–246) (FCEA), enacted on June 18, 2008, amended and renamed the Food Stamp Act of 1977, 7 U.S.C. 2011, *et seq.,* as the Food and Nutrition Act of 2008 (the Act). This final rule implements FCEA provisions affecting the eligibility, benefits, and certification of program participants, as well as E&T requirements of the program. This rule also codifies into the SNAP regulations the FCEA's nomenclature changes from ''Food Stamp Program'' to ''Supplemental Nutrition Assistance Program'' (SNAP) throughout Part 273 of the SNAP regulations.

What were the FCEA mandatory provisions and when did States have to implement them?

The statutory provisions covered in this rule were effective on October 1, 2008. Many of the eligibility, certification and E&T provisions included in this final rule were mandated by the FCEA to be implemented by State agencies on October 1, 2008. These provisions, addressed in an implementing memo issued on July 3, 2008, describing both mandatory and optional provisions, with corresponding FCEA sections include:

- Section 4001—Changing the program name;
- Section 4101—Excluding military combat pay;
- Section 4102—Raising the standard deduction for small households;
- Section 4103—Eliminating the dependent care deduction caps;
- Section 4104(a)—Indexing the resource limits;
- Section 4104(b)—Excluding retirement accounts from resources;
- Section 4104(c)—Excluding education accounts from resources;
- Section 4107—Increasing the minimum benefit for small households; and
- Section 4122—Funding cycles for E&T programs.

What were the optional provisions in the FCEA?

The FCEA also created new program options that State agencies may include in their administration of the program, which State agencies were permitted to implement on October 1, 2008. These provisions, which are addressed in this rule, with corresponding FCEA sections include:

- Section 4105—Expanding simplified reporting;
- Section 4106—Expanding transitional benefits option;
- Section 4108—E&T funding of job retention services; and
- Section 4119—Telephonic signature systems.

FNS informed State agencies of implementation timeframes for all SNAP provisions in the July 3, 2008, FCEA memorandum. The memo is available on the FNS Web site at *http://www.fns.usda.gov/sites/default/files/070308_0.pdf.*

When did the Department publish the proposed rule and how did commenters respond?

On May 4, 2011, the Department published a proposed rule (76 FR 25414) that would codify certain provisions of the FCEA as well as two discretionary provisions into SNAP's certification, eligibility, and E&T rules. The 60-day comment period ended on July 5, 2011. A total of 118 commenters submitted comments. These commenters included the following: 59 advocacy groups, 18 food banks, 15 individuals, 13 non-profit organizations, seven associations and six State agencies. The Department greatly appreciates the comments received on the proposed rule as they have been essential in developing the final rule. The Department received generally favorable feedback from the public on the proposed rule. Where commenters expressed concerns or questions, the Department has considered these issues, and where appropriate, incorporated these comments into the regulatory text.

In this final rule, the Department discusses each statutory and discretionary provision in the proposed rule and the comments made, with some general exceptions. Although the Department considered all comments, the preamble discussion focuses primarily on the most frequent comments and/or those that influenced revisions to the proposed rule, and modifications made to the proposed rule in response to public input. Comments supporting proposed provisions are generally not discussed in detail. The Department also does not discuss comments that only address technical corrections or inadvertent omissions in detail; however, the appropriate corrections are made. For provisions on which no comments were received, the Department is adopting those provisions as proposed. Other comments added value and clarity to the regulations and we incorporate those suggested revisions into the relevant regulatory provisions.

The Department also received comments on several provisions that were outside the scope of the proposed rulemaking. By outside the scope, the Department means that commenters provided substantive feedback on provisions that were not proposed for revisions as part of this rulemaking. Most of the comments that are outside the scope of the proposed rulemaking will generally be identified but not fully discussed in this final rule. Nevertheless, the Department appreciates the feedback on those issues and will consider incorporating some of those perspectives and suggestions in future guidance, rulemaking and/or policy discussions.

To view all public comments on the proposed rule go to *www.regulations.gov* and search for public submissions under docket number FNS–2011–0008.

Discussion of Specific Provisions and Comments

1. Program name change and Other Conforming Nomenclature Changes, Part 273

What changes are made to the program's name by this final rule?

This rule incorporates the nomenclature revisions proposed in the May 4, 2011 proposed rule. These changes are based on Section 4001 of the FCEA, which changed the name of the program as well as the name of the statute that governs the program. The Department is updating nomenclature in sections where substantial changes are being made or the necessary changes have already been identified. This is a long-term and incremental process. The nomenclature changes made in this final rule throughout part 273 include the following:

Previous name	New name
Food Stamp Program	Supplemental Nutrition Assistance Program (SNAP).
Food Stamp Act of 1977	Food and Nutrition Act of 2008.
food stamp	SNAP.
food coupons	SNAP benefits.

Previous name	New name
food stamps	SNAP benefits.

In addition, this rule incorporates a change at 7 CFR 273.25 to update references to SFSP (Simplified Food Stamp Program) to S–SNAP wherever it occurs and FSP to SNAP.

Do State agencies have to use the new program name, SNAP?

No. Although the official name of the program changed on October 1, 2008, State agencies may continue to use State-specific names for SNAP. One commenter (State agency) asked whether States may exhaust existing inventory of materials prior to transitioning to a new program name. It has been a longstanding policy of the Department to allow States to use State-specific names. Therefore, it is also a State agency's discretion to deplete materials using the old name prior to changing to a new program name, whether it is SNAP or some other State-specific name. As mentioned in the preamble to the May 4, 2011 proposed rule, FNS continues to request that State agencies discontinue the use of the name, ''Food Stamp Program''. In addition, FNS recommends that States that have yet to move to a name other than ''Food Stamp Program'' should consider adopting the official name, Supplemental Nutrition Assistance Program, or SNAP. Several commenters opposed the use of any other name than SNAP, and another commenter stressed the importance of having a national name for a national program. While we understand the reasoning behind this comment, because the Department has permitted States to use State-specific names for many years, it would be inappropriate and costly to require States to transition to the official Federal program name at this time. However, in recognition of commenters' support of the use of the updated program name exclusively, and in order to support consistency across the program, the Department is updating the final rule to include most of the above-mentioned nomenclature changes throughout Parts 271 through 285, not just in Part 273 as in the proposed rule. These sections include all Department SNAP and Food Distribution program regulations.

The proposed rule changed ''food stamps'' and ''food coupons'' to ''benefits.'' On further review after publication of the proposed rule, the Department determined that the reference to ''benefits'' is not specific enough in many instances throughout Parts 271 through 285. In this final rule, the Department will change references to ''food stamps'' to ''SNAP benefits'' through Parts 271 through 285 and ''food coupons'' to ''SNAP benefits'' through Part 273.

2. What changes were proposed to provisions on drug addiction and alcoholic (DAA) treatment centers and in group living arrangements (GLAs) in the proposed rule?

The Department proposed revising § 273.11(e) and § 273.11(f) to remove references to food coupons and to update the procedures for providing benefits via EBT cards to residents of DAA centers, and residents of GLAs. The purpose of this proposed provision was to update nomenclature to reflect the electronic issuance of benefits through EBT. Since these procedures are already in use by these types of centers, only the regulatory description of the procedures was proposed to be updated. The proposed regulation would have required that the center advise the State agency of the center's inability to refund the departing resident's benefits, but did not provide a time frame for this requirement.

What comments were received on the proposed revisions?

The Department received 11 comments that addressed client rights as related to residents of these DAA centers and GLAs. In particular, commenters believed that both DAA treatment centers and GLAs should be required to return a pro-rata share of benefits to residents who leave in the middle of the month, return EBT cards to departing residents, and report when residents leave the center. Commenters also said that these centers should not be allowed to act as an authorized representative for the SNAP recipient. Prior to EBT, such centers were required to redeem residents' paper coupons through authorized food stores. Under EBT, both DAA treatment centers and GLAs centers are allowed to be authorized as retailers in order to redeem benefits directly through a financial institution. Both DAA treatment centers and GLAs then use the cash to purchase food for their residents.

One commenter suggested that the Department strengthen the procedures used when residents leave these centers and enhance protections for these vulnerable SNAP participants. The comment included the following specific recommendations: (1) Require both DAA centers and GLAs to submit a completed change report form to the State when the residents depart; (2) require centers to provide EBT cards to departing residents; (3) and require that the EBT cards returned to the departing residents include pro-rated benefits. The commenter pointed out that the current and proposed regulations raise concerns because residents of both DAA treatment centers and GLAs may not be receiving the full amount of benefits they are entitled to when they leave the center. The commenter pointed out that prorating by day is a basic rule in SNAP and recommended pro-rating by day for substance use disorder treatment centers whose residents have departed. FNS believes that these concerns and recommendations are important to ensure that residents of DAA treatment centers and GLAs do not lose SNAP benefits when they leave.

What is required by current regulations regarding GLAs and DAA treatment centers when a resident receiving SNAP befits leaves the center?

Current regulations require the State to ensure that its procedures prohibit DAA treatment centers from obtaining more than one-half of the household's (typically a single individual) allotment prior to the 16th of the month unless the center permits the return of the benefits to the household's EBT account through a refund, transfer, or other means. The EBT procedures for residents in GLAs vary depending on whether all the residents are certified together as one household or are certified individually.

The current regulations require that the DAA treatment center must provide the household with its EBT card if the center has possession of card when a resident leaves. In the case where the household has already left and the treatment center is unable to return the benefits, the center must promptly inform the State agency and the State agency must provide the household with the EBT card.

The current regulations provide that the day of the month that the resident leaves the treatment center determines how the resident will receive their unspent benefits once they leave the center. Generally, if the household leaves prior to the 16th of the month, the State must ensure that its

procedures prohibit the DAA treatment center from obtaining more than one-half of the household's allotment and return of one-half of the allotment to the household's EBT account through a refund, transfer, or other means if the household leaves prior to the 16th of the month. If the household leaves on or after the 16th day of the month, the State agency, at its option, may require the DAA treatment center to give the household a portion of its allotment, but this is not required. If no benefits have been spent on behalf of the individual household, the center must return the full value, including any benefits already debited from the household's current monthly allotment but not yet spent. In situations where benefits have already been debited from the EBT account and any portion spent on behalf of household, the DAA treatment center has several options to ensure clients receive the balance of their benefits for that month.

Are the rights of clients residing in DAA treatment centers and in GLAs also changed by the final rule?

Yes. Even though the Department did not propose any changes to the rights of clients at these centers, the comments received on this topic convinced the Department of the need for changes to these provisions to better protect these vulnerable participants. Consequently, the Department has decided to issue several changes to provisions in § 273.11(e) and § 273.11(f) as an interim final rule to ensure that this vulnerable population receives the benefits they are entitled to as soon as possible. The Department has determined that these changes to the current rules are necessary to ensure that this vulnerable population begins receiving all the benefits to which they are entitled as soon as possible. Therefore, the Department has determined pursuant to 5 U.S.C. 553(b)(B) that there is good cause to forego the notice of proposed rulemaking procedure since, in this instance, it is contrary to the public interest. The Department will accept and consider comments on these provisions prior to issuing a final rule. The Department will accept and consider comments on these provisions prior to issuing a final rule.

Most significantly, the rule requires that both DAA treatment centers and GLAs (referred to below as ''centers'') must now return a prorated amount of the household's monthly allotment back to the EBT account based on the number of days in the month that the household resided at the center regardless of whether the household leaves before, on, or after the 16th day. No matter the method used by the center to redeem a household's benefits, the household, not the center, will now have sole access to the prorated benefits in the EBT account if the household leaves the center. States' automated systems and EBT make the precise, day-by-day, prorating of benefits easy.

In addition, the interim final rule requires that centers notify the State agency of the household's change in address, and new address if available, and that the center is no longer the household's authorized representative. The center must provide the household with a change report form as soon as it has knowledge the household plans to leave the facility and advise the household to report to the State agency any changes that the household is required to report within 10 days of the change. After the household leaves the center, the center can no longer act as the household's authorized representative for certification purposes or for obtaining or using benefits.

If the household has already left the center, and as a result, the center is unable to refund the benefits to the household, the center is required to notify the State agency within five days of the of the household's departure that the center was unsuccessful in its effort to refund the prorated share. Once notified, the State agency must effect the refund from the center's bank account to the household's EBT account within a reasonable period of time. These procedures are applicable at any time during the month. Five days is a reasonable and necessary amount of time given that the household will have no access to these funds during the time and may be unable to purchase food.

The center is also required to provide the household with its EBT card within 5 days of the household's departure and to return any EBT card not provided to departing residents to the State agency within 5 days.

If the center completed any part of its monthly shopping by the time a household departs, the food purchased on behalf of the departed resident will remain in the center and will be used to feed other residents.

The Department will also consider changing the terminology used in SNAP rules from DAA treatment centers to the more medically correct ''Substance Use Disorder'' treatment centers. Any such action would be made in future rulemaking, and not for purposes of this interim final rule, to ensure the terminology is changed throughout the SNAP regulations.

Finally, the Department revises outdated references to § 273.1(e)(2) in this final rule. Section 273.1(e)(2) previously discussed the allowability of certain residents of public institutions to apply for SNAP benefits jointly with their SSI application. This language is now contained at 273.11(i). The Department replaces the references to § 273.1(e)(2) with § 273.11(i) in the two sections of the regulations where the old reference is contained, at §§ 273.2 and 273.10.

3. Military Combat-Related Pay Exclusion § 273.9(c)(20)

What changes did the FCEA make regarding the exclusion of military combat-related pay from income in SNAP eligibility determinations?

Section 4101 of FCEA added Section 5(d)(19) of the Act (7 U.S.C. 2014(d)(19)) to exclude special pay to United States Armed Forces members that is received in addition to basic pay as a result of a member's deployment or service in a designated combat zone. The exclusion includes any special pay received pursuant to Chapter 5 of Title 37 of the United States Code and any other payment that is authorized by the Secretary as appropriate to be excluded under Section 5(d)(19) of the Act. To qualify for the exclusion, the pay must be received as a result of deployment to or service in a combat zone and must not have been received immediately prior to the service or deployment in the combat zone.

How did FNS propose to implement this exclusion in the SNAP regulations?

FNS proposed to add a new paragraph (20) to § 273.9(c) to exclude special combat-related pay received by a household from a person who is serving in the U.S. Armed Forces and is deployed to or serving in a Federally-designated combat zone. This special pay must be received in addition to basic pay and must not be received immediately prior to the service or deployment in the combat zone.

What types of pay must be excluded from the eligibility determination under this requirement?

A total of 59 commenters provided feedback on this provision. Forty-nine of those commenters requested guidance to assist State and local agencies identify what constitutes the special pay that is to be excluded from household income. Eleven commenters further requested that the Department explicitly identify what pay is excluded from the service member's leave and earnings statements (LES), for example, hostile fire pay and hazardous duty incentive pay. They requested that the Department expand specific guidance

issued in 2005 on the exclusion of military combat pay and provide a link to the Department of Defense (DoD) Defense Finance and Accounting Service (DFAS) Web site at *http://www.dfas.mil/dfas/militarymembers.html.* That being said, nine of those 11 commenters also acknowledged that listing this link in the regulation could require more frequent regulation updates, and that guidance may be more helpful. One commenter requested that the Department periodically update guidance to reflect changes in designated combat zones. Eleven commenters recommended that the Department clarify that only money made available to the household should be counted as income, and one commenter recommended specific procedures for calculating the amount of money that is available to household members when the service member keeps some of the special pay.

In considering these comments, FNS consulted with staff at DoD's DFAS. DFAS explained that there are complexities with combat pay; for example, combat zones change and some people may receive special pay when they are not deployed to a combat zone. DFAS recommended issuing guidance, which the Department intends to do shortly after publication of this rule. A combat zone is any area that the President of the United States designates by Executive Order as an area in which the U.S. Armed Forces are engaging or have engaged in combat. DFAS recommended that eligibility workers review a service member's LES to determine what additional pay categories he or she received as a result of the deployment to the combat zone. In most cases, the amount to be excluded should be identifiable by comparing the LES reflecting pay immediately prior to deployment to the LES after deployment. When questions arise as to specific issues or payment codes, DFAS recommended that State agency staff contact the service members' supporting finance office.

The Department is not the Federal agency charged with determining combat zone designations. DoD, and in particular DFAS, has the expertise on specific types of pay a service member receives during a deployment to a combat zone and an understanding of the various issues that can arise in combat-related pay issues. The language in the proposed rule reflects the broader language of Section 5(d)(19) of the Act in that the pay is limited to those special pays listed at Chapter 5 of Title 37 of the United States Code. In addition, the pay must be received in addition to basic pay, received as a result of deployment, and not received before the deployment or service in a combat zone. The Department also wishes to reiterate that only income made available to the household is considered for the purposes of determining a household's eligibility and benefit level. The Department believes that these criteria are sufficiently clear for State agencies to make a determination on the appropriate income exclusion. For these reasons, the Department adopts the proposed provision at § 273.9(c)(20) without change as final and is committed to providing additional guidance shortly after publication of this rulemaking.

4. Standard Deduction Increase § 273.9(d)(1)(iii)

How did the law change the SNAP standard deduction?

Section 4102 of the FCEA amended Section 5(e) of the Act (7 U.S.C. 2014(e)) to raise the minimum standard deduction from $134 to $144, effective in FY 2009 for the 48 contiguous States and the District of Columbia. In addition, it changed the minimum standard deduction amounts for Alaska, Hawaii, the U.S. Virgin Islands and Guam to $246, $203, $127 and $289, respectively. Beginning in FY 2010 and each fiscal year thereafter, FCEA mandated that the minimum standard deduction must be indexed to inflation. FNS calculates this amount and releases it annually to State agencies.

How did the Department propose to incorporate this change in the regulations?

The Department proposed amending the regulations at § 273.9(d)(1)(iii) to incorporate the FCEA changes to the minimum standard deduction. In addition, the Department proposed a technical revision to correct the citation at § 273.12(e)(1)(B) from § 273.9(d)(7) to § 273.9(d)(1).

Will the Department adopt the provision as proposed?

Yes. Sixty-two commenters indicated their general approval of the proposals regarding the standard deduction. No commenters shared concerns with the proposal.

Does the Department intend to provide any additional guidance on the standard deduction provision?

Not at this time. While only eight commenters requested guidance on the standard deduction, 59 commenters noted a problem with timely updating of standard deduction increases for households participating under demonstration projects. These commenters requested that the Department ensure that States with combined application projects (CAPs) and other demonstration projects make annual updates to the standard deduction on a timely basis. States are already required to comply with the terms and conditions of demonstration projects such as CAPs and make annual updates according to existing SNAP policy.

5. Eliminating the Cap on Dependent Care Expenses § 273.9(d)(4)

What changes did the law make to the dependent care deduction?

Section 4103 of the FCEA amended section 5(e)(3) of the Act (7 U.S.C. 2014(e)(3)) to eliminate the caps on the deduction for dependent care expenses, thereby allowing eligible households to deduct the full amount of their dependent care costs. The change was effective October 1, 2008. The law required State agencies to implement the provision for new households applying for benefits as of that date. For ongoing households already on the program, the Department encouraged State agencies to implement the change in the deduction amount as soon as possible on or after October 1, 2008, on a case-by-case basis, at the first opportunity to enter the household's case file. Prior to this change in the law, the caps on the dependent care deduction had not been adjusted for many years, and the caps no longer reflected the actual dependent care costs that low-income households pay. Eliminating the caps enables households to deduct the full costs of dependent care that are allowable and not already reimbursed by another program, and results in a benefit increase for some families with high dependent care costs.

How did the Department propose to revise the deduction for dependent care costs?

The Department proposed to amend §§ 273.9(d)(4) and 273.10(e)(1)(i)(E) to eliminate the caps on dependent care. In addition, the Department proposed to clarify that expenses for transporting dependents to and from care, and separate activity fees charged by the care provider that are required for the care arrangement, are also deductible as part of the actual costs of care.

The Department also proposed to incorporate into § 273.9(d)(4) longstanding guidance that limits dependent care to include care for children through the age of 15 as well

as incapacitated persons of any age that are in need of dependent care. The Department invited comments on whether the definition of ''elderly or disabled'' in 7 CFR 271.2 should be used to define an incapacitated person. Finally, the Department proposed to restore language that permits households to deduct dependent care costs if a household member needs care for a dependent in order to seek employment. A 1989 technical amendment to the regulations had removed the previously codified provision.

What dependent care issues did commenters focus on?

Overall, commenters supported the Department's proposal to remove the dependent care caps from the SNAP regulations. Commenters from the advocacy community strongly supported the proposals to include transportation costs and activity fees as part of dependent care expenses, but these commenters opposed the proposed limits based on age or incapacitation.

What concerns did commenters express about transportation-related dependent care costs?

Most of the 81 commenters that addressed dependent care changes enthusiastically supported the proposal to allow households to deduct transportation costs to and from dependent care facilities. Only one commenter opposed the proposal. However, some commenters, including several State agencies, expressed concern about the error-prone nature of determining transportation costs specifically related to dependent care and provided several suggestions to help reduce potential errors. Their suggestions included making transportation costs optional, permitting the use of standard transportation allowances (either developed by the Department or by individual States), and allowing States additional time to implement this provision since it will be new policy for some States. Concerning the potential that transportation costs associated with dependent care may be more error-prone, the Department notes that a number of State agencies have been allowing households to deduct dependent care related transportation costs for years and this has not been identified as a major source of quality control errors.

What is Federal policy on verifying child care costs?

Current regulations do not require verification of dependent care costs unless the amount being claimed is considered questionable, per § 273.2(f)(2). However, SNAP regulations at § 273.2(f)(3) also permit State agencies to verify on a project level basis or a statewide basis certain eligibility factors that are not otherwise required to be verified under Federal regulations.

Should State agencies require verification of transportation-related dependent care costs?

A number of commenters, representing both State agencies and advocates, argued that States should not have to verify transportation costs unless questionable. In particular, commenters noted the difficulty of verifying transportation costs related to dependent care. Many commenters from the advocacy community urged the Department to restrict States' use of the optional verification provision at § 273.2(f)(3) for transportation-related dependent care costs. While the Department understands the concern of these commenters, the Department declines the request to impose such a restriction. That is, State agencies have the option to verify transportation costs if questionable. This option allows States to be responsive to current information, such as QC data, which may indicate a need for verification of certain information, whether it be statewide or just in certain project areas. The provisions of § 273.2(f)(2) require that questionable items be verified on a case-by-case basis, but States must establish guidelines for determining what is questionable.

What are activity fees?

As discussed in the preamble to the proposed rule, an activity fee is an expense associated with a structured care program. The activity should both be necessary for the dependent to experience the typical daily activities offered in the care and enable a household member to be employed, seek employment, or pursue training or education to prepare for employment. We define activity fees in the final regulatory text as an activity or other fee associated with the care provided to the dependent that are necessary for the household to participate in the care. An activity fee does not have to be mandatory to be deductible under this provision, but it does need to be specific and identifiable as with all deductible dependent care costs. Examples of activity fees that may be deductible as dependent care costs include the cost of an art class for an after-school program or an adult day care program, additional equipment fees charged for attending a sports camp, or the cost of field trips sponsored by summer camps. Activity fees that are necessary for the dependent to experience the typical daily activities offered in care should be allowed.

What feedback did commenters provide on activity fees?

In the proposed rule, the Department requested that commenters provide feedback on the proposal to allow households to deduct separately identifiable activity fees that are necessary for the household to participate in or maintain care. The Department stressed its interest in receiving commenter input on activity fees since State agencies will be responsible for determining whether specific costs qualify as allowable activity fees. In particular, we asked commenters to address whether activity fees are identifiable additional charges paid by households that can be verified, if more detailed guidance was needed to determine allowable costs, and what specific conditions commenters would wish to see in a final rule.

Commenters generally approved of the proposal to allow activity fees. Some commenters addressed the preamble request for feedback on whether activity fees are easily identified and verified and whether more information or guidance is needed on activity fees. Generally, commenters requested clarification on activity fees without giving particular feedback. Eight commenters, mostly advocates, responded that FNS needs to clarify what is meant by activity fees; one State agency disagreed. Other commenters requested guidance on specific issues, such as whether activity fees for a home day care are allowable deductions and when an activity fee is required. One commenter writing on behalf of a group of eligibility workers indicated that identifying and verifying activity fees is dependent on State or local dependent care licensing requirements, and that unregulated or informal dependent care facilities are unlikely to have documented costs such as activity fees. The Department did not make any substantive changes due to the overall general nature of the comments. One technical correction was made. In the final regulatory text, the Department includes an activity or other fee associated with dependent care as an allowable dependent care cost.

What particular other costs may be deducted in caring for a dependent under the final rule?

Commenters, mostly from the advocacy community, requested clarification on other allowable costs related to dependent care, such as subsidy copays (70), payments made to individuals, related or unrelated, residing with the household but not receiving SNAP benefits (62), payments for the care of non-household members such as a relative that the household is responsible for (3), and payments made for reasonable fees including late fees (14). One commenter suggested there be a standard deduction for the costs.

Such dependent care costs are allowable if they are necessary for a household member to search for employment, or to accept or continue employment, training, or education in preparation for a job (see Section 5(e)(3) of the Act). For example, although the Department will not address other specific additional allowable costs in the regulatory language beyond transportation and activity fees, subsidy co-pays and late fees or application fees would meet the statutory definition at section 5(e)(3) of the Act. However, whether other dependent care costs mentioned by commenters involving household members or non-household members are allowed requires a closer examination of the specific situations to determine whether the costs would meet the statutory definition. If State agencies have questions about specific or complex situations, we recommend that they work with their FNS Regional Office to determine whether these costs qualify for the dependent care deduction.

Commenters also suggested that in order to address a persistent source of confusion, the final rule should specify that care is deductible even if provided by a relative as long as that person is not receiving SNAP benefits as part of the same household as the dependent receiving care. The Department agrees with this suggestion and has included it in the final rule.

Are dependent care costs incurred due to job search deductible?

Sixty-nine commenters requested that the final rule explicitly allow a deduction for dependent care costs incurred by households with individuals looking for work. The preamble to the proposed rule stated that the Department intended to reinsert language about the deductibility of dependent care costs incurred by job seekers into § 273.9(d)(4), which had been inadvertently dropped in a rulemaking in 1989. However, despite this stated intention, the proposed regulatory language at § 273.9(d)(4) did not actually include this language. We appreciate this observation from commenters and, to address this oversight, the Department is revising the proposed provision at § 273.9(d)(4) to allow household members who are seeking work to deduct dependent care costs.

How did commenters react to the age and incapacitation criteria for allowable dependent care costs?

Most commenters who addressed the provision (66) opposed both criteria and did not want to use the regulatory definition of ''elderly or disabled member'' to define ''incapacitation''; one State agency disagreed. In particular, commenters from the advocacy community opposed any restrictions on the dependent care deduction as long as the household is able to provide documentation if questioned by the State agency. We received conflicting comments as to the age restriction, with suggestions that the age be limited to children until their sixteenth birthday and that the deduction be permitted to children through their eighteenth birthday.

One commenter noted that households with older teens (16 years of age and older) may have legitimate dependent care needs not related to incapacitation, such as enrollment in outside-school care for safety, truancy, foster care or court-ordered supervision requirements. The commenter pointed out that 16-year-olds are required to register for work unless in school half-time or otherwise exempt from registering, but being required to register for work does not necessarily mean a 16 or 17 year old does not need supervision. The comment went on to argue that adolescents may need to be enrolled in after-school or summer programs due to an incapacity or disability. Parents may not have a government-funded option, or may have to private pay a fee for older children to participate in adult supervised activities.

Commenters also questioned what the Department meant by ''incapacitation'', which was not defined in the proposed rule.

What does the final rule require relative to limiting dependent care costs based on age or incapacitation?

While the limit on the use of the dependent care deduction with regard to age reflects longstanding guidance from 1987, the Department agrees that there are circumstances where a child 16 or older may still be in need of supervision and has revised this restriction in the final rule to include all children under the age of 18.

The other proposed criterion, incapacitation, accounts for persons who have some physical or mental limitation that requires them to receive dependent care. This also reflects longstanding guidance, although it does not appear to have been widely disseminated. The regulatory definition of disabled is stringent and the proposed definition would not necessarily capture the breadth of situations. The Department wishes to clarify that, for the purpose of this provision only, incapacitation refers to any permanent or temporary condition that prevents an individual from participating fully in normal activities, including but not limited to work or school, without supervision and that requires the care of another person to ensure the health and safety of the individual, or a condition or situation that makes a lack of supervision risky to the health and safety of that individual. By extending dependent care to those who are incapacitated, the dependent care needs of any SNAP household member expected to comply with work requirements, or who is working, in training or education programs, or seeking work, would be allowable as a deduction. The Department believes that this clarification provides both a reasonable consideration of the dependent care expenses of older youth and adults and a measure of protection to the program from abuse.

Allowable medical expenses may be deducted under the excess medical deduction or the dependent care deduction but not both provisions. Prior to the removal of the dependent care caps by Section 4103 of the FCEA, adult dependent care needs were still an allowable deduction under 273.9(d) as medical expenses. Individuals who meet the specific legal definition of ''elderly or disabled persons'' at § 271.2 have been able to deduct dependent care monthly costs over the $35 threshold of the excess medical deduction as described in § 273.9(d)(3)(x). This provision allows for the costs of ''maintaining an attendant, homemaker, home health aide, or child care services, housekeeper, necessary due to age, infirmity, or illness.'' Allowing a household with an elderly or adult member with a disability to deduct the entire monthly dependent care costs under the dependent care deduction provision rather than the excess medical deduction provides these households with an additional $35 per month in

dependent care deductions. The Department is revising the language at §§ 273.9(d)(3)(x) and 273.9(d)(4) to ensure that dependent care costs are not double counted under both the dependent care deduction provision and the excess medical deduction provision.

Accordingly, for the reasons noted above, the Department is revising the provision from the proposed language at § 273.9(d)(4) to instead specify that dependent care expenses incurred during a job search are deductible, provided the costs are not already paid by another source on behalf of the household, and to clarify that the costs of care provided by a relative may be deducted so long as the relative providing care is not part of the same household as the child or dependent adult receiving care. The Department is also revising proposed § 273.9(d)(4) and current § 273.9(d)(3)(x) to state that the same dependent care costs for a qualifying household member who is elderly or has a disability may be deducted under § 273.9(d)(4) or § 273.9(d)(3)(x) but not both.

6. Asset Indexation § 273.8(b)

How did the law change SNAP asset limits?

Section 4104(a) of the FCEA amended Section 5(g) of the Act (7 U.S.C. 2014(g)) to mandate that current asset limits be indexed to inflation, rounding down to the nearest $250, beginning October 1, 2008.

How did the Department propose to implement this change in SNAP regulations?

The Department proposed to amend § 273.8(b) to specify that the asset limits are indexed to inflation as of October 1, 2008, and adjusted on October 1 of each following year. As mandated by the Act, the maximum allowable financial resources shall be adjusted and rounded down to the nearest $250 to reflect changes in the Consumer Price Index for the All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor for the 12-month period ending the preceding June. Each adjustment shall be based on the unrounded amount for the prior 12-month period.

What comments did the Department receive on this proposal?

Five commenters addressed this provision. Three commenters approved of the methodology in the proposed rule. One State agency argued that the provision would be difficult to administer as it only affects applicants, and suggested that the Department issue guidance to explain how to handle asset increases for new and ongoing cases. One member of the public stated that the asset limit for a person with a disability should be raised to $5,700.

As stated in the proposed rule, the provision will not adversely affect those currently participating. Participating households have already met a lower resource limit. For example, when the resource limit for the elderly or those with a disability increased to $3,250, effective October 2012, no action was required for ongoing cases of elderly participants because they already met the existing $3,000 limit. Changes to households' resources will be captured on recertification consistent with existing program requirements. The Department has considered the comments and has determined that additional guidance is not necessary to implement this provision successfully.

For the reasons noted above, FNS will adopt in this final rule the provision at § 273.8(b) as proposed, with one technical correction revising the reference to the inflation adjustment procedure at § 273.8(b)(1) for both households with a member who is elderly or has a disability and all other households.

7. Exclusion of Retirement Accounts From Resources § 273.8(e)(2)

How did the law change the handling of retirement accounts as a SNAP resource?

Section 4104(b) amended Section 5(g)(7) of the Act (7 U.S.C. 2014(g)(7)) to exclude from resources any funds in a plan, contract, or account, described in sections 401(a), 403(a), 403(b), 408, 408A, 457(b), and 501(c)(18) of the Internal Revenue Code (IRC) of 1986 and the value of funds in a Federal Thrift Savings Plan account as provided for in 5 U.S.C. 8439.

How did the Department propose to codify this provision in the SNAP regulations?

The Department proposed to amend SNAP regulations at § 273.8(e)(2) to exclude funds from countable resources if they are in accounts that fall under any of the sections of the IRC as noted above.

How did commenters react to the proposed provision?

The Department received 85 comments generally approving the proposed provision; 81 commenters requested that the Department provide detailed guidance on identifying tax-exempted accounts. Nine of these commenters recommended that we should work with the IRS to develop guidelines for identifying the tax-exempted accounts that are excludable. One commenter believes the Department's generic use of the term plans such as ''408A plans'' implies that other 408A accounts or contracts are not excluded. The commenter recommended the Department amend the regulations to consistently refer to all retirement accounts excluded under this provision. Two commenters recommended that the language be more open-ended, allowing for new programs to be added as Congress approves without the need to do a new rule. The Department believes that the proposed language regarding 408A accounts is clear and will adopt the provision as proposed.

Eleven commenters recommended increasing the $1,500 limit on the value of funeral agreements specified in § 273.8(e)(2), arguing that the $1,500 limit is outdated and unrealistic. Commenters also suggested that the Department adjust the limit for inflation by using the Consumer Price Index for all Urban Consumers. The Department agrees with the commenters that the value of funeral agreements is out of date. However, because the original intent of this limit was to conform SNAP to Aid to Families with Dependent Children policy, which no longer exists, continuing to have a limit is unnecessary. The final rule excludes the value of funeral arrangements from SNAP resources altogether.

While most commenters supported the retirement account provisions of the proposed rule, several urged the Department to issue guidance on how to identify the types of retirement accounts on the source documents that are excludable. One commenter acknowledged the chart the Department included in August 29, 2008 guidance as an important first step in helping identify the type of retirement accounts excluded under this provision (see *http://www.fns.usda.gov/snap/questions-and-answers-certification-issues-2008-farm-bill-2*). This commenter concluded that households would need to provide verification that a particular retirement account is excluded. The Department notes that Federal regulations do not require the verification of resources. Information on resources must be verified only if the State agency has opted to require verification (see §§ 273.2(f)(2) and 273.2(f)(3)).

The Department has considered these comments and believes the policy guidance on exclusion of retirement accounts from resources provides sufficient guidance in this area and

detailed and accurate information on which plans are excluded. In view of this, any additional guidance that the Department may issue in the future will address new questions or issues as they arise.

In this final rule the Department also made minor technical changes to streamline the language from the proposed § 273.8(e)(2)(v) on tax-preferred accounts. Finally, legislation subsequent to this proposed rule added funds in Achieving a Better Life Experience (ABLE) program accounts as tax-favored savings accounts for people with disabilities under IRC Section 529A through the Tax Increase Prevention Act of 2014, Public Law 113–295. The Department is adding qualified ABLE programs as excludable resources at § 273.8(e)(2)(ii), consistent with Department policy issued on April 4, 2016.

8. Exclusion of Education Accounts From Resources § 273.8(e)(20)

How did the law change the handling of education accounts as a SNAP resource?

Section 4104(c) of the FCEA, which amended Section 5(g)(8) of the Act (7 U.S.C. 2014(g)(8)), excluded education savings accounts described in Sections 529 and 520 of the IRC from resources in SNAP eligibility determinations. The FCEA provided the Secretary with discretion to exclude other education savings accounts.

How did the Department propose to codify this provision in the SNAP regulations?

The Department proposed to add a new paragraph § 273.8(e)(20) to exclude all funds in education savings accounts from resources if the funds are described in section 529 or section 530 of the IRC. (Section 529 of the IRC describes qualified tuition programs that allow a contributor to contribute funds or purchase tuition credits for qualified education expenses for a designated beneficiary. Section 530 of the IRC describes Coverdell Education Savings Accounts, which are trusts created to pay the education expenses of the designated beneficiary.) The Department would also maintain discretion to exclude other tax-preferred education savings accounts in the future.

How did commenters react to the proposed provision?

Virtually the same number of commenters that provided comments on the proposed exclusion of qualifying retirement accounts also provided comments on the exclusion of qualifying education accounts, the only difference being that one hunger advocate commented only on the retirement account provision and one nonprofit commented only on the education account provision. As with the retirement account provision, all commenters generally approved of the proposal.

Several commenters urged the Department to exercise its discretion by excluding any future education accounts if the fund is described in section 529 or section 530 of the IRC, as provided in the FCEA. The Department cannot anticipate changes in the tax law or predict how future education savings accounts will be structured. Therefore, the Department will not amend the regulatory language from the proposed rule to accommodate this comment.

Commenters urged the Department to issue guidance on how to identify the type of education accounts excluded under this provision. The Department appreciates the commenters' recommendation and may develop guidance outside this rulemaking to assist State agencies identify qualified tuition programs described in sections 529 and 530 of the IRC.

One commenter suggested the location of the exclusion of retirement accounts at 7 CFR 273.8(e)(2) while educational accounts are excluded at 7 CFR 273.8(e)(20) may cause some readers to miss the educational accounts exclusion. The Department considered the comment but decided the location of the provisions was not sufficiently critical to relocate the educational accounts exclusion.

In this final rule the Department also made minor technical changes to streamline the language from the proposed § 273.8(e)(20)(iii) on education savings accounts.

9. Expansion and clarification of simplified reporting provisions, § 273.12(a)

How did the law expand simplified reporting?

Section 4105 of the FCEA removed a restriction in section 6(c)(1)(A) of the Act (7 U.S.C. 2015(c)(1)(A)) that prohibited periodic reporting for certain households, including homeless, migrant and seasonal farm workers, and adults who are elderly or have a disability in households with no earnings. The previous statutory restriction discouraged State agencies from including these households in their simplified reporting systems. As amended by the FCEA, Section 6(c)(1)(A) of the Act now limits the frequency of periodic reporting for homeless and migrant or seasonal farm worker households to every 4 months and for households in which all adult members are elderly or have disabilities with no earned income to once a year. To be consistent with current law, regulations published on January 29, 2010 (75 FR 4912), extended simplified reporting to all households that are certified for at least 4 months.

Did commenters address these proposed changes to simplified reporting?

Yes, the Department received several comments on the proposed language at § 273.12(d)(6)(iii)(B) pertaining to the due dates for periodic reports. One commenter suggested using language similar to that provided for filing monthly reports at § 273.21(h)(1)(i). Another commenter stated that requiring the periodic report between 4 months and 6 months after certification was too rigid a time period and risked the possibility of case closure due to procedural reasons. This commenter also noted that the proposed language on due dates for receipt of periodic reports is too vague and needs to specify the period of time for which changes must be reported.

Although these comments are directed to a paragraph about simplified reporting that the Department had proposed to clarify, the commenters focused on language that had not actually been updated but had been included only as part of a proposed reorganization of § 273.12. For this reason, the Department considers many of these comments to be outside the scope of the proposed rule and will not amend the proposed text to incorporate these comments. However, the Department appreciates the feedback and encourages commenters to resubmit these comments in any future rulemaking that addresses substantive changes to client reporting systems. As discussed below, the Department decided to make certain changes in this rule that were recommended by a commenter that will clarify the regulations.

How did the Department propose to reorganize § 273.12?

The Department proposed to reorganize § 273.12 to improve the readability of the section and to clarify aspects of current reporting requirements applicable to the reporting systems covered in this section of the SNAP regulations. Currently, there are four SNAP client reporting systems authorized in SNAP regulations. Three of these client reporting systems—change reporting (also known as incident reporting), quarterly reporting,

and simplified reporting—are covered in § 273.12. Monthly reporting is covered in § 273.21.

The proposed change would have reorganized § 273.12 so that all provisions applicable to each of the three reporting systems contained in this section of the regulations (change, quarterly, and simplified) would be located together for ease of reference.

What comments did the Department receive on the proposed reorganization of § 273.12?

The Department received comments from 66 individuals and groups about the proposed changes to this section of SNAP regulations. Commenters opposed specific provisions within § 273.12, most of which have been part of codified regulations for years and were not proposed to be revised. Three commenters addressed the proposed reorganization, and they were generally critical of the proposal. Several commenters pointed out that our proposed reorganization was duplicative because the same provisions that applied to all three reporting systems were repeated three times in the reorganized text. They recommended an alternate approach to reorganizing reporting system provisions and also noted numerous technical errors in the proposed reorganized text. They recommended that the Department combine all periodic reporting systems—quarterly, simplified and monthly reporting systems—into a single subsection and extend the client protections that they believe to be part of the monthly reporting system to quarterly and simplified reporting.

Does this final rule include a reorganization of § 273.12?

No. In view of the negative response from commenters, the Department has decided to exclude the proposed reorganization of client reporting systems in the final rule. The number and specificity of comments about codified regulations on client reporting systems indicates that this is an area of program operations that needs a more detailed approach to improve clarity over and above a reorganization of text. Indeed, the complexity of the issues as well as the continuing evolution of client reporting systems, particularly as State agencies modernize their eligibility and certification systems, indicate such a revision warrants a separate rulemaking. Thus, although we believe that regulations on client reporting systems would benefit from reorganization, we agree that more substantive changes should be considered beyond the proposed reorganization.

What changes to § 273.12 are made in the final rule?

The Department will adopt the proposed changes that clarify the timeframes for periodic reporting by certain households under simplified reporting in § 273.12(a)(5)(iii)(A) and § 273.12(a)(5)(iii)(B). The Department is also making edits to the requirement to report changes in vehicle assets at § 273.12(a)(1)(iv) and in liquid resources at § 273.12(a)(1)(v). These changes are made to clarify that households need not report changes in vehicles and liquid resources, if those resources are excluded from the SNAP eligibility determination per § 273.8. In addition, based on comments, the Department is clarifying the provision dealing with State action on ''unclear'' information at § 273.12(c)(3), and the requirement regarding the timeframe during which households must report changes in income at § 273.12(a)(2).

The comments regarding State action on unclear information obtained by a State focused on data matches, but also apply to any information that is not considered to be verified upon receipt. The commenter pointed out that the information obtained may be old, outdated, or otherwise inaccurate. The commenter suggested that States be prohibited from requiring households to provide verification as a result of a data match unless the information is current and suggests the household is ineligible.

The Department agrees that many data matches that deal with income are ''old'' because income data is typically reported by quarter and is not available until a month or two after the end of a quarter. Data from new hire, employer, and unearned income data bases are generally more current, but not all data matches will be made prior to the household's current participation. This is why both the current and proposed rules treat such information as unclear.

Some income matches may show minor discrepancies with the income reported by the household, may be based upon data that may be several months old, and may not have been required to be reported. When this occurs, State agencies sometimes follow up using a Request for Contact (RFC). Households that struggle to understand and respond timely to the State's inquiries can inadvertently lose eligibility, even if the unclear information was not accurate or would not have affected eligibility. If a household does not respond to a Request for Contact, they could ultimately be terminated, have to reapply and experience a loss of benefits in the process; even if the matching information was outdated or generally consistent with the information that the household had already reported to the State. This can clearly create an access issue for eligible households. It also contributes to ''churning'' where households go on and off the program, losing benefits in the process and adding to the States' administrative burdens.

Some data (usually from governmental sources) that provide current information directly from the specific source may be considered to be verified upon receipt and can be acted upon without requiring contact with the household. If a State receives current information that is verified upon receipt—for example, because it is from a highly reliable government source—the State must act on that change using the other information it has in the case file, such as removing income for an individual no longer in the household. If that action results in a reduction in benefits, the State must issue a notice of adverse action that explains why the change was made, so that if a household disagrees with the underlying data that resulted in the change, the household has the ability to provide evidence to the State.

In response to comments, under the final rule, States may not follow up on unclear information with an RFC unless the information the State receives: (1) Is less than 60 days old; and (2) reflects information that, if true, was required to be reported under the applicable reporting requirements in 7 CFR 273.12 for the reporting system to which the household has been assigned. For example, in the case of households assigned to simplified reporting, the unclear information would, if true, place the household's income above 130 percent of the federal poverty line. Or, in the case of households assigned to change reporting, the information, if true, would result in an income change that was above the $100 reporting threshold or reflect a change in household composition.

Under simplified reporting, households are not required to report changes in income outside of the periodic report or a recertification action unless the change would result in an income level above the household's gross income limit as specified at § 273.12(a)(5)(v). It is inconsistent to tell households they are not required to report changes in income below this limit and then, based upon a data match, require that they respond to information (and potentially lose benefits if they fail to respond) that does

not appear to exceed their income limit. Therefore, this rule prohibits States from following up on unclear information that does not meet the reporting criteria for simplified reporting described in 273.12(a)(5) until the next recertification action or periodic report.

Likewise, a similar policy will be applied to households assigned to change reporting. For these households, a State would only follow up on current, unclear information if the information would have been required to be reported if correct. It is also inconsistent to tell households they are not required to report changes in income below $100 and then, based upon a data match, require that they respond to a request for information (and potentially lose benefits if they fail to respond) that does not appear to exceed this threshold. Thus, unclear information that suggests income changed by less than the $100 income change reporting threshold would not be followed up on. Therefore for households subject to change reporting, this rule prohibits States from following up on unclear information that does not meet the criteria for what must be reported in 272.12(a)(1) until the next recertification action or periodic report.

For example, at application a household reports that it has earned income based upon working between 25 and 32 hours a week at $12 an hour. The State verifies the most recent 30 days of income and correctly projects about $1,400 a month in earned income over the certification period based upon working about 27 hours per week. Six months into the certification, an automated data match indicates that the income averaged $1,600 per month for a three-month period. Under the final rule, for a household subject to simplified reporting, a State may not pursue the matter until the household applies for recertification since the income does not exceed the gross income limit and was not required to be reported. For a household subject to change reporting, a State would pursue the matter with an RFC because this discrepancy exceeds the $100 reporting threshold.

Under any reporting system, unclear information that indicates that the information that the State used at the time of certification may have been incorrect is a different matter. States should consistently follow up on new information that indicates differences with the information used at the time of certification as this new information is not a ''change'' in circumstances subject to reporting and can represent integrity issues. For example, if a work number data match shows earnings in the month of certification that a household member failed to report during the certification process, the State should follow up with an RFC and potentially file a claim against the household for any resulting over-issuance if the household does not provide evidence that the data are incorrect. If the earnings occurred after certification (and was thus a change in circumstances) and did not appear to bring the households eligibility into question, in the case of a household assigned to simplified reporting, the State would follow up on the information at the next certification action or periodic report, but not before.

In the case of household composition changes, if the information is verified upon receipt, the State must take action, regardless of the household's reporting system. Furthermore, a State may not issue an RFC based on unclear information that is not current, or is about a change in household composition that a household would not have been required to report, if accurate.

There are two types of household composition changes that follow different procedures. Under the final rule, if a State receives match information pursuant to a match described in § 272.13 or § 272.14, the State will follow up with a notice of match results and use the procedures in § 273.12(c)(3)(iii). The Department makes conforming changes at § 272.13(b)(4) and § 272.14(c)(4) to reference the verification process in § 273.12(c)(3)(iii).

For households subject to change reporting, if the household fails to respond to the notice of match results or does respond but fails to provide sufficient information to clarify its circumstances, the State agency must issue a notice of adverse action as described in § 273.13 that terminates the case.

For any households subject to reporting requirements other than change reporting, if the household fails to respond to the notice of match results or does respond but refuses to provide sufficient information to clarify its circumstances, the State agency must act on that change using only the other information it has in the case file, such as removing an individual that is no longer in the household and removing his or her income. If benefits are decreased or the household is to be terminated from program participation, the State agency must issue a notice of adverse action as described in § 273.13.

The notices of match results must clearly explain what information is needed from the household and the consequences of failing to respond to the notice as explained above.

For information that does not meet the above criteria related to when a State must follow up on unclear information, the State agency shall not act or follow up on the unclear information until the household's next recertification action or when its next periodic report is due. However, a State may follow up with a household to provide information on a voluntary basis if the information would result in an increase in benefits, but the State may not take adverse action if the household does not respond. The final rule also clarifies that unclear information is information that is not verified or verified information where the effect on the household's certification is not apparent. These provisions are in this final rule at § 273.12(c)(3).

FNS will be updating Quality Control (QC) materials as necessary to ensure that if States follows the requirements laid out in the final rule and households reports any changes in accordance with their reporting system's requirements, there is no household or agency error.

Comments were also received regarding some important differences between the regulatory requirements governing the procedures for monthly reporting at § 273.21 and periodic reporting in § 273.12(a)(5). The comments pointed out that the monthly reporting provisions offered certain protections to households that failed to file required reports on time that were absent from the periodic reporting provisions. The Department examined these differences and included changes in this final rule that would better conform the provisions of the two reporting systems. The additions to the periodic reporting provisions include a requirement to provide household with a notice reminding them of the need to submit a periodic report and the option of reinstating households that provide reports before the end of the issuance month. The final rule also includes language that codifies current policy and practice regarding using a combined report form for SNAP and TANF or Medicaid and that non-applicant household or family members need not provide SSNs or information about citizenship or immigration status on periodic report forms.

In addition, based on a comment received, the Department has made a clarification by referencing the asset limits as indexed to inflation as described in § 273.8(b). Therefore, with this modification, we will adopt the proposed clarification on household requirements for reporting changes of

the value of liquid assets. This provision is found in this final rule at § 273.12(a)(1)(v). This final rule also adopts the Department's proposed language on reporting the acquisition of licensed vehicles at § 273.12(a)(1)(iv).

The Department also received a comment regarding the need to index the amounts of change to income that trigger a report for households assigned to change reporting and the need to make the amount for general assistance (GA) consistent with unearned income generally. The Department agrees with this comment and has increased the amount of change in GA benefits that will require a household to report (in cases that are not jointly processed.) from $50 to $100. The Department has also indexed the $100 amounts that trigger household's reporting requirements to the Consumer Price Index (CPI).

Beginning in FY 2018, and for every fiscal year thereafter, the dollar amounts will be adjusted and rounded to the nearest $25 to reflect changes in the CPI for the All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor (for the 12-month period ending the preceding June).

Finally, based upon a comment received, the Department has clarified the requirement regarding the timeframe in which State agencies shall require households to report changes in income. Current regulations say that the State agency has the flexibility to require the change in income to be reported as early as 10 days from the date that the household becomes aware of the change or as late as 10 days from the date that the household receives the first payment attributable to the change. This flexibility has created confusion when a household reports a change in income, but cannot verify the new amount. If the household waits to report until it has a paycheck in hand, the time spent waiting for the verification may be beyond the required timeframe. Therefore, to improve consistency with reportable changes in income, § 273.12(a)(2) has been modified to require reporting within 10 days of receipt of the first payment attributable to the change. Additionally, § 273.12(a)(2) of the final rule retains language that appeared in the proposed rule at 273.12(b)(6)(ii) that provides States with the option to require that households report changes within 10 days of the end of the month in which the change occurred.

10. Transitional Benefits Alternative (TBA) §§ 272.2, 273.26, 273.27, 273.29, 273.32

How did the FCEA change the TBA option?

Section 4106 of the FCEA amended Section 11(s)(1) of the Act to permit State agencies to provide transitional SNAP benefits to households with children that cease to receive cash assistance under a State-funded cash assistance program (SFCA). Prior to this change in the law, States had the option to provide transitional SNAP benefits only to households that stopped receiving Federally-funded TANF assistance.

How did the Department propose to implement this provision?

The Department proposed to amend State plan requirements at § 272.2(d)(1)(xvi)(H) and Subpart H in part 273 of the SNAP regulations, to specify that a household's eligibility for TBA may be based on the termination of SFCA in addition to the termination of TANF. The Department proposed to specify that a household may qualify for an additional TBA period if the household participates in a SFCA program that continues after TANF has ended, and then the household subsequently stops participating in the SFCA. The Department also proposed that, in administering TBA based on the termination of SFCA, State agencies would follow the same procedures they currently use to administer TBA based on termination of TANF. In making this change, we proposed to add SFCA to the following provisions in Subpart H of part 273:

- § 273.26—introductory paragraph and paragraph (a);
- § 273.27(a) and (c);
- § 273.29(c) and (d); and
- § 273.32.

What types of cash assistance are covered under TBA?

Sixty-two commenters requested clarification on the eligibility of households receiving cash assistance, TANF or State Maintenance of Effort (MOE) funded assistance, or SFCA. Specifically, they requested clarification that the exit must be from cash assistance for both TANF and State-funded benefits programs. One commenter requested examples of what would be considered a SFCA program.

Section 11(s)(1)(A) of the Act authorizes States to provide TBA for a household that ceases to receive cash assistance under a State program funded under Part A of Title IV of the Social Security Act. TANF is authorized under part A of Title IV of the Social Security Act, and the cash assistance that eligible low-income households receive may be funded in part by the TANF Federal grant or by State MOE funds. The Department is clarifying the description of TANF at § 273.26(a)(1) as the program authorized under Part A of Title IV of the Social Security Act, and that Federal cash assistance may include both TANF and State MOE funds.

Based on the language in Section 11(s)(1)(B) of the Act, the Department is clarifying in § 273.26(a)(2) that SFCA programs include State-funded programs that provide cash assistance to families with children. These SFCA programs are separate and distinct from State-level programs funded by TANF. An example of an eligible SFCA program would be a State general assistance program that provides cash assistance to families with children. Programs that are not intended for families with children or do not provide a cash benefit are ineligible under this provision. TBA ensures that households with children that are leaving cash assistance for either TANF or State-funded benefits programs can continue to meet their nutritional needs as they transition from these cash assistance programs to the workforce.

What about programs funded by local governments?

Ten commenters requested clarification on whether SFCA programs that rely on local funds would qualify under this provision. Several commenters noted that some States require local governments to contribute funding to statewide SFCA programs. FNS guidance issued on August 29, 2008, (see *http://www.fns.usda.gov/questions-and-answers-certification-issues-2008-farm-bill-2*) stated that county-funded programs were not eligible SFCA programs for TBA. While we continue to hold to this guidance, we agree with commenters that SFCA programs may include local level funds as part of the funding stream. Thus, the Department will amend proposed § 273.26(a)(2) to clarify that eligible SFCA programs that are funded by both State and local funds provided that the programs are intended to be statewide.

What is the relationship between participation in TANF and SFCA and receipt of TBA?

Two commenters requested clarification on eligibility for TBA when participation in the SFCA program is concurrent, sequential or provided as an alternative to TANF. They also requested that the regulatory language clarify that State agencies may provide

TBA for households leaving TANF for SFCA and again when leaving SFCA. In the August 29, 2008, guidance previously identified, the Department indicated that a household may receive TBA when leaving TANF and again when leaving SFCA, resulting in an additional period of TBA eligibility for the household. If participation in a SFCA program is ending, whether concurrently with TANF or as an alternative to TANF, the household would be eligible for one period of TBA up to 5 months, as described in the State's plan of operation. The Department amended the proposed § 273.26(b)(3) to reflect that the SFCA program may be concurrent, sequential, or alternative to TANF.

What issues raised by commenters on TBA are considered outside of the scope of the rule?

Commenters raised a number of questions or asked for clarifications on issues that were not addressed in the proposed rule. Such comments addressed aspects of TBA that the Department did not propose to revise. The Department included the existing TBA regulations in the proposed rule in order to incorporate the change in the law with regard to SFCA programs. The Department did not propose amendments to the basic provisions of TBA that are codified in the SNAP regulations. The more frequently mentioned comments included requests for clarification that households with partial sanctions in TANF or SFCA may still receive TBA (63 commenters) and requests for further explanation on the issue of TBA being a frozen benefit that may not be changed except in two instances (62 commenters). For this reason, we consider such comments to be outside the scope of the proposed rule because they did not specifically address issues related to the proposal to add of SFCA programs to the TBA regulations.

We appreciate the effort that commenters put into providing these comments. As with the comments received on client reporting systems, it appears that commenters, particularly those in the advocacy community, have noted a number of TBA-related issues that could benefit from additional guidance. The Department appreciates the thoughts and feedback on TBA issues, and encourages commenters to re-submit these suggestions in future rulemakings.

Were any additional changes made based upon the comments received on TBA?

Yes, one commenter pointed out that the regulations should be revised to clarify that SNAP households should be able to shift from the transitional benefit period back to the regular SNAP program based on a joint TANF/SNAP application. The commenter believed that the TANF application should be treated as a joint TANF/SNAP application, consistent with current 7 CFR 273.2(j). As required for all SNAP non-expedited applications, the State would have 30 days to determine the household's SNAP eligibility using information from the new application. Consistent with these changes, the commenter suggested that the TBA notice be revised to state that households that reapply for TANF cash assistance will be asked to reapply for SNAP at the same time. The commenter also recommended revising the regulations to acknowledge that the State agency may adjust the SNAP benefit to account for automatic annual changes in benefit rules, such as the annual cost of living, standard deduction adjustments and excess shelter deduction cap adjustments. The Department agrees that a revision to the final regulation is needed to clarify this process and made the necessary changes.

The Department is also making minor changes to clarify 273.26(b) and (d) to add MOE and clarify that SFCA may be received concurrently, sequentially or alternatively to TANF, based upon comments. In addition, the Department is amending § 273.27 to again include the State MOE funds and clarify that States need not obtain additional information from household prior to their participation in TBA. Finally, based on a comment that the Department is amending § 273.29 and § 273.32 to clarify that TBA households applying for TANF or SFCA benefits shall be jointly processed for SNAP benefits.

One commenter noted that while 40 States have sanction policies that terminate cash assistance because of noncompliance, it is also common for States to reduce the cash assistance benefit amount by removing the individually sanctioned household member. The Department appreciates this insight and is altering the regulatory language to clarify that when a household has a member who has been sanctioned, the remaining eligible household members may receive transitional SNAP benefits if the cash assistance ends for another reason.

11. Increasing Benefits for Small Households: Minimum Benefit Increase §§ 271.2 and 273.10(e)(2)(ii)(C)

What is the legal basis for raising the minimum benefit?

The Food Stamp Act of 1977 established a monthly minimum benefit of $10 per month for one-person and two-person households, and the amount has not been adjusted since that time. Section 4107 of the FCEA amended section 8(a) of the Act (7 U.S.C. 2017(a)) to increase the minimum benefit amount for one-person and two-person households from $10 to eight percent of the maximum allotment for a one-person household, rounded to the nearest whole dollar.

What did the Department propose regarding the minimum benefit?

The Department proposed to amend the regulations at § 273.10(e)(2)(ii)(C) to incorporate the FCEA provision indexing the minimum benefit amount to eight percent of the maximum allotment for a one-person household, rounded to the nearest whole dollar. In addition, the Department proposed to update the definition of minimum benefit in § 271.2 to remove the reference to the former minimum benefit amount of $10 and specify that the minimum benefit shall be based on the provisions of § 273.10.

How did the public respond to the minimum benefit proposal?

Sixty-one commenters generally approved of the proposal regarding the minimum benefit. Fifty-eight commenters suggested that the Department ensure that States with combined application projects (CAPs) and other demonstration projects make annual updates on a timely basis. Eight commenters requested general guidance. One individual generally agreed with the proposal, but suggested that the minimum benefit amount should be $50.

The Department appreciates commenters' feedback. The FCEA required the increase of the minimum benefit and the Department made a straightforward update to the regulations to implement it. Existing procedures and requirements surrounding the minimum benefit remain. The Department is adopting the provisions as proposed. Any additional guidance will be provided outside of the rulemaking process.

12. Employment and Training (E&T): Funding for Job Retention Services, § 273.7(e)(1)

What changes did the Department propose to make to the E&T program?

The Department proposed to implement Section 4108 of the FCEA, which amended Section 6(d)(4) of the Act, to add job retention services of up to 90 days as an allowable E&T component. The Department proposed to revise the SNAP regulations at § 273.7(e)(1) to incorporate this change. We received 64 comments in total on this provision.

Will the Department permit State agencies to determine when the 90 days of services start?

The Department received 61 comments requesting that the rule specify State agency discretion on the start date of job retention services. The Department agrees that individual circumstances may warrant job retention services that begin at various times, such as on the day a job offer is accepted, the day the individual reports the information to his or her E&T case manager, the first day of the job, or other time based on the availability and type of services. Therefore, the Department will permit State agencies to identify when the 90 days of job retention services start.

The Department also received one comment requesting that job retention services be available to an E&T participant for each new job the individual obtains. The Act provides for a period of not more than 90 days of job retention services after an individual who received E&T services gains employment. For example, if an individual gains employment through a new job, receives 90 days of job retention services, and then later finds a different job, he or she would generally not be eligible for a new 90-day period of job retention services. However, if the individual re-engaged in E&T services and then gains new employment, he or she would be eligible for additional job retention services. For example, there may be circumstances where an individual participates in job search, gains employment and receives 90 days of job retention services. This individual may later reengage with E&T after a job loss to search for work or obtain career or technical training to find a better job and could qualify for an additional 90 days of job retention services. The Department does not want to limit State agencies in helping clients obtain regular employment with good wages and career progression. We understand that State agencies are in a better position to determine when job retention services might be appropriate for a new hire and the Department is allowing for State agency flexibility for this issue in § 273.7(e)(1)(viii).

Because job retention services are an E&T component, they need to be connected to receipt of SNAP even as we recognize that they may not begin until after a job commences and, in some cases, a household has left the SNAP program. The Department is taking this opportunity to clarify that an individual must be receiving SNAP benefits in the month of or the month prior to beginning job retention services. The Department is amending § 273.7(e)(1)(viii) in this final rule to this effect.

Are job retention services available to those who previously received E&T services, whether or not it led to employment?

The Department received one comment asking whether job retention services would be available to E&T participants if the components they participated in did not lead directly to employment. The Act provides that these services intend to ensure job retention after an individual who received E&T services gains employment. The Act does not require a link between the E&T activity and employment itself. Additionally, we recognize that it may be difficult to establish a link between participation in an E&T component and gained employment when there is a gap in services or a component does not have a direct link to a job. Therefore, the Department is not requiring evidence of a link between an E&T component and job entry in order for the State agency to provide job retention services. State agencies have discretion on the amount of time that may pass between an E&T component and start of job retention services. However, this rule does require that the household must have been receiving SNAP in the month of or the month prior to beginning job retention services.

Are job retention services limited to those who leave the program due to increased earnings?

The Department received 62 comments stating that the proposed rule unnecessarily limited job retention services to individuals losing SNAP benefits as a result of increased earnings. The comments pointed out that there may be circumstances such as where someone leaving SNAP would not have increased earnings but would need job retention services, such as an individual who took a job with reduced hours at a good wage with the hope that hours would increase or a lower-paying job with the opportunity for quick promotion.

The Department agrees that there may be circumstances where job retention services are appropriate for households leaving SNAP. However, there may also be circumstances where an individual or household is leaving SNAP due to an intentional program violation or failure to comply with SNAP work requirements without good cause. Therefore, the Department is clarifying in § 273.7(e)(1)(viii) that State agencies may extend job retention services to individuals who participated in another E&T component and are leaving SNAP for any reason other than a disqualification. As provided in this rule, the State agency may not disqualify an individual who refuses or fails to comply with job retention services.

The Department is taking this opportunity to clarify that an individual need not complete an E&T component in order to start receiving job retention services. For example, an individual assigned to two months of job search may find a job after two weeks and would then be eligible for job retention services.

Does the 90-day limit apply to case management?

The Department received one comment asking for clarification on the limits of case management. State agencies may provide E&T case management to participants as long as a participant is engaged in an E&T program or component. Since job retention is an E&T component, individuals receiving job retention services are eligible for case management up to the 90-day limit.

Are child care and transportation allowable participant reimbursements under a job retention component?

The Department received 60 comments requesting that child care and transportation be included as allowable participant reimbursements under a job retention component. The Department omitted transportation and dependent care from the list of allowable services and reimbursable participation costs in the preamble to the proposed rule because Section (6)(d)(4)(I) of the Act specifically provides for transportation and dependent care as allowable E&T participant reimbursements. The Department is clarifying that transportation and dependent care are allowable participant reimbursements under the job retention component,

including for individuals no longer receiving SNAP.

13. Application Signature Systems §§ 273.2(c)(1), 273.2(c)(3) and 273.2(c)(7)

What is the statutory authority for the proposed changes regarding signatures?

Section 11(e)(2)(C)(i) of the Act allows for various types of signatures. Section 4119 of FCEA amended section 11(e) of the Act (7 U.S.C. 2020(e)) to permit a State agency to accept telephonic signatures, subject to certain conditions. These conditions, described at Section 11(e)(1)(C)(ii) of the Act, require that a State agency:

- Record for future reference the verbal assent of the household member and the information to which assent was given;
- Include effective safeguards against impersonation, identity theft and invasions of privacy;
- Not deny or interfere with the household's right to apply in writing;
- Promptly provide to the applicant a written copy of the complete application with instructions for a simple procedure to allow correction of any errors or omission;
- Comply with all statutory provisions for processing applications described at Section 11(e)(1)(B) of the Act;
- Satisfy all requirements in the Act and other laws applicable to SNAP and that the date of the verbal assent is considered to be the date the application is signed; and
- Comply with all other standards established by the Secretary.

In the proposed rule, the Department used the term ''spoken signature'' to include means of assenting to information other than written or electronic signatures, with the most obvious example being an interactive interview with a SNAP household over the telephone. However, the term ''spoken signature'' has resulted in confusion and questions as to whether a ''spoken signature'' and a ''telephonic signature'' is interchangeable.

To clarify this confusion, the Department uses the term ''telephonic signature'' in this final rule, which more directly reflects the statutory language. The language in Section 4119 refers to the option for a ''telephonic signature'', and lays out requirements for a system to capture telephonic signatures allowing households to sign an application through a recorded verbal assent over the telephone. Although the Department no longer uses the term ''spoken signature'' in this final rule, an in-office spoken signature may be necessary in some circumstances, for example, as a reasonable accommodation for an applicant with disabilities.

How did the Department propose to implement the telephonic signature option?

To implement the statutory provisions for telephonic signatures, the Department proposed new § 273.2(c)(7), which addressed specific types of application signatures. As proposed at § 273.2(c)(7)(viii), a State agency opting to accept telephonic signatures must:

- Specify in its State plan that it has chosen this option;
- Use terms that clearly indicate to the household how to provide assent or agreement during an interview, such as ''yes'', ''no'', ''I agree'' or ''I do not agree'';
- Promptly provide to the applicant a written copy of the completed application, with instructions for a simple procedure for correcting any errors or omissions;
- Allow the household at least 10 calendar days to return the corrections; and
- Use the date of the telephonic signature as the date of the application.

What other changes were proposed for application signature systems?

The Department proposed a number of requirements for application signature systems described in proposed § 273.2(c)(7), both to implement the FCEA and to clarify additional standards for such systems. First, the Department proposed to extend certain statutory criteria for telephonic signatures to all types of application signatures, namely the requirements to: Record for future reference the information and the assent to the information on the application; include effective safeguards against impersonation identity theft, and invasions of privacy; not interfere with a household's right to apply in writing; provide applicants a written copy of the completed application with instructions for a simple procedure to correct errors or omissions (excluding applications with a written signature); comply with SNAP regulations for bilingual requirements; and satisfy all applicable statutory requirements for SNAP applications with the date of verbal consent by the household considered to be the date of the application for all purposes.

Second, the Department proposed to specify unique criteria relevant to certain types of signatures. The signature types identified in the proposed rule were handwritten signatures (which may include signing with a mark or ''X''), electronic signatures, telephonic signatures, and gestured signatures. As explained in the preamble to the proposed rule, the Department included gestured signatures to provide those with hearing disabilities equal access to SNAP. As a State option under SNAP regulations, a gestured or visual signature may provide an alternative to a handwritten signature and may be an efficient means of giving assent as part of an interactive interview. Gestured signatures to indicate ''yes'' or ''I agree'' would include those in American Sign Language, Manually Coded English, or similar language or method during an interview. Except for handwritten signatures, the Department proposed that applicants have at least 10 calendar days to review and correct any errors or omissions to applications with electronic, telephonic or gestured signatures. The Department proposed that States have the option to accept unwritten signatures and written signatures using a mark or ''X'', but are not required to do so.

Third, the Department proposed amendments to the regulations so that the provisions would also apply to applications submitted at recertification (§ 273.14(b)(2)) and to monthly, quarterly, and simplified periodic reports (§§ 273.21(h)(2)(vi), 273.12(c)(5)(ii)(F), and 273.12(d)(5)(ii)(F), respectively) required to be submitted under the client periodic reporting systems. Periodic reporting forms are functionally equivalent to applications in that they are clients' signed statements of circumstances. Since unwritten signatures suffice for applications and reapplications, the Department proposed that unwritten signatures should also suffice for periodic reporting forms. However, as with applications, a State agency is not required to accept unwritten signatures. The Department did not propose to extend this option to change reporting forms, since there is no Federal requirement that a household assigned to a change reporting system must sign the report form.

Did the Department propose any other changes to the application process?

Yes. As part of a general updating of application submission procedures and availability of application provisions, we proposed to reorganize §§ 273.2(c)(1) and 273.2(c)(3). In doing so, the Department reaffirmed certain fundamental aspects to the SNAP application process, including the household's right to file an application

the same day it contacts the SNAP office during office hours without an interview, and with only a name of a responsible member of the household or the authorized representative, address and signature. The Department also proposed to specify that households have a right to apply or reapply in writing, and the State agency must not interfere with this right. The Department also proposed at § 273.2(c)(1)(v) that the State agency must give all households who file non-paper applications a copy of the information provided and that these households must have 10 days to review the information that has been recorded electronically. Under proposed § 273.2(c)(3)(ii), the Department specified that the State agency must make paper application forms readily accessible and available even if the State agency also accepts application through electronic means.

The Department also proposed to add a new provision for application forms at § 273.2(b)(1)(x) to specify that an application form may be an on-line document, a recorded telephonic conversation, or a recorded visually signed conversation.

What did commenters say about gestured signatures?

Many commenters (55) approved of the Department's proposal to add gestured signatures as an optional type of signature for SNAP applications. The Department received no negative comments on this proposal, and the final rule retains the provision, with some modifications, as an optional signature type, described at § 273.2(c)(7)(ix). Those modifications include specifying that a State agency that chooses to accept gestured signatures must specify it has taken this option in its State plan of operation, and eliminating the ten-day period for households to return corrections to the State agency.

How did commenters respond to the State option to establish telephonic signature systems?

Most commenters supported the Department's inclusion of non-traditional signatures for applications, including telephonic signatures, but several requested clarifications with regard to telephonic signature systems. One commenter considered the proposed rule unclear on how to submit applications as recorded oral conversations, and requested that the Department clearly specify that applications may be made by telephone.

The Department wishes to distinguish between applying for SNAP benefits by telephone and providing a telephonic signature to complete an application. Telephonic signatures are not limited to telephonic applications and can be used to sign any application regardless of the means by which the application is completed (*e.g.,* online, telephonically, paper).

The FCEA requires that these systems record ''the verbal assent of the household member and the information to which assent was given.'' For a signature to be considered a telephonic signature, the system must make an audio recording over the telephone of the household's verbal assent as well as a summary of what the household is agreeing to, but not the entire telephone conversation. The Department envisions that an acceptable summary could include an eligibility worker's reiteration of the information the household provided during the call, such as updates to income, household composition, or deductions. This definition is not met if State or local office staff attest to securing the verbal assent over the telephone without actually making an audio recording over the telephone of the household member's attestation. The Department encourages States to consult with their legal counsel to ensure that the captured telephonic signature meets the State's legal definition of a signature and the recorded portion constitutes ''assent'' under that definition. In the final rule, the Department clarifies this requirement at § 273.2(c)(7)(viii)(B).

To be a valid telephonic signature, the recorded verbal assent must be linked to the application itself. This is to ensure the State agency has ready access to the audio file containing the recorded verbal assent. Telephonic signature files must be retrievable and must also comply with Federal records retention requirements in 7 CFR 272.1(f). The Department is revising the proposed regulations at § 273.2(c)(7)(viii)(C) to make this clear. The Department notes that it is also revising the proposed regulations for handwritten, gestured and telephonic signatures, for clarity and consistency, to indicate that the date of application is the date the application is received by the State agency, and that if the application is received outside normal business hours the State agency will consider the date of application the next business day.

Two commenters noted that an application should be treated as filed whenever a household leaves it with a community partner or similar entity charged by the State agency to assist with application processing. These commenters emphasized that households submitting applications at locations other than traditional local SNAP offices should not have their benefits delayed, and treating the application as filed when it is submitted to the community partner would help to address this problem.

In accordance with 273.2(c)(1), the date of the application is the date it is received by the State agency. However, a State may enter into a formal agreement, such as a contract or Memorandum of Understanding (MOU), in which a third-party accepts applications on behalf of the State agency. Such an agreement may stipulate that the date the application is received by the third-party is the date of the application. FNS does not have the authority to enforce program time requirements on entities other than State SNAP agencies. Organizations that fail to deliver the applications on the same date they receive them from a household are delaying the household's filing date and, potentially, the timeframe in which they will begin to receive assistance. Organizations or entities informally engaged in application assistance who do not have a contract or MOU with the State should make every effort to submit applications timely to the State agency so that the filing date will be as early as possible and benefits will not be delayed.

State agencies that choose to implement a telephonic signature process with a contracted third-party, or a third-party acting on behalf of the State agency through a MOU, such as a community-based organization, must ensure the records in the contractor's possession are readily accessible. Also, the State must ensure that the electronic signature files are readily accessible.

In addition, State agencies using a third party should be aware of the following:

- State agencies must follow the appropriate merit system personnel policy.
- Regardless of where the telephonic signature file is stored, the State owns the signature and any other data produced under contract by a third-party entity using Federal funding.
- Telephonic signature files and related data stored on third-party hardware must be transferred to the State agency in a usable format should the third party relationship with the State agency terminate. The third-party cannot retain these records.
- FNS recommends that the State agency include appropriate language in their memorandums of understanding or contractual agreements to ensure the third-party is in compliance with program requirements.

Commenters also requested various clarifications as to the filing date. These include requests to require the automatic recording of the date for applications filed electronically, that the filing date should be the day received by the office during business hours, to allow States to use a statewide definition of receipt of applications, and to allow applications for pre-released institutionalized applicants to be the actual date submitted (not when released). FNS finds that existing program requirements in the regulations and policy memos provide sufficient guidance on these matters.

One commenter spoke to the proposed criteria for effective safeguards against impersonation, identity theft and invasions of privacy for telephonic signature systems, and requested more information on the nature of these safeguards and how states might implement them. As discussed further below, FNS expects States to develop a telephonic signature process that includes necessary safeguards against impersonation, identity theft, and invasions of privacy, as is required by the Act. States have discretion to determine those safeguards and implement them effectively.

What did commenters say about the optional nature of unwritten signatures?

Four commenters disagreed with the Department's proposal at § 273.2(c)(7)(iii) that it be optional for States to accept unwritten signatures, arguing that States should be required to accept unwritten signatures unless an alternative exists that provides comparable access to program for people with disabilities.

Relatedly, one commenter stressed that the Department should emphasize that handwritten signatures should always be counted as a signature. The Department agrees. Handwritten signatures transmitted electronically must still be considered a signature for program purposes. For example, signatures received by facsimile are not unwritten signatures.

Section 11(e) of the Act allows telephonic signatures as an option, not a requirement. As stated in the preamble to the proposed rule, the Department has consistently recommended that State agencies consult legal counsel to verify that verbal assent constitutes a valid signature pursuant to State law. Following the statutory option for telephonic signatures, the Department also proposed to give States the option to accept or not accept other types of unwritten signatures, such as gestured or electronic signatures. We also note that for those States choosing not to take the option, unwritten or alternative signatures may still be required for some applicants with disabilities as a reasonable accommodation under Section 504 of the Rehabilitation Act or in compliance with other civil rights laws. These unwritten or alternative signatures that are not part of a formal State option must still meet the requirements of the final rule. For these reasons, the Department will adopt the provision proposed at § 273.2(c)(7)(iii) without change except for a revision to remove the reference including faxed signatures as unwritten signatures at 273.2(c)(7)(iii)(A), and to add clarifying language regarding compliance with civil rights laws.

What did commenters say about giving households 10 days to review and correct non–paper applications?

A total of 13 commenters, including advocates, State agencies, and related associations, opposed the 10-day review period for non-paper applications (*i.e.,* electronically submitted applications and applications with telephonic or gestured signatures). One State agency commented that the 10-day review period makes no sense for online applications, and stated that a regulation already exists for handling changes between application filing and certification. Another State agency objected to extending the opportunity to review and change information on a signed application for households who complete the application themselves, such as an online application that the households signs electronically and submits, and that for applications submitted by households (either electronic or paper), the interview is the point when information on the application can be corrected or clarified. This commenter recommended that the Department keep the post-signature review opportunity only for households that are signing by voice or gesture, and allow State agencies to determine the process by which these households will be able to review and provide corrections to their applications.

Sixty-two commenters requested clarification on the 10-day review period, stressing that the application process must not be delayed during the time period and that all applications must meet normal/expedited processing times. Most of these commenters said failure to return the form should not result in an intentional program violation (IPV), other sanctions or termination. Four commenters asked for clarification that one signature is sufficient.

Does the final rule keep the 10-day review period?

No. The Department finds commenters' objections to the proposed 10-day review period persuasive. The Department agrees that the 10-day review proposal would have caused unnecessary action and delay, both for State agencies and applicants. Accordingly, we have dropped proposed language at §§ 273.2(c)(1)(v)(A), 273.2(c)(7)(vii)(D), 273.2(c)(7)(viii)(D), and 273.2(c)(7)(ix)(D).

What types of applications retain the post-signature review and correction process?

The final rule retains the post-signature review and correction process for applications with telephonic or gestured signatures. It is statutorily required for applications with telephonic signatures per Section 11(e)(2)(C)(iii)(IV) of the Act, and the Department continues to believe that this process is also appropriate for applications with gestured signatures because these applications are anticipated to be completed initially by a SNAP eligibility worker who will record information provided by the household during an interactive interview. The Department agrees that a post-signature review and correction process is unnecessary for households that have independently entered information on the application and submitted an electronically-signed application. Accordingly, this language is removed from §§ 273.2(c)(1)(v)(A) and 273.2(c)(7)(vii)(D) is removed entirely.

In response to other commenter requests for clarification, the Department wishes to clarify that the application process must not be delayed as a result of the State procedure for household review and correction of information on applications, and that all applications must meet normal/expedited processing times. In addition, only one signature is necessary to be considered a complete application, provided that the signature is provided in a form that is accepted by the State agency. Finally, the household's failure to return the copy of the application or the summarized information used by the State agency to determine eligibility and benefit levels must not result in an IPV, other sanction, or termination.

Additionally, the Department is making technical corrections to this section. First, the Department is removing several references in this section to ''paper or electronic'' and combining all references to the filing date of the application in

§ 273.2(c)(1)(iv). Next, the Department has reorganized sections § 273.2(e)(2)(i) and § 273.2(e)(2)(ii) and added § 273.2(e)(2)(iii) and § 273.2(e)(2)(iv). The paragraphs have been renumbered accordingly.

What did commenters say about the availability of paper applications?

Eight commenters agreed with the Department's proposal that paper application forms must always be available and that States must not interfere with a household's right to file a written application. These commenters further stated that States should affirmatively encourage the filing of paper applications and that the regulations should prohibit States from suggesting to households disadvantages of filing a paper application. The Department understands the concern of commenters that certain low-income populations, such as the elderly, those with a disability and individuals with limited English proficiency, may be discouraged from applying for benefits as States move to an increasingly electronic environment for applying for SNAP benefits, but the Department also believes that the proposed rule language strongly supports household access to paper application and the right to apply in writing. Accordingly, the final rule retains the language proposed at §§ 273.2(c)(1)(ii) and 273.2(c)(3)(ii).

The Department notes a clarification in this final rule at § 273.2(c)(3) that, when filing an application, an applicant must be able to file the application with only a name, address and signature. The existing language had suggested that the process begins with name, address and signature. Technological advances have led to more States using methods other than traditional paper applications for SNAP. We want to emphasize that, regardless of the method used, an applicant's filing date is preserved when name, address and signature is received by the State agency and that all State application procedures—including, but not limited to, paper, online, and telephone processes—must afford applicants the ability to submit an application with just these elements and must make it readily apparent to applicants that this option is available to them. The Department believes it is important to make clear, consistent with longstanding policy, that once a household submits an application with name, address and signature, that application is filed as of the date it is received by the State agency.

Which applicants should receive a copy of their non-paper application?

The Department proposed at § 273.2(b)(1) and § 273.2(c)(1)(v)(B) to require State agencies to provide households with a paper copy of a non-paper application. This is an extension of the current provision at § 273.2(c)(1), which requires that State agencies must provide applicants with a copy of their applications filed on-line at the SNAP local office. Three State agencies disagreed with the proposed extension of the application copy requirement. However, 64 commenters approved of the Department's proposal and recommended that States be required to provide households with a copy of their filed applications, whether paper or non-paper. Commenters also requested clarification on what is meant by ''completed application''. A large number of commenters (65) suggested that in lieu of sending the actual completed application, it would be acceptable for the State agency to send the household a list of information provided by the client and recorded by the State agency.

Commenters also expressed some confusion about the timing of receipt of the completed application. Some commenters suggested that, in addition to the post-signature review and correction process, State agencies should also provide a copy of the information that the State agency used to determine eligibility and benefits. This second copy of the ''completed application'' would be sent with the notice of eligibility or denial.

Since the 2008 publication of the proposed rule, the Department has learned from multiple State agencies that the previously existing requirement to give households a copy of a completed application filed on-line at SNAP local office has resulted in a significant waste of paper because applicants often leave those copies, which include confidential personal information, at the local office. In response to these concerns, the Department has approved a waiver since 2011 to allow the State agency to offer households a copy of an application completed on-line at the local office. Under this waiver, the local office is obligated to provide a paper copy of an application only if the applicant indicates a desire to receive it after it is offered to them. Currently, almost one third of the State agencies are approved to operate this waiver.

In the proposed rule, the Department intended that the copy of the completed application would be part of the post-signature review and correction process that had been proposed for all non-paper applications. In order to ensure that all applicants have an opportunity to review the information submitted in their application for benefits, and based on the comments received, in the final rule the Department requires State agencies to offer all households a copy of the completed application. At the option of the household, the copy of the completed application may be in electronic form. The State agency will have the discretion to determine the most efficient means to offer this option, for example, by adding a question on the application as to the applicant's preference. This procedure will make the need for the above-mentioned waiver obsolete.

In view of the above considerations, the Department will not adopt the proposed provisions at § 273.2(b)(1)(x) and § 273.2(c)(1)(v)(B) to require State agencies to provide households a copy of completed non-paper applications. Instead, the Department is revising and redesignating the regulations at § 273.2(c)(1)(v) to require that State agencies must offer to provide copies of all applications completed by households regardless of the method by which the applicant submitted the application. The regulation will also specify that the household will have the option to receive the copy of their completed application in electronic format. Because State agencies may have logistical updates to their application process to implement this provision, State agencies will have one year from the date this rule is published to implement this requirement.

The Department is also clarifying that State agencies opting to accept telephonic or gestured signatures may determine the form of the completed application that is sent to these households. As stated in the preamble to the proposed rule, the State agency need not provide a transcript of the recorded application, but it must include the information that the State agency will use to determine eligibility and benefits. Thus, a completed application may be a list of information provided by the household or an exact copy of the application submitted. States will have the flexibility to provide information to households in a way most efficient for them. As with other information forwarded to households by State agencies, State agencies must be in compliance with all Federal laws regarding accessibility for people with disabilities. Since utilizing telephonic or gestured signatures is optional, the Department believes that State agencies taking this option are in the best position to determine the form

of the completed application that is sent to households. The Department anticipates that information will likely be digitized, and that it will likely not be that difficult to generate the information in a format understandable to the household.

What did commenters say about the proposal to allow telephonic and gestured signatures for periodic reports?

Most commenters (63 out of 66) who addressed this issue opposed this proposal, and several indicated a desire for the removal of the signature requirement on periodic reports. Their opposition reflects a misunderstanding, however, about the current requirements for periodic reports. The signature requirement for periodic reports is not a new requirement. As stated in the preamble to the proposed rule, the periodic report is similar to an application in that it includes a household's statement of its circumstances. The signature requirement for periodic reports is found in current regulations at § 273.12(b)(2)(vii) for quarterly and simplified reporting systems, and at § 273.21(h)(2)(vi) for monthly periodic reports. The household's signature on the periodic reports acknowledges an understanding that the information provided in the report may result in the termination or reduction of benefits. The proposed revisions to these paragraphs simply extended to State agencies the option to allow households filing periodic reports to provide a telephonic or gestured signature if the State has opted to accept these types of signatures. This final rule retains these proposed revisions. That is, State agencies electing to use telephonic or gestured signatures may also allow the use of these signatures for periodic reports.

How do States safeguard signature systems?

Five commenters, including three State agencies, requested guidance on how States can safeguard all signature systems against impersonation, identity theft and invasions of privacy. States must ensure privacy is maintained according to current requirements. As stated in the preamble to the proposed rule, the Department does not think that this requirement will be a significant burden to State agencies. State agencies already protect households' privacy by following the regulations on the confidentiality of households' records, per § 272.1(c), and by prudent administrative practices. If the Department obtains or develops any more information on technical or other means of compliance, we will issue guidance outside of the rulemaking process.

Will the Department add additional language regarding compliance with civil rights laws?

Five commenters stated that application processing regulations should be in compliance with legislation protecting people with disabilities, including Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). Existing regulations already require such compliance. Nondiscrimination regulations exist at 7 CFR 272.6, and prohibit discrimination against applicants in any aspect of program administration in accordance with those laws. Regulations requiring compliance with Section 504 of the Rehabilitation Act exist at current § 273.2(c)(3) and at proposed § 273.2(c)(3)(i). Also, regulations require that State agencies provide applications in other languages as required in § 272.4(b).

14. Employment and Training (E&T): Funding Cycle § 273.7(d)(3)(ix)

How did the FCEA change the E&T funding cycle?

Section 4122 of the FCEA amended Section 16(h)(1)(A) of the Act (7 U.S.C. 2025(h)(a)(A)) to place a 15-month limit on the availability of unobligated, unexpended E&T funds. The Department proposed to implement Section 4122 of FCEA by removing the reference in § 273.7(d)(3)(ix) stating that funds allocated in accordance with paragraph § 273.7(d)(1) will remain available until obligated or expended. The Department received two comments on this provision. These comments did not address the rule itself, but asked for guidance and technical assistance on the availability of additional E&T funds. The Agricultural Act of 2014 (Pub. L. 113–79) changed the E&T funding cycle to a two-year period. The Department has already issued subsequent guidance on this issue. Because the Agricultural Act of 2014 superseded the provision contained in the proposed rule, the Department is not adopting this provision as proposed.

Will the Department remind State agencies of available E&T funds?

Yes. Commenters suggested that the Department remind State agencies of the status of unobligated, unexpended funds. The Department currently informs State agencies of available funds and will continue to do so. State agencies may request additional 100 percent Federal funds at any time provided that the State agency can amend its E&T plan and obligate additional funds before the end of the Federal fiscal year.

Will the Department provide technical assistance to States on how to request, plan and manage E&T funds?

The Department received one comment recommending that the Department offer technical assistance in planning and managing E&T funds. The Department appreciates this suggestion and will take it into consideration when developing future guidance and designing E&T tools.

15. Telephone Interviews at Initial Certification and Recertification §§ 273.2(e)(2) and 273.14(b)(3)

What is the current requirement concerning interviews at initial application and recertification?

Current regulations at § 273.2(e)(1) require a face-to-face interview at initial application and at least every 12 months after that, except for certain households certified for more than 12 months. Under § 273.2(e)(2), the State agency may waive the face-to-face interview and hold a telephone interview if requested by the household based on a hardship such as disability, inadequate transportation or an employment conflict. If the State agency waives the face-to-face interview based on such a household hardship, it must document the waiver in the household's case file. Under § 273.14(b)(3), State agencies must meet the same interview requirements for households at recertification, including a face-to-face interview, and may also waive the face-to-face interview for hardship reasons as provided in § 273.2(e).

How did the Department propose to change the regulations regarding face-to-face interviews?

The Department proposed to amend §§ 273.2(e)(2) and 273.14(b)(3) to allow State agencies to use a telephone interview rather than a face-to-face interview without the need for the State to ascertain hardship. State agencies would be required to provide a face-to-face interview if requested by the household or if the State agency determines that one is necessary. However, if a household that meets the State agency's hardship criteria requests to waive the in-office interview, the State agency would be required to conduct the interview by telephone or a home visit. The proposal incorporated policy issued by the Department in a June 25, 2009, memorandum, which can be found on the FNS Web site at: *http://*

origin.www.fns.usda.gov/snap/rules/Memo/2009/062509.pdf. The Department also proposed to require that State agencies that opt to provide telephone interviews in lieu of face-to-face interviews must specify this in their State plan of operation and describe the type of households that will be routinely offered a telephone interview.

Did commenters support the proposed change?

Forty-five commenters supported the proposal to make the telephone interview an option under the regulations. Seventy-one commenters suggested updating the regulatory language to remove reference to ''waivers'', ensure that clients retain the right to have a face-to-face interview, and ensure clients continue to have the right to request a telephone interview due to hardship.

Did the Department modify the provisions of the proposed rules?

Language requiring that households have a face-to-face interview if requested will be retained in the final rule. However, in § 273.2(e)(2), the final rule has been modified from the proposed based upon suggestions made by commenters. The final rule has been modified to: remove references to waivers; clarify requirements for providing face-to-face interviews and that such interviews can be conducted at an applicant's residence; and reiterate that State agencies must provide Limited English Proficient (LEP) households with bilingual personnel during the interview (as already required under § 272.4(b)).

Nine commenters took this opportunity to emphasize their strong support of the SNAP interview, and they requested that clear interview priorities in terms of client rights be established for interviews. They suggested the regulations on interviews be revised to indicate that the face-to-face interview and in-person assistance is the preferred approach for conducting interviews, with the second preferred approach being State agency or client requested telephone interviews, and the last preferred approach being home interviews agreed upon by agency and client. Interestingly, 53 other commenters suggested reducing the requirement for interviews where other methods of contact suffice and the client's benefits will be approved or continued as a result of approved waivers.

Commenters also suggested requiring State agencies to provide households with a toll-free number where households can call for an interview when a scheduled interview did not occur, that State agencies encourage households that missed an interview to reschedule the interview before denying the household for a missed interview, and to permit wider use of interactive voice response system interviews and allow more States to test certification of certain types of households without interview. One commenter disagreed with the automated interview suggestion.

The Department appreciates the unique benefits that accrue to households and program integrity as a result of required interviews. The Department agrees that the interview is a fundamental aspect to this program, and does not intend to eliminate the interview. Therefore, the final regulatory text incorporates the requirement that State agencies must inform each applicant of the opportunity for a face-to-face interview at the time of application and recertification and grant a face-to-face interview to any household that requests one at any time, even if the State chooses the option to make telephone interviews generally available. The final rule also makes clear that if a State does not adopt the option to make telephone interviews generally available, it must provide for such an interview for individuals who meet the hardship criteria, at the household's option. Also, the State agency may provide a home-based interview only if the household meets the hardship criteria and requests one. However, the Department does not believe it is prudent to establish preferred interview methods in the regulations. The Department believes that State agencies should have flexibility to determine the preferred approach for conducting interviews.

Again, the Department emphasizes that State agencies must provide a face-to-face interview if requested by the household or its authorized representative at initial application or recertification; that is, any time during the application process. To ensure consistency and fairness across the caseload, State agencies must establish reasonable standards for which households will be offered a telephone interview. State agencies must also ensure that all households meeting the hardship criteria are offered a telephone interview. Again, the State agency may provide a home-based interview only if a household meets the hardship criteria and requests a home-based interview. The Department will continue to work with State agencies that request waivers of certain aspects of interviews to improve efficiency while preserving client rights and access to the program.

Are telephone interviews compliant with civil rights laws?

Sixty-three commenters requested clarification that telephone interviews, if used, must be available to all types of households, not only those with limited English proficiency and people with disabilities. SNAP regulations at § 272.6 prohibit discrimination against any applicant or participant in any aspect of SNAP administration, including, but not limited to the certification of households, the issuance of coupons, the conduct of fair hearings or the conduct of any other program service for reasons of age, race, color, sex, disability, religious creed, national origin, or political beliefs. On May 12, 2011, the Department published its final rule, ''Civil Rights Protections for SNAP Households'', which implements the provisions of Section 11(c) of the Act, as amended by Section 4117 of the FCEA. In this final rule, the Department amended § 272.6(a) to specifically provide that State agency administration of the program must be consistent with the ADA. The Department also made a change in terminology to update the reference to ''handicap'' to ''disability'' in § 272.6 in conformance with the ADA.

In addition, 50 commenters requested assurance that households needing extra assistance in completing the interview process get it. The Department agrees that this is a reasonable expectation for individuals applying for SNAP benefits. However, this issue involves the customer service aspect of the interview process, as opposed to the straightforward goal of eliminating the need for a waiver of the regulations to conduct telephonic interviews. The efficiency and effectiveness of the waiver has already been long-established, and the Department requires that State agencies provide households with assistance in the interview process by requiring State agencies to provide an in-person interview whenever requested. For these reasons, the Department will not revise regulatory language to adopt this suggestion. Nevertheless, it is important to note that the Department examines customer service issues at the State and local offices as part of the Management Evaluation (ME) process, as well as other reviews that target program access requirements. Further, the Department conducts civil rights reviews and examines the State agency complaint system, which is required in § 272.6(d). State agencies are required to develop and implement corrective action to

address deficiencies identified during ME, program access, and civil rights reviews.

16. Averaging student work hours, § 273.5(b)

What does the law require for student work hours?

Under Section 6(e) of the Act (7 U.S.C. 2015(e)) and § 273.5(b), students enrolled at least half-time in an institution of higher education are ineligible to participate in SNAP unless they meet at least one of several criteria. One criterion allows students to participate if they are employed for a minimum of 20 hours a week. Section 6(e)(4) of the Act describes the student work requirement and provides that a student may be eligible for SNAP is if he or she ''is employed a minimum of 20 hours per week . . . during the regular school year.'' Since there is no methodology for applying this rule in the Act, the Department interpreted the provision as requiring full-time college students to work a minimum of 20 hours every week to be eligible for SNAP.

How did the Department propose to change the work requirement?

The Department proposed to amend § 273.5(b)(5) to give State agencies the option, without needing to request a waiver, to determine compliance with the 20-hour minimum work requirement by averaging the number of hours worked over the month, using an 80-hour monthly minimum.

Did commenters support the proposed provision?

Yes. Sixty commenters, including advocates, food banks and associations, supported the proposal to average student work hours as an option in the regulation. Most of these commenters also suggested that States be permitted to average work hours over a longer period of time to reflect the variable nature of student work schedules, such as a quarter, semester or trimester.

The Department agrees that the option suggested by commenters has merit for students and State agencies, and is adding this option to revised § 273.5(b)(5) in this final rule. The final rule language specifies that work hours performed during academic breaks greater than one month must not be averaged with other months. The Department believes that this will enable students to manage their employment and school workloads efficiently while still requiring students receiving SNAP to work while in school.

In addition to the revision noted above, the Department has eliminated the 80-hour per month language from the proposed rule in the final rule. This language is contained in the Act for work requirements for able-bodied adults without dependents, but it does not appear in the Act with regard to student hours.

Accordingly, the Department will adopt the proposed revision to § 273.5(b)(5) with modifications for the reasons noted above.

II. Procedural Matters

Executive Orders 12866 and 13563

We have examined the impacts of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993) and Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011). Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated an ''economically'' significant rule, under section 3(f)(1) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB). Consistent with the requirements of Executive Orders 12866 and 13563, a Regulatory Impact Analysis (RIA) was developed for this final rule. The RIA is included in the docket for this rule at *www.regulations.gov.* The docket number is FNS–2011–0008. A summary of the analysis follows:

Regulatory Impact Analysis

The provisions in this final rule are intended to increase SNAP benefit levels for certain participants, reduce barriers to participation and promote efficiency in the administration of the program. The Department has estimated the total SNAP costs to the Government of the FCEA statutory provisions implemented in this rule as $831 million in fiscal year (FY) 2010 and $5.619 billion over the 5 years FY 2010 through FY 2014. The changes to the rule provisions between the proposed rule and the final rule do not have any significant impacts on the cost estimates. As many of the provisions are self-implementing upon the date specified in FCEA, the impacts are already fully incorporated into the President's budget baseline. In addition to the SNAP costs discussed above, the provisions of this rule also result in a major reduction in reporting burden for SNAP clients. We estimate that this reduction in burden yields an overall annual cost savings of $286 million.

Statement of Need: This final rulemaking is necessary to amend SNAP regulations to implement provisions of the FCEA that establish new eligibility and certification requirements for the receipt of SNAP benefits. These provisions are intended to increase SNAP benefit levels for certain participants, reduce barriers to participation, and promote efficiency in the administration of the program.

Benefits: As noted above, provisions of this rule increase SNAP benefits for certain households and reduce participant burden by streamlining program administration.

Costs: As noted above, we estimate that the provisions contained in this rule will reduce household-level burden by over 40 million hours, resulting in an annualized cost savings of approximately $286 million.

Transfers: As noted above, the Department has estimated the total SNAP costs to the Federal Government at $831 million in FY 2010 and $5.619 billion over the 5 years FY 2010 through FY 2014.

Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

USDA has conducted a series of Tribal consultation sessions to gain input by elected Tribal officials or their designees concerning the impact of this rule on Tribal governments, communities and individuals. These sessions took place in the months of October, November and December of 2010 and January 2011 at locations around the country. These sessions established a baseline of consultation for future actions regarding this rule. Reports from these sessions for consultation were included in the USDA annual reporting on Tribal Consultation and Collaboration. No

comments were received on this specific rule during these consultations. The policies contained in this rule would not have Tribal implications that preempt Tribal law. USDA will offer future opportunities, such as webinars and teleconferences, for collaborative conversations with Tribal leaders and their representatives concerning ways to improve rules with regard to their effect on Indian country.

We are unaware of any current Tribal laws that could be in conflict with the final rule. However, should a Tribe request consultation, the Food and Nutrition Service will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on small entities. Pursuant to that review, the Administrator certifies that this final rule does not have a significant impact on small entities.

State and local human service agencies will be the most affected to the extent that they administer SNAP. The provisions of this final rule, affecting the eligibility, benefits, certification and employment and training requirements for applicant or participant households in SNAP, are implemented through State agencies, which are not small entities as defined by the Regulatory Flexibility Act. In addition, the majority of this rule's provisions were implemented as required by the FCEA on October 1, 2008. This rule amends the SNAP regulations to be consistent with the requirements of the FCEA.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, the Department generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of $146 million or more (when adjusted for 2015 inflation; GDP deflator source: Table 1.1.9 at *http://www.bea.gov/iTable*) in any one year. This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) that impose costs on State, local, or Tribal governments or to the private sector of $146 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

SNAP is listed in the Catalog of Federal Domestic Assistance under No. 10.551. For the reasons set forth in the final rule in 7 CFR 3015, Subpart V and related Notice (48 FR 29115), the Program is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Federalism Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of the Executive Order 13132.

Prior Consultation With State Officials

After the FCEA was enacted on June 18, 2008, FNS held a series of conference calls with State agencies and FNS regional offices to explain the SNAP provisions included in the public law and to answer questions that State agencies had about implementing the changes to the program. On July 3, 2008, FNS issued an implementation memorandum that described each SNAP-related provision in the FCEA and provided basic information to assist State agencies in meeting statutorily-mandated implementation timeframes. FNS responded to additional questions that State agencies submitted and posted the answers on the FNS Web site. Another forum for consultation with State officials on implementation of the FCEA provisions included various conferences hosted by FNS regional offices, State agency professional organizations, and program advocacy organizations. During these conferences, held in the latter part of 2008 and early months of 2009, FNS officials responded to a range of questions posed by State agency officials related to implementation of FCEA provisions.

Nature of Concerns and the Need To Issue This Rule

This rule implements changes required by the FCEA. State agencies were generally interested in understanding the timeframes for implementing the various provisions and the implications of the statutory provisions on State agency administration workload and on applicants and participants. FNS was able to answer questions that directly related to the mandatory or optional nature of the provisions and to confirm the statutorily-mandated timeframes for implementation. FNS was also able to respond to questions that involved current regulations or written policy. An example of such an issue was whether uncapped dependent care claimed by an applicant or participant must be verified. FNS was able to answer this question by drawing on current policy at § 273.2(f), which requires that dependent care expenses, like other household costs, must only be verified if questionable or if the State agency opts to require verification of such costs. However, State agencies raised a number of questions that required policy development and could not be answered without promulgation of a new rulemaking. These types of questions raised by State agencies or program advocacy organizations contributed directly to the development of policy in this rule. For example, State agencies asked whether transportation costs associated with getting a dependent to and from care could be counted as part of dependent care expenses and thus be deducted. In this rulemaking, we have clarified specific SNAP policy on this issue that had not been sufficiently developed prior to this rule.

Extent to Which We Met Those Concerns

FNS has considered the impact of the final rule on State and local agencies. This rule makes changes that are required by law. Most provisions in this rule implement provisions of the FCEA, which were effective on October 1, 2008. Two additional provisions are discretionary in nature and give State agencies regulatory options that currently may only be waived through SNAP's administrative waiver request procedures, which are outlined in § 272.3(c) of this chapter.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies that conflict with its provisions or that would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless so specified in the ''Effective

Date'' paragraph of this rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted. In SNAP, the administrative procedures are as follows: (1) For program benefit recipients—State administrative procedures issued pursuant to Section 11(e) of the Act (7 U.S.C. 2020(e)(1)) and regulations at § 273.15; (2) for State agencies—administrative procedures issued pursuant to Section 14 of the Act (7 U.S.C. 2023) and regulations at § 276.7 (for rules related to non-Quality Control liabilities) or Part 283 (for rules related to Quality Control liabilities); (3) for Program retailers and wholesalers—administrative procedures issued pursuant to Section 14 of the Act (7 U.S.C. 2023) and 7 CFR 279.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with the Department Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the rule might have on minorities, women and persons with disabilities. After a careful review of the rule's intent and provisions, and of the characteristics of SNAP households and individual participants, we have determined that this rule would not have a disproportionate impact on any of these groups. We have no discretion in implementing many of these changes. The changes that are required to be implemented by law have already been implemented as of October 1, 2008. FNS expects that the discretionary provisions included in this final rule will benefit applicants and participants that are among the protected classes of individuals. All data available to FNS indicate that protected individuals have the same opportunity to participate in SNAP as non-protected individuals. FNS specifically prohibits the State and local government agencies that administer the Program from engaging in actions that discriminate based on race, color, national origin, sex, religion, age, disability, marital or family status (SNAP's nondiscrimination policy can be found at § 272.6(a)). Where State agencies have options, and they choose to implement a certain provision, they must implement it in such a way that it complies with the regulations at § 272.6.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. Chapter 35; see 5 CFR part 1320) requires that OMB approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. The proposed rule outlined the provisions of this rule that will affect reporting and recordkeeping requirements and the associated information collection burden maintained approved collections OMB No. 0584–0064 and 0584–0083. Of the provisions in this rule that have been amended in response to public comments, none of these amendments revise the proposed reporting and recordkeeping requirements. Thus, the reporting and recordkeeping requirements will be adopted as final. Section 271.8, Information collection/recordkeeping—OMB assigned control numbers, is revised accordingly.

Since the publication of the proposed rule, the existing information collections in which the PRA burden will be merged have changed. Changes to those collections result in adjustments to the total burden calculation. Due to changes in participation levels and other mathematical corrections [1] to 0584–0064, the adjusted burden estimate for reporting requirements associated with this rule appear in the table below. As indicated in the proposed rule, the estimated burden impact to recordkeeping is zero. Revisions to 0584–0083 since 2010 have not resulted in adjustments associated with this rulemaking and therefore the burden table for 0584–0083 has not been set out below.

The changes in burden that result from the provisions in this final rule are subject to review and approval by OMB. We have indicated in the Notes column of the table below where ''no changes'' have been made from the proposed rule. When the information collection requirements have been approved, FNS will publish a separate action in the **Federal Register** announcing OMB's approval.

Reporting

Section of regulation	Title	Estimated number of respondents	Reports filed annually per respondent	Total annual responses	Estimated average number of burden hours per response	Estimated total burden hours	Notes
State Agency Level							
Part 273	Change of Program Name.	44.00	1.00	44.00	8.00	352.00	No change.
273.9(c)	Exclusion of combat-related pay.						No change.
273.9(d)(1)(iii)	Increase of minimum standard deduction.						No change.
§§ 273.9(d)(4) & 273.10(e)(1)(i)(E).	Elimination of cap on dependent care expenses—SA Operation Manual update.	53.00	1.00	53.00	8.00	424.00	No change.
"	Newly certified households w/dependent care.	53.00	9,517.26	504,415.04	0.08	42,034.59	Adjusted for change in participation level.
"	Existing households w/dependent care.	53.00	12,412.90	657,883.89	0.03	21,929.46	Adjusted for change in participation level.
273.10(e)(2)(ii)(C)	Minimum benefit increase.	53.00	1.00	53.00	0.50	26.5	No change.
273.8(b)	Asset indexation	53.00	16.98	900	0.02	15.03	No change.

[1] The proposed rule estimated small reductions in reporting burden for certain administrative requirements. These reductions were removed as burden associated with these requirements had not been previously accounted for in the OMB-cleared information collection. These estimates were small and inconsequential to the net burden impact.

Section of regulation	Title	Estimated number of respondents	Reports filed annually per respondent	Total annual responses	Estimated average number of burden hours per response	Estimated total burden hours	Notes
Reporting							
273.8(e)(2)(i)	Exclusion of retirement accounts from resources.						
"	Newly certified households.						Burden removed due to duplication with total application burden.
"	New and Existing households.						Burden reduction removed. Due to mathematical correction.
273.8(e)	Exclusion of education accounts from resources.						
"	Newly certified households.						Burden removed due to duplication with total application burden.
"	New households (existing households not included, already captured in respondents under retirement accounts provision).						Burden reduction removed. Due to mathematical correction.
§§ 273.12(a)(5), (b), and (c).	Expansion of simplified reporting.						
"	Newly added elderly or disabled households.	47.00	53,000.00	2,491,000	0.18	457,596.70	No change.
§ 272.2(d)(1)(H) and 273 Subpart H.	Transitional benefits alternative.					0.00	No change.
§§ 273.2(b) & (c), 273.12(c) and (d), 273.14(b), and 273.21(h).	Telephonic signature	3.00	1.00	3	120.00	360.00	No change.
§§ 273.2(e)(2) & 273.14(b)(3).	Telephonic interviews	40.00	1.00	40.00	2.00	(80.00)	No change.
273.5(b)(5)	Averaging student work hours.						Burden reduction removed. Due to mathematical correction.
§§ 273.7(e)(1)(viii) & 273.7(e)(4)(iii).	Employment and Training: Job retention services.						No change.
State Agency Burden Total		53		3,654,392		522,658	
Household Level							
Part 273	Change of Program Name.						No change.
273.9(c)	Exclusion of combat-related pay.						No change.
273.9(d)(1)(iii)	Increase of minimum standard deduction.						No change.
§§ 273.9(d)(4) & 273.10(e)(1)(i)(E).	Elimination of cap on dependent care expenses.						
"	Newly certified households w/dependent care.	504,415.04	1.00	504,415.04	0.08	42,118.66	Adjusted for change in participation level.
"	Existing households w/ dependent care.	657,884	1.00	657,883.89	0.03	21,973.32	Adjusted for change in participation level.
273.10(e)(2)(ii)(C)	Minimum benefit increase.						No change.
273.8(b)	Asset indexation						No change.
273.8(e)(2)(i)	Exclusion of retirement accounts from resources.						
"	New and existing households.						Burden reduction removed. Due to mathematical correction.
273.8(e)	Exclusion of education accounts from resources.						
"	New households (existing households not included, already captured in respondents under retirement accounts provision).						Burden reduction removed. Due to mathematical correction.
§§ 273.12(a)(5), (b), and (c).	Expansion of simplified reporting.	2,491,000	1	2,491,000.00	0.0835	207,998.50	No change.

Reporting							
Section of regulation	Title	Estimated number of respondents	Reports filed annually per respondent	Total annual responses	Estimated average number of burden hours per response	Estimated total burden hours	Notes
§ 272.2(d)(1)(H) and 273 Subpart H.	Transitional benefits alternative.	.....	.....	.....	.....	.....	No change.
§§ 273.2(b) & (c), 273.12(c) and (d), 273.14 (b) and 273.21(h).	Telephonic signature	.....	.....	.....	.....	.....	No change.
§§ 273.2(e)(2) & 273.14(b)(3).	Telephonic interviews ...	20,663,092	1	20,663,092.00	-2	(41,326,184)	Adjusted for change in participation level.
273.5(b)(5)	Averaging student work hours.	.....	.....	.....	.....	.....	No change.
§§ 273.7(e)(1)(viii) & 273.7(e)(4)(iii).	Employment and Training: Job retention services.	.....	.....	.....	.....	.....	No change.
Household burden total		24,316,391	.....	24,316,390.93	.....	(41,054,094)	
Total Reporting burden of Eligibility, Certification and E&T Rule		24,316,444	.....	27,970,782.79	.....	(40,531,435.24)	
Total Reporting Burden for OMB No. 0584–0064 per revision (In clearance at OMB)		.....	.....	.....	.....	114,211,604	
Net Reporting Burden for 0584–0064 with Eligibility, Certification and E&T Rule		.....	.....	.....	.....	73,680,169	

* Figures in table rounded to two decimals.

E-Government Act Compliance

FNS is committed to complying with the E—Government Act, 2002 to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 271

Food stamps, Grant programs-social programs. Reporting and recordkeeping requirements.

7 CFR Part 272

Alaska, Civil rights, Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeeping requirements, Unemployment compensation, Wages.

7 CFR Part 273

Administrative practice and procedure, Aliens, Claims, Employment, Food stamps, Fraud, Government employees, Grant programs-social programs, Income taxes, Reporting and recordkeeping requirements, Students, Supplemental Security Income, Wages.

■ Accordingly, 7 CFR parts 271 through 283 and 285 are amended as follows:

■ 1. The authority citation for 7 CFR parts 271 through 283 and 285 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

PARTS 271 THROUGH 283 AND 285—[AMENDED]

■ 2. Parts 271 through 283 and 285 are amended as follows:

■ a. Remove the words ''the Food Stamp Program'' and ''Food Stamp Program'' and add in their place the word ''SNAP'' each time they appear in these parts;

■ b. Remove the words ''Food Stamp Act'' and ''Food Stamp Act of 1977'' and add in their place the words ''Food and Nutrition Act of 2008'' each time they appear in these parts;

■ c. Remove the words ''food stamp'' and add in their place the word ''SNAP'' each time they appear in these parts; and

■ d. Remove the words ''food stamps'' wherever they appear and add in their place the words ''SNAP benefits'' each time they appear in these parts.

PART 271—GENERAL INFORMATION AND DEFINITIONS

■ 3. In § 271.2, revise the definition of *Minimum benefit* to read as follows:

§ 271.2 Definitions.

* * * * *

Minimum benefit means the minimum monthly amount of SNAP benefits that one- and two-person households receive. The amount of the minimum benefit shall be determined according to the provisions of § 273.10 of this chapter.

* * * * *

■ 4. Revise § 271.8 to read as follows:

§ 271.8 Information collection/recordkeeping—OMB assigned control numbers.

7 CFR section where requirements are described	Current OMB control No.
272.1(f)	0584–0010
	0584–0025
	0584–0034
	0584–0037
	0584–0064
	0584–0069
	0584–0074
	0584–0080
	0584–0081
	0584–0083
	0584–0299
	0584–0303
	0584–0336
	0584–0339
272.2(d)	0584–0064
272.2(a), (c), (d), (e), (f)	0584–0083
272.5(c)	0584–0083
272.3(a), (b), (c)	0584–0083
272.6(g), (h)	0584–0025
273.2(a), (b), (c), (e), (f), (h)	0584–0064
273.5(b)	0584–0064
273.7(a), (d), (e)	0584–0339
273.7(c)	0584–0083
	0584–0339
273.8(b), (e)	0584–0064
273.9(d)	0584–0496
273.9(d) (c)	0584–0064
273.10(e), (g)(1)	0584–0064
273.11(b)	0584–0496
273.11(i) (1)–(4)	0584–0080
	0584–0081
273.11(i)(5)	0584–0081
273.11(i)(6)	0584–0080
	0584–0081
273.12(a), (b), (c), (d)	0584–0064
273.13(a), (b)	0584–0064
273.14(b)	0584–0064
273.16(a), (b), (d), (e), (f), (g), (h), (i)	0584–0064
273.18(h)	0584–0069
273.21(h)	0584–0064

7 CFR section where requirements are described	Current OMB control No.
273.24(f)	0584–0479
274.3(d)	0584–0069 0584–0080
274.4(a)	0584–0080
274.4(b)	0584–0080 0584–0081
274.6(a), (b) and (e)	0584–0080 0584–0081
275.2(a)	0584–0010 0584–0303
275.4(a)	0584–0010 0584–0303
275.4(b)	0584–0010
275.4(c)	0584–0034 0584–0074 0584–0299
275.5(a), (b)	0584–0010
275.6(b)	0584–0010
275.8(a)	0584–0010
275.9(b), (g)	0584–0010
275.10(a)	0584–0074 0584–0299 0584–0303
275.11(a)	0584–0303
275.12(b), (c), (d), (e)	0584–0074
275.12(f), (g)	0584–0299
275.13(b), (d), (e)	0584–0034
275.14(c), (d)	0584–0034 0584–0074 0584–0299
275.16(b), (c), (d)	0584–0010
275.17(a), (b)	0584–0010
275.18(a), (b)	0584–0010
275.19(a), (b), (c)	0584–0010
275.20(a)	0584–0010
275.21(b)	0584–0034 0584–0074 0584–0299
275.21(c), (d), (e)	0584–0034
275.22(a), (b)	0584–0010
275.23	0584–0010 0584–0034 0584–0074 0584–0299
277.18(a), (c), (d), (f), (i)	0584–0083
278.1(a), (b), (l)	0584–0008
278.5(c), (d), (f)	0584–0008
278.6(b)	0584–0008
278.7(b), (c)	0584–0008
278.8(a)	0584–0008
280.7(c), (d), (g)	0584–0336
280.9(b)	0584–0037
280.10(a)	0584–0336

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

■ 5. In § 272.2, revise paragraphs (d)(1)(xvi)(A) through (H) and add paragraphs (d)(1)(xvi)(I) and (J) to read as follows:

§ 272.2 Plan of operation.

* * * * *

(d) * * *

(1) * * *

(xvi) * * *

(A) Section 273.2(c)(7)(viii) and 273.2(c)(7)(ix) of this chapter, it must include in the Plan's attachment the option to accept telephonic signatures and gestured signatures on the application and reapplication forms (other than for households the State may be required to accept such signatures as a reasonable accommodation under Section 504 of the Rehabilitation Act or in compliance with other civil rights laws) and a description of the procedures being pursued under the provision;

(B) Sections 273.2(e)(2) and 273.14(b)(3) of this chapter, it must include in the Plan's attachment the option to provide telephone interviews in lieu of face-to-face interviews at initial application and reapplication for households other than those that meet the hardship criteria and a description of the procedures being pursued under the provision;

(C) Sections 273.2(f)(1)(xii), 273.2(f)(8)(i)(A), 273.9(d)(5), 273.9(d)(6)(i) and 273.12(a)(4) of this chapter, it must include in the Plan's attachment the options it has selected;

(D) Section 273.5(b)(5) of this chapter, it must include in the Plan's attachment the option to average student work hours and a description of how student work hours will be calculated;

(E) Section 273.8(e)(19) of this chapter, it must include in the Plan's attachment a statement that the option has been selected and a description of the resources being excluded under the provision;

(F) Section 273.9(c)(3) of this chapter, it must include in the Plan's attachment a statement that the option has been selected and a description of the types of educational assistance being excluded under the provision;

(G) Sections 273.9(c)(18) and 273.9(c)(19) of this chapter, it must include in the Plan's attachment a statement of the options selected and a description of the types of payments or the types of income being excluded under the provisions;

(H) Section 273.12(a)(5) of this chapter, it must include in the Plan's attachment a statement that the option has been selected and a description of the types of households to whom the option applies;

(I) Section 273.12(c) of this chapter, it must include in the Plan's attachment a statement that the option has been selected and a description of the deductions affected; and

(J) Section 273.26 of this chapter, it must include in the Plan's attachment a statement that transitional SNAP benefits are available and a description of the eligible cash-assistance programs by which households may qualify for transitional benefits; if one of the eligible programs includes a State-funded cash assistance program; whether household participation in that program runs concurrently, sequentially, or alternatively to TANF; the categories of households eligible for such benefits; the maximum number of months for which transitional benefits will be provided.

* * * * *

■ 6. In § 272.3, remove paragraph (c)(5) and redesignate paragraphs (c)(6) and (c)(7) as paragraphs (c)(5) and (c)(6), respectively, and revise redesignated paragraphs (c)(5) and (c)(6). The revisions read as follows:

§ 272.3 Operating guidelines and forms.

* * * * *

(c) * * *

(5) Notwithstanding the preceding paragraphs, waivers may be granted by the Food and Nutrition Service as provided in section 5(f) of the Act. Waivers authorized by this paragraph are not subject to the public comment provisions of paragraph (d) of this section.

(6) Notwithstanding the preceding paragraphs, waivers may be granted by the Food and Nutrition Service as provided in section 6(c) of the Act. Waivers authorized by this paragraph are not subject to the public comment provisions of paragraph (d) of this section.

■ 7. In § 272.13, revise paragraph (b)(4) to read as follows:

§ 272.13 Prisoner verification system (PVS).

* * * * *

(b) * * *

(4) Notice to the household of match results. The State must use the procedures laid forth in § 273.12(c)(3)(iii) of this chapter;

* * * * *

■ 8. In § 272.14, revise paragraph (c)(4) to read as follows:

§ 272.14 Deceased matching system.

* * * * *

(c) * * *

(4) Notice to the household of match results. The State must use the procedures laid forth in § 273.12(c)(3)(iii) of this chapter;

* * * * *

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

■ 9. In part 273, remove the words ''food coupons'' wherever they appear and add in their place the words ''SNAP benefits.''

■ 10. Effective March 7, 2017, in § 273.2:

■ a. Revise paragraph (b)(1);

■ b. Revise paragraphs (c)(1) and (c)(3);

■ c. Add new paragraph (c)(7);
■ d. Revise paragraph (e)(2);
■ e. Revise the first and last sentences of paragraph (i)(3)(i);
■ f. Revise paragraph (i)(3)(ii);
■ g. Revise the last sentence of paragraph (k)(1)(i)(O);
■ h. Amend the first sentence of paragraph (n)(4)(i)(C) by removing the word ''coupons'' and adding in its place the word ''benefits'';
■ i. Amend paragraph (n)(4)(iii) by removing the words ''authorization documents or coupons'' and adding in its place the words ''EBT accounts''; and
■ j. Remove references to ''§ 273.1(e)(2)'' wherever they appear and add in their place ''§ 273.11(i)''.

The additions and revisions read as follows:

§ 273.2 Office operations and application processing.

* * * * *

(b)(1) A State agency may consider an application form to be a paper document, on-line document or a recorded conversation. Each application form shall contain:

* * * * *

(c) * * *

(1) *Household's right to file*—(i) *Where to file.* Households must file SNAP applications by submitting the forms to the SNAP office either in person, through an authorized representative, by mail, by completing an on-line electronic application, or, if available, by fax, telephone, or other electronic transmission.

(ii) *Right to file in writing.* All households have the right to apply or to re-apply for SNAP in writing. The State agency shall neither deny nor interfere with a household's right to apply or to re-apply in writing.

(iii) *Right to same-day filing.* Each household has the right to file an application form on the same day it contacts the SNAP office during office hours. The household shall be advised that it does not have to be interviewed before filing the application and may file an incomplete application form as long as the form contains the applicant's name and address, and is signed by a responsible member of the household or the household's authorized representative. Regardless of the type of application system used, the State agency must provide a means for all applicants applying through any mechanism to immediately begin the application process by filing an application with only the name, address and signature.

(iv) *Recording the filing date.* The date of application is the date the application is received by the State agency. State agencies must document the application date on the application. If the application is received outside normal business hours the State agency will consider the date of application the next business day. For online applications, the date of application is the date the application is submitted, or the next business day if it is submitted after business hours. For telephonic applications, the date of application is the date on which the household member provides verbal assent.

(v) [Reserved]

(vi) *Residents of institutions.* The following special provisions apply to residents of institutions.

(A) *Filing date.* When a resident of an institution is jointly applying for SSI and SNAP benefits prior to leaving the institution, the filing date of the application that the State agency must record is the date of release of the applicant from the institution.

(B) *Processing deadline.* The length of time a State agency has to deliver benefits is calculated from the date the application is filed in the SNAP office designated by the State agency to accept the household's application, except when a resident of a public institution is jointly applying for SSI and SNAP benefits prior to his/her release from an institution in accordance with § 273.11(i).

(C) *Certification procedures.* Residents of public institutions who apply for SNAP prior to their release from the institution shall be certified in accordance with § 273.2 paragraph (g)(1) or § 273.2(i)(3)(i) of this section, as appropriate.

* * * * *

(3) *Availability of the application form.* (i) *General availability.* The State agency shall make application forms readily accessible to potentially eligible households. The State agency shall also provide an application form to anyone who requests the form. Regardless of the type of system the State agency uses, the State agency must provide a means for applicants to immediately file an application that includes only name, address and signature. If the State agency maintains a Web page, it must make the application available on the Web page in each language in which the State agency makes a printed application available. The State agency must provide on the Web page the addresses and phone numbers of all State SNAP offices and a statement that the household should return the application form to its nearest local office. The applications must be accessible to persons with disabilities in accordance with Section 504 of the Rehabilitation Act of 1973, Public Law 93–112, as amended by the Rehabilitation Act Amendments of 1974, Public Law 93–516, 29 U.S.C. 794, and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101.

(ii) *Paper forms.* The State agency must make paper application forms readily accessible and available even if the State agency also accepts application forms through other means.

* * * * *

(7) *Signing an application or reapplication form.* In this paragraph, the word ''form'' refers to applications and reapplications.

(i) *Requirement for a signature.* A form must be signed to establish a filing date and to determine the State agency's deadline for acting on the form. The State agency shall not certify a household without a signed form.

(ii) *Right to provide written signature.* All households have the right to sign a SNAP form in writing.

(iii) *Unwritten signatures.* The State agency shall decide whether unwritten signatures are generally acceptable. The State agency may decide to accept unwritten signatures. A State agency that does not select this option must accept unwritten signatures when necessary to comply with civil rights laws.

(A) These may include electronic signature techniques, recorded telephonic signatures, or recorded gestured signatures.

(B) A State agency is not required to obtain a written signature in addition to an unwritten signature.

(iv) *Who may sign the form.*

(A) An adult member of the household.

(B) An authorized representative, as described in paragraph (n)(1) of this section.

(v) *Criteria for all signatures.* All systems for signatures must meet all of the following criteria:

(A) Record for future reference the assent of the household member and the information to which assent was given;

(B) Include effective safeguards against impersonation, identity theft, and invasions of privacy;

(C) Not deny or interfere with the right of the household to apply in writing;

(D) Comply with the SNAP regulations regarding bilingual requirements at § 272.4(b) of this chapter; and

(E) Satisfy all requirements for a signature on an application under all laws and guidance applicable to SNAP, including civil rights laws.

(vi) *Handwritten signatures.* These provisions apply specifically to

handwritten signatures, including handwritten signatures that the household transmits by facsimile or other electronic transmission.

(A) If the signatory cannot sign with a name, an X is a valid signature.

(B) The State agency may require a witness to attest to an X signature.

(C) An employee of the State agency may serve as a witness.

(vii) *Electronic signatures.* These provisions apply specifically to electronic signatures.

(A) The State agency may accept an electronic signature but is not required to do so.

(B) Some examples of electronic signature are the use of a Personal Identification Number (PIN), a computer password, clicking on an ''I accept these conditions'' button on a screen, or clicking on a ''Submit'' button on a screen.

(viii) *Telephonic signatures.* These provisions apply specifically to telephonic signatures.

(A) A State agency that chooses to accept telephonic signatures under this paragraph (c)(7)(viii) must specify in its State plan of operation that it has selected this option.

(B) To constitute a valid telephonic signature, the State agency's telephonic signature system must make an audio recording of the household's verbal assent and a summary of the information to which the household assents. An example of a telephonic signature is a recording of ''Yes'' or ''No'', ''I agree'' or ''I do not agree'', or otherwise clearly indicating agreement or disagreement during an interview over the telephone. An example of a summary of the information to which the household assents is a recording of a reiteration of the household's details agreed to during the telephone conversation.

(C) A telephonic signature system must provide for linkage from the audio file of the recorded verbal assent to the application so that the State agency has ready access to the household's entire case file.

(D) The State agency shall promptly provide to the household member a written copy of the completed application, with instructions for a simple procedure for correcting any errors or omissions.

(ix) *Gestured signatures.* These provisions apply specifically to gestured signatures.

(A) A State agency that chooses to accept gestured signatures under this paragraph (c)(7)(ix) must specify in its State plan of operation that it has selected this option.

(B) Gestured signatures include the use of signs and expressions to communicate ''Yes'' or ''I agree'' in American Sign Language (ASL), Manually Coded English (MCE) or another similar language or method during an interview, in person or over a video link.

(C) The State agency shall promptly provide to the household member a written copy of the completed application, with instructions for a simple procedure for correcting any errors or omissions.

* * * * *

(e) * * *

(2) The State agency may use a telephone interview instead of the face-to-face interview required in paragraph (e)(1) of this section for all applicant households, for specified categories of households, or on a case-by-case basis because of household hardship situations as determined by the State agency. The hardship conditions must include, but are not limited to, illness, transportation difficulties, care of a household member, hardships due to residency in a rural area, prolonged severe weather, or work or training hours that prevent the household from participating in an in-office interview. If a State agency has not already provided that a telephone interview will be used for a household, and that household meets the State agency's hardship criteria and requests to not have an in-office interview, the State agency must offer to the household to conduct the interview by telephone. The State agency may provide a home-based interview only if a household meets the hardship criteria and requests one. A State agency that chooses to routinely interview households by telephone in lieu of the face-to-face interview must specify this choice in its State plan of operation and describe the types of households that will be routinely offered a telephone interview in lieu of a face-to-face interview. The State agency must grant a face-to-face interview to any household that requests one.

(i) State agencies must inform each applicant of the opportunity for a face-to-face interview at the time of application and recertification and grant a face-to-face interview to any household that requests one at any time, even if the State agency has elected the option to routinely provide telephone interviews.

(ii) Like households participating in face-to-face interviews, households interviewed by any means other than the face-to-face interview are not exempt from verification requirements. However, the State agency may use special procedures to permit the household to provide verification and thus obtain its benefits in a timely manner, such as substituting a collateral contact in cases where documentary verification would normally be provided.

(iii) The use of non-face-to-face interviews may not affect the length of a household's certification period.

(iv) State agencies must provide Limited English Proficient (LEP) households with bilingual personnel during the interview as required under § 272.4(b) of this chapter.

* * * * *

(i) * * *

(3) * * *

(i) * * * For households entitled to expedited service, the State agency shall post benefits to the household's EBT card and make them available to the household not later than the seventh calendar day following the date an application was filed. * * * Whatever systems a State agency uses to ensure meeting this delivery standard shall be designed to provide the household with an EBT card and PIN no later than the seventh calendar day following the day the application was filed.

(ii) *Drug addicts and alcoholics, group living arrangement facilities.* For residents of drug addiction or alcoholic treatment and rehabilitation centers and residents of group living arrangements who are entitled to expedited service, the State agency shall make benefits available to the recipient not later than the 7 calendar days following the date an application was filed.

* * * * *

(k) * * *

(1) * * *

(i) * * *

(O) * * * It shall also include the client's rights and responsibilities (including fair hearings, authorized representatives, out-of-office interviews, reporting changes and timely reapplication), information on how and where to obtain an EBT card and PIN and how to use an EBT card and PIN (including the commodities clients may purchase with SNAP benefits.

* * * * *

■ 11. Effective January 8, 2018, in § 273.2, add paragraph (c)(1)(v) to read as follow:

§ 273.2 Office operations and application processing.

* * * * *

(c) * * *

(1) * * *

(v) *Application copies.* When a household member completes an

application, the State agency must offer to provide a copy of the completed application. For purposes of this subsection, a copy of the completed application is a copy of the information provided by the client that the State agency has used or will use to determine a household's eligibility and benefit allotment. At the option of the household, the State may provide the copy in an electronic format.

* * * * *

■ 12. In § 273.5, revise paragraph (b)(5) to read as follows:

§ 273.5 Students.

* * * * *

(b) * * *

(5) Be employed for a minimum of 20 hours per week and be paid for such employment or, if self-employed, be employed for a minimum of 20 hours per week and receiving weekly earnings at least equal to the Federal minimum wage multiplied by 20 hours. The State agency may choose to determine compliance with this requirement by calculating whether the student worked an average of 20 hours per week over the period of a month, quarter, trimester or semester. State agencies may choose to exclude hours accrued during academic breaks that do not exceed one month. A State agency that chooses to average student work hours must specify this choice and specify the time period over which the work hours will be averaged in its State plan of operation;

* * * * *

■ 13. In § 273.7:

■ a. Add paragraph (e)(1)(viii);

■ b. Add a sentence to the beginning of paragraph (e)(4)(iii);

■ c. Amend the introductory text of paragraph (k)(1) by removing the word ''coupon'' and adding in its place the word ''benefit'';

■ d. Amend the introductory text of paragraph (k)(4) by removing the word ''coupon'' and adding in its place the word ''benefit'';

■ e. Amend paragraph (k)(6) by removing the word ''coupon'' and adding in its place the word ''benefit'';

■ f. Amend the introductory text of paragraph (m)(1) by removing the word ''coupon'' and adding in its place the word ''benefit''; and

■ g. Amend paragraph (m)(5)(ii) by removing the word ''coupon'' and adding in its place the word ''benefit''.

The addition and revision read as follows:

§ 273.7 Work provisions.

* * * * *

(e) * * *

(1) * * *

(viii) Job retention services that are designed to help achieve satisfactory performance, retain employment and to increase earnings over time. The State agency may offer job retention services, such as case management, job coaching, dependent care assistance and transportation assistance, for up to 90 days to an individual who has secured employment. The State agency may determine the start date for job retention services provided that the individual is participating in SNAP in the month of or the month prior to beginning job retention services. The State agency may provide job retention services to households leaving SNAP up to the 90-day limit unless the individual is leaving SNAP due to a disqualification in accordance with 273.7(f) or 273.16. The participant must have secured employment after or while receiving other employment/training services under the E&T program offered by the State agency. There is no limit to the number of times an individual may receive job retention services as long as the individual has re-engaged with E&T prior to obtaining new employment. An otherwise eligible individual who refuses or fails to accept or comply with job retention services offered by the State agency may not be disqualified as specified in paragraph (f)(2) of this section.

* * * * *

(4) * * *

(iii) Voluntary participants are not subject to the 120-hour cap on monthly participation.

* * * * *

■ 14. In § 273.8:

■ a. Revise paragraphs (b), (c)(1), and (e)(2); and

■ b. Add a new paragraph (e)(20).

The revisions and addition should read as follows:

§ 273.8 Resource eligibility standards.

* * * * *

(b) *Maximum allowable financial resources.* The maximum allowable liquid and non-liquid financial resources of all members of a household without members who are elderly or have a disability shall not exceed $2,000, as adjusted for inflation in accordance with paragraph (b)(1) and (b)(2) of this section. For households including one or more member who is elderly or has a disability, such financial resources shall not exceed $3,000, as adjusted for inflation in accordance with paragraph (b)(1) and (b)(2) of this section.

(1) Beginning October 1, 2008, and each October 1 thereafter, the maximum allowable financial resources shall be adjusted and rounded down to the nearest $250 to reflect changes in the Consumer Price Index for the All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor (for the 12-month period ending the preceding June).

(2) Each adjustment shall be based on the unrounded amount for the prior 12-month period.

(c) * * *

(1) Liquid resources, such as cash on hand, money in checking and savings accounts, saving certificates, stocks or bonds, and lump sum payments as specified in § 273.9(c)(8); and

* * * * *

(e) * * *

(2) Household goods, personal effects, the cash value of life insurance policies, one burial plot per household member, and the value of one funeral agreement per household member. The cash value of pension plans or funds shall be excluded. The following retirement accounts shall be excluded:

(i) Funds in a plan, contract, or account that meets the requirements that is described in one of the following sections of the Internal Revenue Code of 1986:

(A) Section 401(a), which includes funds commonly known as ''tax qualified retirement plans,'' including ''401(k) plans'';

(B) Section 403(a), which includes funds that are similar to 401(a) plans but are funded through annuity contracts;

(C) Section 403(b), which includes tax-sheltered annuities, custodial accounts, and retirement income accounts retirement plans for some employees of public schools and tax exempt organizations;

(D) Section 408, which includes traditional Individual Retirement Accounts and traditional Individual Retirement Annuities (IRAs);

(E) Section 408A, which includes plans commonly known as ''Roth IRAs'' (including the ''myRA'');

(F) Section 457(b), which includes plans commonly known as ''eligible deferred compensation plans'' for employees of state or local government or tax-exempt entities; or

(G) Section 501(c)(18), which includes plans funded by employee contributions.

(ii) Funds in a Section 529A, which includes funds in a qualified ABLE program.

(iii) Funds in the Federal Thrift Savings Fund within the meaning of that term as used in section 7701(j) of the Internal Revenue Code of 1986. as defined by 5 U.S.C. 8439.

(iv) Any other retirement plan or arrangement that is designated as tax-

exempt under a successor or similar provision of the Internal Revenue Code of 1986.

(iv) Any other retirement account determined by FNS to be appropriate for exclusion.

* * * * *

(20) The following education accounts are excluded from allowable financial resources:

(i) Funds in a qualified tuition program, as defined by section 529 of the Internal Revenue Code of 1986; (ii) Funds in a Coverdell education savings account, as defined by section 530 of the Internal Revenue Code of 1986; and

(iii) Funds in any other education savings account determined by FNS to be appropriate for exclusion.

* * * * *

■ 15. In § 273.9:

■ a. Amend paragraph (a)(4) by removing the Web site ''*www.fns.usda.gov/fsp*'' and adding in its place the Web site ''*www.fns.usda.gov/snap*'';

■ b. Amend the second sentence of paragraph (b)(1)(iii) by removing the words ''Job Training Partnership Act'' and adding in their place the words ''Workforce Investment Act of 1998'';

■ c. Amend the first sentence of paragraph (b)(1)(v) by removing the words ''section 204(b)(1)(C) or section 264(c)(1)(A) of the Workforce Investment Act'' and adding in their place the words ''Title 1 of the Workforce Investment Act of 1998'';

■ d. Amend paragraph (c)(10)(v) by removing the words ''Job Training Partnership Act (Pub. L. 90–300)'' and adding in their place the words ''Workforce Investment Act of 1998'';

■ e. Add new paragraph (c)(20);

■ f. Revise paragraph (d)(1)(iii);

■ g. Amend the second sentence of paragraph (d)(3)(x), by removing the word ''coupon'' and adding in its place the word ''benefit''; and

■ h. Revise the last sentence of paragraph (d)(3)(x); and

■ i. Revise paragraph (d)(4).

The addition and revisions read as follows:

§ 273.9 Income and deductions.

* * * * *

(c) * * *

(20) Income received by a member of the United States Armed Forces under Chapter 5 of Title 37 of the United States Code that is:

(i) Received in addition to the service member's basic pay;

(ii) Received as a result of the service member's deployment to or service in an area designated as a combat zone as determined pursuant to Executive Order or Public Law; and

(iii) Not received by the service member prior to the service member's deployment to or service in a Federally-designated combat zone.

(d) * * *

(1) * * *

(iii) *Minimum deduction levels.* Notwithstanding paragraphs (d)(1)(i) and (d)(1)(ii) of this section, the standard deduction for FY 2009 for each household in the 48 States and the District of Columbia, Alaska, Hawaii, Guam and the U.S. Virgin Islands shall not be less than $144, $246, $203, $289, and $127, respectively. Beginning FY 2010 and each fiscal year thereafter, the amount of the minimum standard deduction is equal to the unrounded amount from the previous fiscal year adjusted to the nearest lower dollar increment to reflect changes for the 12-month period ending on the preceding June 30 in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor, for items other than food.

* * * * *

(3) * * *

(x) * * * If a household incurs attendant care costs that could qualify under both the medical deduction of § 273.9(d)(3)(x) and the dependent care deduction of § 273.9(d)(4), the costs may be deducted as a medical expense or a dependent care expense, but not both.

(4) *Dependent care.* Payments for dependent care when necessary for a household member to search for, accept or continue employment, comply with the employment and training requirements as specified under § 273.7(e), or attend training or pursue education that is preparatory to employment, except as provided in § 273.10(d)(1)(i). Costs that may be deducted are limited to the care of an individual for whom the household provides dependent care, including care of a child under the age of 18 or an incapacitated person of any age in need of care. The costs of care provided by a relative may be deducted so long as the relative providing care is not part of the same SNAP household as the child or dependent adult receiving care. Dependent care expenses must be separately identified, necessary to participate in the care arrangement, and not already paid by another source on behalf of the household. If a household incurs attendant care costs that could qualify under both the medical deduction of § 273.9(d)(3)(x) and dependent care deduction of § 273.9(d)(4), the costs may be deducted as a medical expense or a dependent care expense, but not both. Allowable dependent care costs include:

(i) The costs of care given by an individual care provider or care facility;

(ii) Transportation costs to and from the care facility; and

(iii) Activity or other fees associated with the care provided to the dependent that are necessary for the household to participate in the care.

* * * * *

■ 16. In § 273.10:

■ a. Amend paragraph (e)(1)(i)(E) by removing the words ''up to a maximum amount'';

■ b. Revise paragraph (e)(2)(ii)(C);

■ c. Amend paragraph (e)(2)(vi) introductory text by removing the word ''housholds'' and adding in its place the word ''households''; and

■ d. Remove references to ''§ 273.1(e)(2)'' wherever they appear and add in their place ''§ 273.11(i)''.

The revision reads as follows:

§ 273.10 Determining household eligibility and benefit levels.

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(C) Except during an initial month, all eligible one-person and two-person households shall receive minimum monthly allotments equal to the minimum benefit. The minimum benefit is 8 percent of the maximum allotment for a household of one, rounded to the nearest whole dollar.

* * * * *

■ 17. In § 273.11:

■ a. Remove paragraph (e)(2)(iii) and redesignate paragraph (e)(2)(iv) as new paragraph (e)(2)(iii);

■ b. Redesignate paragraphs (e)(5), (e)(6), and (e)(7) as paragraphs (e)(6), (e)(7), and (e)(8);

■ c. Add a new paragraph (e)(5);

■ d. Revise newly redesignated paragraph (e)(6);

■ e. Revise the last sentence of newly redesignated paragraph (e)(7);

■ f. Revise the second and fourth sentences of newly redesignated paragraph (e)(8);

■ g. Revise paragraph (f)(4);

■ h. Revise paragraph (f)(5);

■ i. Revise the first sentence of paragraph (f)(6); and

■ j. Revise the first sentence of paragraph (f)(7).

The additions and revisions read as follows:

§ 273.11 Action on households with special circumstances.

* * * * *

(e) * * *

(5) DAA treatment centers may redeem benefits in various ways depending on the State's system design.

The designs may include DAA treatment center use of individual household EBT cards at authorized stores, authorization of DAA treatment centers as retailers with EBT access via POS at the treatment center, DAA treatment center use of a treatment center EBT card that is an aggregate of individual household benefits, and other designs. The State agency must ensure that the selected design permits the return of benefits to the household's EBT account through a refund, transfer or other means. Guidelines for approval of EBT systems are contained in part 274 of this chapter.

(6) When a household leaves the DAA treatment center, the DAA treatment center must perform the following:

(i) Notify the State agency by sending a completed change report form to the agency informing the agency of the household's change in address, new address if available, and that the DAA treatment center is no longer the household's authorized representative. Also the DAA treatment center must provide the household with a change report form as soon as it has knowledge the households plans to leave the facility and advise the household to return the form to the appropriate office of the State agency within 10 days of any change the household is required to report. After the household leaves the treatment center, the treatment center can no longer act as the household's authorized representative for certification purposes or for obtaining or using benefits.

(ii) Provide the household with its EBT card within 5 days of the household's departure if it was in the possession of the DAA treatment center. The DAA treatment center must return any EBT card not provided to departing residents to the State agency within 5 calendar days.

(iii) Return a prorated amount of the household's monthly allotment back to the household's EBT account based on the number of days in the month that the household resided at the DAA treatment center. If the DAA treatment center is authorized as a retailer, the State agency must require the DAA treatment center to process the refund back to the household's EBT account. Under an EBT system where the treatment center has an aggregate EBT card or uses individual cards as the authorized representative, the State agency must transfer the prorated portion of the household's monthly allotment from a DAA treatment center's bank account back to the household's EBT account. In either case, the household, not the DAA treatment center, must be allowed to have sole access to the household's EBT account at the time the household leaves the DAA treatment center.

(iv) If the household has already left the DAA treatment center, and as a result, the treatment center is unable to refund the benefits in accordance with this paragraph, the DAA treatment center must notify the State agency within 5 days of the household's departure that the DAA treatment center was unsuccessful in its effort to refund the prorated share of its benefits and the State agency must effect the refund from the treatment center's bank account to the household's EBT account within 5 days after receiving notification from the center. These procedures are applicable at any time during the month.

(7) * * * The DAA treatment center shall be strictly liable for all losses or misuse of benefits and/or EBT cards held on behalf of resident households and for all overissuances which occur while the households are residents of the DAA treatment center.

(8) * * * The State agency shall promptly notify FNS when it has reason to believe that a DAA treatment center is misusing benefits and/or EBT cards in its possession. * * * The State agency shall establish a claim for overissuances of benefits held on behalf of resident clients as stipulated in paragraph (e)(7) of this section if any overissuances are discovered during an investigation or hearing procedure for redemption violations. * * *

* * * * *

(f) * * *

(4) If the resident has made application on his/her own behalf, the household is responsible for reporting changes to the State agency as provided in § 273.12(a). If the GLA is acting in the capacity of an authorized representative, the GLA shall notify the State agency, as provided in § 273.12(a), of changes in the household's income or other household circumstances and when the household leaves the GLA. The GLA shall return any household's benefits to the State agency if they are received after the household has left the group living arrangement.

(5) When the household leaves the facility and the GLA acts as an authorized representative for purposes of redeeming benefits using individual household cards or an aggregate card on behalf of the residents (regardless of the method of application), the same provisions applicable to drug and alcoholic treatment centers in paragraphs (e)(5) and (e)(6) of this section also apply to GLAs.

(6) The same provisions applicable to drug and alcoholic treatment centers in paragraphs (e)(7) and (e)(8) of this section also apply to GLAs when acting as an authorized representative. * * *

(7) If the residents are certified on their own behalf, the GLA may either act as the household's authorized representative for purposes of redeeming benefits to be used to purchase meals served either communally or individually to eligible residents or allow eligible residents to retain their EBT card and benefits to purchase and prepare food for their own consumption. * * *

* * * * *

■ 18. In § 273.12:

■ a. Revise the section heading and paragraphs (a)(1)(i) through (a)(1)(v);

■ b. Revise paragraph (a)(2);

■ c. Revise paragraph (a)(5)(ii)(B);

■ d. Revise paragraph (a)(5)(iii);

■ e. Revise paragraph (a)(5)(iv);

■ f. Revise paragraph (b)(2)(vii) and (b)(2)(x);

■ g. Revise paragraph (c)(3);

■ h. Amend paragraph (e)(1)(B) by removing the reference ''273.9(d)(7)'' and replacing it with the reference ''273.9(d)(1)''; and

■ i. Amend paragraph (e)(1)(C) by removing the reference ''273.9(d)(8)'' and replacing it with the reference ''273.9(d)(6)''.

The revisions read as follows:

§ 273.12 Reporting requirements.

(a) * * *

(1) * * *

(i) (A) A change of more than $100 in the amount of unearned income, except changes relating to public assistance (PA) or general assistance (GA) in project areas in which GA and food stamp cases are jointly processed. The State agency is responsible for identifying changes during the certification period in the amount of PA, or GA in jointly processed cases. If GA and food stamp cases are not jointly processed, the household is responsible for reporting changes in GA of more than $100.

(B) A change in the source of income, including starting or stopping a job or changing jobs, if the change in employment is accompanied by a change in income.

(C) One of the following, as determined by the State agency (different options may be used for different categories of households as long as no household is required to report under more than one option; the State may also utilize different options in different project areas within the State):

(*1*) A change in the wage rate or salary or a change in full-time or part-time employment status (as determined by

the employer or as defined in the State's PA program), provided that the household is certified for no more than 6 months; or

(*2*) A change in the amount earned of more than $100 a month from the amount last used to calculate the household's allotment, provided that the household is certified for no more than 6 months.

(D) Beginning FY 2018, and for every fiscal year thereafter, the dollar amounts in paragraphs (a)(1)(i)(A) and (C) of this section shall be adjusted and rounded to the nearest $25 to reflect changes in the Consumer Price Index for the All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor (for the 12-month period ending the preceding June).

(ii) All changes in household composition, such as the addition or loss of a household member.

(iii) Changes in residence and the resulting change in shelter costs.

(iv) Acquisition of a licensed vehicle that is not fully excludable under § 273.8.

(v) A change in liquid resources, such as cash, stocks, bonds, and bank accounts that reach or exceed the resource limits as described in § 273.8(b) for elderly or disabled households and for all other households, unless these assets are excluded under § 273.8.

* * * * *

(2) Certified households must report changes within 10 days of the date the change becomes known to the household, or at the State agency's option, the household must report changes within 10 days of the end of the month in which the change occurred. For reportable changes of income, the State agency shall require that change to be reported within 10 days of the date that the household receives the first payment attributable to the change. For households subject to simplified reporting, the household must report changes no later than 10 days from the end of the calendar month in which the change occurred, provided that the household receives the payment with at least 10 days remaining in the month. If there are not 10 days remaining in the month, the household must report within 10 days from receipt of the payment. Optional procedures for reporting changes are contained in paragraph (f) of this section for households in States with forms for jointly reporting SNAP and public assistance changes and SNAP and general assistance changes.

* * * * *

(5) * * *

(ii) * * *

(B) For households required to submit a periodic report, a written and oral explanation of the reporting requirements including:

(*1*) The additional changes that must be addressed in the periodic report and verified;

(*2*) When the report is due;

(*3*) How to obtain assistance in filing the periodic report; and

(*4*) The consequences of failing to file a report.

* * * * *

(iii) Periodic report. (A) Exempt households. The State agency must not require the submission of periodic reports by households certified for 12 months or less in which all adult members are elderly or have a disability with no earned income.

(B) Submission of periodic reports by non-exempt households. Households that are certified for longer than 6 months, except those households described in § 273.12(a)(5)(iii)(A), must file a periodic report between 4 months and 6 months, as required by the State agency. Households in which all adult members are elderly or have a disability with no earned income and are certified for periods lasting between 13 months and 24 months must file a periodic report once a year. In selecting a due date for the periodic report, the State agency must provide itself sufficient time to process reports so that households that have reported changes that will reduce or terminate benefits will receive adequate notice of action on the report in the first month of the new reporting period.

(C) The periodic report form must request from the household information on any changes in circumstances in accordance with paragraphs (a)(1)(i) through (a)(1)(vii) of this section and conform to the requirements of paragraph (b)(2) of this section.

(D) If the household files a complete report resulting in reduction or termination of benefits, the State agency shall send an adequate notice, as defined in § 271.2 of this chapter. The notice must be issued so that the household will receive it no later than the time that its benefits are normally received. If the household fails to provide sufficient information or verification regarding a deductible expense, the State agency will not terminate the household, but will instead determine the household's benefits without regard to the deduction.

(E) If a household fails to file a complete report by the specified filing date, the State agency shall provide the household with a reminder notice advising the household that it has 10 days from the date the State agency mails the notice to file a complete report. If an eligible household files a complete periodic report during this 10 day period, the State agency shall provide it with an opportunity to participate no later than ten days after its normal issuance date If the household does not respond to the reminder notice, the household's participation shall be terminated and the State agency must send an adequate notice of termination described in paragraph (a)(5)(iii)(C) of this section.

(F) If an eligible household that has been terminated for failure to file a complete report files a complete report after its extended filing date under (E), but before the end of the issuance month, the State agency may choose to reinstate the household. If the household has requested a fair hearing on the basis that a complete periodic report was filed, but the State does not have it, the State agency shall reinstate the household if a completed periodic report is filed before the end of the issuance month.

(G) The periodic report form shall be the sole reporting requirement for any information that is required to be reported on the form, except that a household required to report less frequently than quarterly shall report when its monthly gross income exceeds the monthly gross income limit for its household size in accordance with paragraph (a)(5)(v) of this section, and able-bodied adults subject to the time limit of § 273.24 shall report whenever their work hours fall below 20 hours per week, averaged monthly.

(H) If the State agency uses a combined periodic report for SNAP and TANF or Medicaid, the State agency shall clearly indicate on the form that SNAP-only households need not provide information required by another program. Non-applicant household or family members need not provide SSNs or information about citizenship or immigration status.

(iv) *Processing periodic reports.* In selecting a due date for the periodic report, the State agency must provide itself sufficient time to process reports so that households will receive adequate notice of action on the report in the first month of the new reporting period. The State agency shall provide the household a reasonable period after the end of the last month covered by the report in which to return the report. The State agency shall provide the household a reasonable period after the end of the last month covered by the report in which to return the report.

Benefits should be issued in accordance with the normal issuance cycle if a complete report was filed timely.

* * * * *

(b) * * *

(2) * * *

(vii) Include a statement to be signed by a member of the household (in accordance with § 273.2(c)(7) regarding acceptable methods of signature) indicating his or her understanding that the information provided may result in reduction or termination of benefits;

* * * * *

(x) If the form requests Social Security numbers, include a statement of the State agency's authority to require Social Security numbers (including the statutory citation, the title of the statute, and the fact that providing Social Security numbers is mandatory except that non-participating household or family members need not provide SSNs or information about citizenship or immigration status), the purpose of requiring Social Security numbers, the routine uses for Social Security numbers, and the effect of not providing Social Security numbers. This statement may be on the form itself or included as an attachment to the form.

* * * * *

(c) * * *

(3) Unclear information. During the certification period, the State agency might obtain unclear information about a household's circumstances from which the State agency cannot readily determine the effect on the household's continued eligibility for SNAP, or in certain cases benefit amounts. The State agency may receive such unclear information from a third party. Unclear information is information that is not verified, or information that is verified but the State needs additional information to act on the change.

(i) The State agency must pursue clarification and verification (if applicable) of household circumstances using the following procedure if unclear information received outside the periodic report is: Fewer than 60 days old relative to the current month of participation; and would, if accurate, have been required to be reported under the requirements that apply to the household under 273.12 based on the reporting system to which they have been assigned. Additionally, the State agency must pursue clarification and verification (if applicable) of household circumstances using the following procedure for any unclear information that appears to present significantly conflicting information from that used by the State agency at the time of certification. The procedures for unclear information regarding matches described in § 272.13 or § 272.14 are found in paragraph (iii) of this section.

(A) The State agency shall issue a written request for contact (RFC) which clearly advises the household of the verification it must provide or the actions it must take to clarify its circumstances, which affords the household at least 10 days to respond and to clarify its circumstances, either by telephone or by correspondence, as the State agency directs, and which states the consequences if the household fails to respond to the RFC.

(B) If the household does not respond to the RFC, or does respond but refuses to provide sufficient information to clarify its circumstances, the State agency must issue a notice of adverse action as described in § 273.13. The State has two options:

(*1*) The State agency may elect to send a notice of adverse action that terminates the case, explains the reasons for the action, and advises the household of the need to submit a new application if it wishes to continue participating in the program; or

(*2*) Alternatively, the State agency may elect to issue a notice of adverse action that suspends the household for 1 month before the termination becomes effective, explains the reasons for the action, and advises the household of the need to submit new information if it wishes to continue participating. If the household responds satisfactorily to the RFC during the period of suspension, the State agency must reinstate the household without requiring a new application, issue the allotment for the month of suspension and, if necessary, adjust the household's participation with a new notice of adverse action.

(C) If the household responds to the RFC and provides sufficient information, the State agency must act on the new circumstances in accordance with paragraphs (c)(1) or (c)(2) of this section, as appropriate.

(ii) If the unclear information does not meet the criteria in paragraph (c)(3)(i) of this section and does not relate to the matches described in paragraph (c)(3)(iii) of this section, then the State agency shall not act on the information or require the household to provide information until the household's next certification action or periodic report is due. A State may follow up with a household to provide information on a voluntary basis if that information would result in an increase in benefits but may not take adverse action if the household does not respond.

(iii) Unclear information resulting from certain data matches. If a State receives match information from a match described in § 272.13 or § 272.14, the State shall follow up with a notice of match results as described in § 272.13(b)(4) and § 272.14 (c)(4). The notices must clearly explain what information is needed from the household and the consequences of failing to respond to the notice as explained in paragraphs (c)(3)(iii)(A) and (B) this section.

(A) For households subject to change reporting, if the household fails to respond to the notice of match results or does respond but refuses to provide sufficient information to clarify its circumstances, the State agency shall issue a notice of adverse action as described in § 273.13 that terminates the case.

(B) For all households not subject to change reporting, if the household fails to respond to the notice of match results or does respond but refuses to provide sufficient information to clarify its circumstances, the State agency shall remove the subject individual and the individual's income from the household and adjust benefits accordingly. As appropriate the State agency shall issue a notice of adverse action as described in § 273.13.

* * * * *

§ 273.13 [Amended]

■ 19. In § 273.13, amend paragraph (b)(10) by removing the word ''coupon'' and adding in its place the word ''benefit''.

■ 20. In § 273.14:

■ a. Amend paragraph (b)(2) by adding a new fourth sentence; and

■ b. Amend the first sentence of paragraph (b)(3) by removing the words ''a face-to-face interview'' and adding in their place the words ''an interview''.

The addition reads as follows:

§ 273.14 Recertification.

* * * * *

(b) * * *

(2) * * * The provisions of § 273.2(c)(7) regarding acceptable signatures on applications also apply to applications used at recertification.

* * *

* * * * *

■ 21. In § 273.15:

■ a. Revise the second sentence of paragraph (c)(1);

■ b. Amend paragraph (c)(2) by removing the word ''coupon'' and adding in its place the words ''SNAP benefit'';

■ c. Amend paragraph (c)(3) by removing the word ''coupon'' and adding in its place the words ''SNAP benefit'';

■ d. Amend paragraph (q)(4) by removing the word ''coupon'' and

adding in its place the words ''SNAP benefit''; and

■ e. Amend paragraph (s) introductory text by removing the word ''coupon'' and adding in its place the words ''SNAP benefit''.

The revision reads as follows:

§ 273.15 Fair hearings.

* * * * *

(c) * * *

(1) * * * Decisions that result in an increase in household benefits shall be reflected in the household's EBT account within 10 days of the receipt of the hearing decision even if the State agency must provide supplementary benefits or otherwise provide the household with an opportunity to obtain the benefits outside of the normal issuance cycle. * * *

* * * * *

■ 22. In § 273.16, revise paragraph (c)(2) to read as follows:

§ 273.16 Disqualification for intentional Program violation.

* * * * *

(c) * * *

(2) Committed any act that constitutes a violation of SNAP, SNAP regulations, or any State statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of SNAP benefits or EBT cards.

* * * * *

§ 273.18 [Amended]

■ 23. In § 273.18, remove paragraph (f)(4) and redesignate paragraphs (f)(5), (f)(6), and (f)(7) as paragraphs (f)(4), (f)(5), and (f)(6).

■ 24. In § 273.21, revise paragraph (h)(2)(vi) to read as follows:

§ 273.21 Monthly Reporting and Retrospective Budgeting (MRRB).

* * * * *

(h) * * *

(2) * * *

(vi) Include a statement to be signed by a member of the household (in accordance with § 273.2(c)(7) regarding acceptable methods of signature), indicating his or her understanding that the provided information may result in changes in the level of benefits, including reduction and termination;

* * * * *

■ 25. In § 273.25:

■ a. Revise the heading of the section and paragraph (a)(1);

■ b. Amend the heading and introductory text of paragraph (b) by removing the word ''SFSP'' and adding in its place the word ''S–SNAP'' wherever it occurs;

■ c. Amend paragraph (b)(1) by removing the word ''SFSP'' and adding in its place the word ''S–SNAP'' and by removing the word ''FSP'' wherever it occurs and adding in its place the word ''SNAP'';

■ d. Amend paragraphs (b)(2) and (b)(3) by removing the word ''SFSP'' wherever it occurs and adding in its place the word ''S–SNAP'';

■ e. Amend paragraph (c) by removing the word ''SFSP'' in the first sentence and adding in its place the word ''S–SNAP'' and by revising the second and third sentences; and

■ f. Amend paragraphs (d) and (e) by removing the word ''SFSP'' wherever it occurs and adding in its place the word ''S–SNAP''.

The revisions read as follows:

§ 273.25 Simplified SNAP.

(a) * * *

(1) Simplified SNAP (S–SNAP) means a program authorized under 7 U.S.C. 2035.

* * * * *

(c) * * * If a household is not receiving TANF assistance (payments have not been authorized) at the time of its application for S–SNAP, the State agency must process the application using the regular SNAP requirements of § 273.2, including processing within the 30-day time frame, and screening for and provision of expedited service if eligible. The State agency must determine under regular SNAP rules the eligibility and benefits of any household that it has found ineligible for TANF assistance because of time limits, more restrictive resource standards, or other rules that do not apply to SNAP.

* * * * *

■ 26. Revise § 273.26 to read as follows:

§ 273.26 General eligibility guidelines.

(a) *Eligible programs.* The State agency may elect to provide transitional SNAP benefits to households whose participation in the following programs is ending:

(1) TANF or State Maintenance of Effort (MOE) funded cash assistance programs, as authorized under part A of Title IV of the Social Security Act; or

(2) A State-funded cash assistance (SFCA) program that provides assistance to families with children. Eligible SFCA programs may include programs funded by both state and local funds provided the programs are intended to be statewide.

(b) *Description of State transitional benefits.* A State agency that chooses to provide transitional benefits must describe features of its transitional SNAP benefits alternative in its plan of operation, as specified in § 272.2(d)(1)(xvi)(H) of this chapter and as described in § 273.26(b)(1) through (b)(6).

(1) A statement that transitional benefits are available;

(2) The eligible programs by which households may qualify for transitional benefits;

(3) If the State agency is offering transitional benefits through a SFCA program, in addition to TANF or MOE, whether the SFCA program participation runs concurrently, sequentially, or alternatively to the TANF or MOE program;

(4) The categories of households eligible for such benefits;

(5) The maximum number of months for which transitional benefits will be provided; and

(6) Any other items required to be included under this subpart H.

(c) *Eligible households.* The State agency may limit transitional benefits to households in which all members had been receiving TANF, MOE, or SFCA, or it may provide such benefits to any household in which at least one member had been receiving TANF, MOE, or SFCA. If a member of a household has been sanctioned but the household is still receiving benefits, the remaining eligible household members may receive transitional SNAP benefits if the cash assistance ends for another reason.

(d) *Ineligible households.* The State agency may not provide transitional benefits to a household that is leaving TANF, MOE, or SFCA when:

(1) The household is leaving TANF or MOE due to a full-family TANF sanction or the household is leaving the SFCA program due to a full-family SFCA program sanction;

(2) The household is a member of a category of households designated by the State agency as ineligible for transitional benefits;

(3) All household members are ineligible to receive SNAP benefits because they are:

(i) Disqualified for an intentional program violation in accordance with § 273.16;

(ii) Ineligible for failure to comply with a work requirement in accordance with § 273.7;

(iii) Receiving SSI in a cash-out State in accordance with § 273.20;

(iv) Ineligible students in accordance with § 273.5;

(v) Ineligible aliens in accordance with § 273.4;

(vi) Disqualified for failing to provide information necessary for making a determination of eligibility or for completing any subsequent review of its eligibility in accordance with § 273.2(d) and § 273.21(m)(1)(ii);

(vii) Disqualified for knowingly transferring resources for the purpose of

qualifying or attempting to qualify for the program as provided at § 273.8(h);

(viii) Disqualified for receipt of multiple SNAP benefits;

(ix) Disqualified for being a fleeing felon in accordance with § 273.11(n); or

(x) ABAWD who fail to comply with the requirements of § 273.24.

(e) *Optional household exclusions.* The State agency has the option to exclude households where all household members are ineligible to receive SNAP benefits because they are:

(1) Disqualified for failure to perform an action under Federal, State or local law relating to a means-tested public assistance program in accordance with § 273.11(k);

(2) Ineligible for failing to cooperate with child support agencies in accordance with § 273.11(o) and (p); or

(3) Ineligible for being delinquent in court-ordered child support in accordance with § 273.11(q).

(f) *Recalculating eligibility for denied households.* The State agency must use procedures at § 273.12(f)(3) to determine the continued eligibility and benefit level of households denied transitional benefits under § 273.26.

■ 27. In § 273.27:

■ a. Revise the first, fourth, and fifth sentences of paragraph (a) introductory text;

■ b. Revise paragraphs (a)(1) and (a)(2); and

■ c. Revise the first and third sentences of paragraph (c).

The revisions read as follows:

§ 273.27 General administrative guidelines.

(a) When a household leaves TANF, MOE, or a SFCA program, a State agency that has elected this option shall freeze the household's benefit allotment for up to 5 months after making an adjustment for the loss of TANF, MOE, or the SFCA. * * * Before initiating the transitional period, the State agency, without requiring additional information or verification from the household, must recalculate the household's SNAP benefit amount by removing the TANF payment, MOE payment, or the SFCA payment from the household's SNAP income.

At its option, the State agency may also adjust the benefit to account for:

(1) Changes in household income that it learns about from another State or Federal means-tested assistance program in which the household participates; or

(2) Automatic annual changes in the SNAP benefit rules, such as the annual cost of living adjustment, the standard deduction adjustment, and the adjustment to the cap on the excess shelter deduction.

* * * * *

(c) When a household leaves TANF, MOE, or SFCA program, the State agency at its option may end the household's existing certification period and assign the household a new certification period that conforms to the transitional period. * * * If the transitional period results in a shortening of the household's certification period, the State agency shall not issue a household a notice of adverse action under § 273.10(f)(4) but shall specify in the transitional notice required under § 273.29 that the household must be recertified when it reaches the end of the transitional benefit period or if it returns to TANF, MOE, or SFCA program during the transitional period.

■ 28. In § 273.29, revise paragraphs (c) and (d) to read as follows:

§ 273.29 Transitional notice requirements.

* * * * *

(c) A statement that if the household returns to TANF, MOE, or SFCA program during its transitional benefit period, it will be asked to reapply for SNAP at the same time. However, if the household has been assigned a new certification period in accordance with § 273.27(c), the notice must inform the household that it must be recertified if it returns to TANF, MOE, or SFCA program during its transitional period;

(d) A statement explaining any changes in the household's benefit amount due to the loss of TANF income, MOE income, or SFCA program income and/or changes in household circumstances learned from another State or Federal means-tested assistance program;

* * * * *

■ 29. Revise § 273.32 to read as follows:

§ 273.32 Households that return to TANF, MOE, or SFCA program during the transitional period.

If a household receiving transitional benefits starts to receive TANF, MOE, or SFCA program during the transitional period, the State agency shall use the information from the TANF, MOE, or SFCA application to re-determine continued SNAP eligibility and benefits, at the same time that the TANF, MOE, or SFCA application is being processed and follow procedures in § 273.2(j) for joint processing of SNAP/TANF applications. This includes processing the application within 30 days. However, for a household assigned a new certification period in accordance with § 273.27(c), the household must be recertified if it returns to TANF, MOE, or the SFCA program during its transitional period.

Dated: December 15, 2016.

Kevin Concannon,

Under Secretary, Food, Nutrition and Consumer Services.

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Part V

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1, 31, and 301

Regulations Regarding Withholding of Tax on Certain U.S. Source Income Paid to Foreign Persons, Information Reporting and Backup Withholding on Payments Made to Certain U.S. Persons, and Portfolio Interest Treatment; Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 31, and 301

[TD 9808]

RIN 1545–BL17: RIN 1545–BN74

Regulations Regarding Withholding of Tax on Certain U.S. Source Income Paid to Foreign Persons, Information Reporting and Backup Withholding on Payments Made to Certain U.S. Persons, and Portfolio Interest Treatment

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Removal of temporary regulations; final regulations; and temporary regulations.

SUMMARY: This document contains final and temporary regulations regarding withholding of tax on certain U.S. source income paid to foreign persons, information reporting and backup withholding with respect to payments made to certain U.S. persons, and portfolio interest paid to nonresident alien individuals and foreign corporations. This document finalizes (with minor changes) certain proposed regulations under chapters 3 and 61 and sections 871, 3406, and 6402 of the Internal Revenue Code of 1986 (Code), and withdraws corresponding temporary regulations. This document also includes temporary regulations providing additional rules under chapter 3 of the Code. The text of the temporary regulations also serves as the text of the proposed regulations set forth in a notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**. The temporary regulations affect persons making payments of U.S. source income to foreign persons.

DATES: *Effective date.* These regulations are effective on January 6, 2017.

Applicability dates. For dates of applicability, see §§ 1.871–14(j), 1.1441–1(f), 1.1441–3(i), 1.1441–4(g), 1.1441–5(g), 1.1441–6(i), 1.1441–7(g), 1.1461–1(i), 1.1461–2(d), 1.6041–1(j), 1.6041–4(d), 1.6042–2(f), 1.6042–3(d), 1.6045–1(q), 1.6049–4(h), 1.6049–5(g), 31.3406(g)–1(g), 31.3406(h)–2(i), and 301.6402–3(f).

FOR FURTHER INFORMATION CONTACT: Leni Perkins at (202) 317–6942 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information in these temporary regulations is contained in a number of provisions including §§ 1.1441–1, 1.1441–3, 1.1441–4, and 1.1441–5. The IRS intends that the information collection requirements of these regulations will be implemented through use of the W–8 series of forms, Form W–9, Form 1042, Form 1042–S, the 1099 series of forms, and Form 8966, as well as certain income tax returns (for example, Forms 1040, 1040–NR, and 1120F). As a result, for purposes of the Paperwork Reduction Act (44 U.S.C. 3507), the reporting burden associated with the collection of information in these regulations will be reflected in the information collection burden and OMB control number of the appropriate IRS form.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books and records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under sections 871, 1441, 1461, 6041, 6042, 6045, 6049, and 6050 of the Code, the Employment Tax Regulations (26 CFR part 31) under section 3406 of the Code, and the Procedure and Administration Regulations (26 CFR part 301) under section 6402 of the Code. On January 28, 2013, final regulations (TD 9610) under chapter 4 of the Code (sections 1471 through 1474) were published in the **Federal Register** (78 FR 5874), and on September 10, 2013, corrections to the final regulations were published in the **Federal Register** (78 FR 55202). The regulations in TD 9610 and the corrections thereto are collectively referred to in this preamble as the 2013 final chapter 4 regulations. To coordinate with certain provisions of the 2013 final chapter 4 regulations, as well as temporary regulations (TD 9657) under chapter 4 published in the **Federal Register** (79 FR 12812) on March 6, 2014, temporary regulations (TD 9658) revising certain provisions of the final chapters 3 and 61 regulations were published in the **Federal Register** (79 FR 12726) on March 6, 2014, and corrections to those temporary regulations were published in the **Federal Register** (79 FR 37181) on July 1, 2014. Collectively, the regulations in TD 9657 and the corrections thereto are referred to in this preamble as the 2014 temporary coordination regulations. A notice of proposed rulemaking cross-referencing the 2014 temporary coordination regulations was published in the **Federal Register** on March 6, 2014 (79 FR 12880).

Comments were received in response to the 2014 temporary coordination regulations, but no public hearing was requested, and none was held. In response to comments, and after further consideration, this document includes final and temporary regulations that revise and clarify certain sections of the 2014 temporary coordination regulations. In some cases, the changes to the 2014 temporary coordination regulations contained in these final and temporary chapter 3 regulations are made to coordinate with final and temporary regulations issued under chapter 4 that are being published in the **Federal Register** concurrently with this document. Certain provisions of these final and temporary chapter 3 regulations were previewed in notices published after the publication of the 2014 temporary coordination regulations. See Notice 2014–33, 2014–21 I.R.B. 1033; Notice 2014–59, 2014–44 I.R.B. 747; and Notice 2016–42, 2016–19 I.R.B. 67. In addition, some changes in these final regulations are corrections of minor errors in the 2014 temporary coordination regulations. Additional unsolicited comments were received regarding the final chapters 3 and 61 regulations. These comments are not discussed herein, except where changes have been made in response thereto.

Summary of Comments and Explanation of Revisions and Provisions

A. Comments and Changes to § 1.1441–1—Requirement for the Deduction and Withholding of Tax on Payments to Foreign Persons

1. U.S. Branch Treated as a U.S. Person

Section 1.1441–1T(b)(2)(iv)(A) of the 2014 temporary coordination regulations provides that a U.S. branch of a foreign person that is a participating FFI, registered deemed-compliant FFI, or NFFE may agree to be treated as a U.S. person. In connection with changes in the chapter 4 regulations published concurrently with these regulations, the final regulations remove the requirement that the foreign person of which the U.S. branch is a part have a specified chapter 4 status. Additionally, the requirements for a withholding certificate from a U.S. branch that agrees to be treated as a U.S. person in § 1.1441–1(e)(3)(v)(A) have been modified to remove the requirement that the U.S. branch certify to the chapter 4

status of the foreign person of which the U.S. branch is a part.

2. Presumption of Foreign Status of an Entity Based on Documentary Evidence or GIIN

Section 1.1441–1T(b)(3)(iii)(A) of the 2014 temporary coordination regulations provides presumption rules for payments made to exempt recipients. Comments requested that if a withholding agent or payor makes a payment (other than a withholdable payment) to an entity payee that is an exempt recipient and has not received a valid withholding certificate but instead has documentary evidence such as a certificate of incorporation indicating that the payee is a foreign person, the withholding agent or payor should be able to presume, based on the documentary evidence, that the payee is a foreign person. The Treasury Department and the IRS decline to adopt this recommendation because the application of such a presumption rule would be limited in scope (given that withholding agents can choose to apply the rules of § 1.1441–1(b)(3)(iii)(A)(*2*), which are generally applicable to withholdable payments, to all payments with respect to an obligation) and because of concerns about the application of the suggested presumption rule in the case of foreign partnerships in which non-exempt recipients are partners, and to which the presumption rules of § 1.1441–5(c)(1)(iii) apply.

Comments also requested that a withholding agent or payor should be able to presume that an undocumented entity payee is foreign if there is a Global Intermediary Identification Number (GIIN) on file for the payee and the payee's name appears on the IRS FFI List. The Treasury Department and the IRS have declined to adopt this suggestion. U.S. entities can obtain GIINs, and if they do, their names appear on the IRS FFI list, such as when they are acting as sponsoring entities for chapter 4 purposes. Thus, it would not be appropriate for a GIIN to support a presumption of foreign status without more evidence of such status.

3. Presumption of Foreign Status for Certain Entities on the per se List of Foreign Corporations

Under § 1.1441–1T(b)(3)(iii)(A)(*1*)(*iii*) of the 2014 temporary coordination regulations, a withholding agent must presume that an undocumented entity payee that is an exempt recipient is a foreign person if the name of the payee indicates that the entity is a type of entity that is on the per se list of foreign corporations in § 301.7701–2(b)(8)(i), unless the name contains the designation ''corporation'' or ''company'' (which, in itself, would not be indicative of foreign status). Comments have requested that, rather than excluding all exempt entity payees whose names include ''company'' or ''corporation'' for purposes of this presumption rule, the rule instead be modified to provide that for payees whose names contain these designations, foreign status should be presumed if the withholding agent has a document that reasonably demonstrates that the entity is incorporated in the relevant foreign jurisdiction on the per se list. The Treasury Department and the IRS agree that this modification is appropriate and have included it in these final regulations.

4. Reliance on Electronic Transmission of Certificates, Forms, and Documentation

Generally, a withholding agent must withhold at a 30% rate on any payment of an amount subject to withholding unless it can reliably associate the payment with documentation upon which it can rely to treat the payment as made to a U.S. person or as made to a beneficial owner that is a foreign person entitled to a reduced rate of withholding. § 1.1441–1(b)(1). The 2014 temporary coordination regulations allow a withholding agent to rely on a valid Form W–8 or documentary evidence received by facsimile or scanned and furnished by email unless the withholding agent knows that the person transmitting the withholding certificate or documentary evidence is not authorized to do so, effective for payments made after March 6, 2014. This effective date prevents withholding agents from relying upon scanned or faxed withholding certificates or documentary evidence pursuant to § 1.1441–1T(e)(4)(iv)(C) of the 2014 temporary coordination regulations for payments made on or before March 6, 2014. As a result, withholding agents must instead obtain ''hard copies'' of the original form or document in order to cure documentation failures for such payments, to the extent allowed under § 1.1441–1(b)(7)(ii). Comments have suggested that the effective date with respect to this provision be modified to allow withholding agents to rely upon forms or documentary evidence received by facsimile or scanned and sent by email after March 6, 2014, regardless of when the payment was made. The Treasury Department and the IRS agree that requiring hard copies of original documentation to cure documentation failures for payments made on or before March 6, 2014, but not for payments after that date, provides minimal benefits compared to the additional effort required for a withholding agent to obtain a hard copy of the documentation. Accordingly, these final regulations modify the effective date as it relates to this provision so that it applies to any open tax year. In addition, to correspond to other changes, § 1.1441–1T(e)(4)(iv)(C) of the 2014 temporary coordination regulations is redesignated as § 1.1441–1(e)(4)(iv)(D) in these final regulations.

5. Curing Late Documentation for Claims That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States

When a withholding agent fails to obtain documentation and fails to withhold at the time of payment, the withholding agent is allowed, under certain circumstances, to obtain a valid withholding certificate (and other certifications, as required) to support a reduced rate of withholding. A withholding agent may obtain valid documentation after the date of payment to establish that a reduced rate of withholding was appropriate when it meets the additional requirements under § 1.1441–1(b)(7)(ii) (as amended by the 2014 temporary coordination regulations).

The rules in § 1.1441–1T(b)(7)(ii) of the 2014 temporary coordination regulations establish when additional documentation is required and what the additional documentation is required to contain. These temporary regulations add § 1.1441–1T(b)(7)(ii)(B) with respect to late documentation for income that is effectively connected with the conduct of a trade or business in the United States (effectively connected income). Under this rule, the withholding certificate (in this case, Form W–8ECI) must be associated with a signed affidavit that states that the information and representations contained on the certificate were accurate as of the time of the payment and either (i) the beneficial owner has included the income on its U.S. income tax return for the taxable year in which the income must be reported, or (ii) the beneficial owner will include the income on its U.S. income tax return for the taxable year in which the income must be reported and the due date for filing the return (including any applicable extensions) is after the date on which the affidavit is signed.

This rule is added to ensure compliance with the requirement that the beneficial owner actually include the income on its income tax return for the taxable year in which the income is

required to be reported for U.S. tax purposes. Because the exemption for withholding on effectively connected income under section 1441(c)(1) applies only when the income is included in the gross income of the recipient, the Treasury Department and the IRS have decided it is appropriate for a withholding agent that receives a late Form W–8ECI to obtain the aforementioned affidavit. A corresponding change has been made to the temporary regulations under chapter 4 that are being published concurrently with these regulations to address circumstances when a withholding agent may rely on a Form W–8ECI provided after the date of a payment to claim that the payment is effectively connected income (and thus is not a withholdable payment under § 1.1473–1(a)(5)(ii)).

6. Nonresident Alien Individuals and Dual Residents

A U.S. person is defined by reference to section 7701(b). The definition of nonresident alien individual in the chapter 3 regulations does not specify the exact circumstances under which a dual resident of the United States and another jurisdiction will be treated as a nonresident alien individual under an applicable income tax treaty and § 301.7701(b)–7. These temporary regulations therefore clarify that an individual will not be treated as a U.S. person for a taxable year (or any portion thereof) for which he or she is a dual resident taxpayer who is treated as a nonresident alien pursuant to § 301.7701(b)–7 for purposes of computing his or her U.S. tax liability. A corresponding change has also been made to the definition of a U.S. person in the chapter 4 regulations that are being published concurrently with these regulations.

7. Hold Mail Instruction

The 2014 temporary coordination regulations provide that an address that is provided subject to instructions to hold all mail to that address is not considered a permanent residence address; the same rule is provided in the 2013 final chapter 4 regulations. Comments have requested that the definition of permanent residence address be modified to treat an address subject to a hold mail instruction as a permanent residence address if additional documentation is provided. The Treasury Department and the IRS agree that a hold mail instruction should not prevent persons from being able to verify that they have a permanent residence address by providing appropriate additional documentary evidence that supports their residency in the foreign jurisdiction where they are claiming to be resident. These temporary regulations thus revise the definition of ''permanent residence address'' in § 1.1441–1T(c)(38) to add that an address that is subject to a hold mail instruction can be relied upon as a permanent residence address if the person provides documentary evidence (as described in § 1.1441–1(c)(17)) establishing the person's residence in the country where the person is claiming to be resident. These revisions also provide that if a hold mail instruction is provided to a withholding agent after the withholding certificate was provided, this will be considered a change in circumstances requiring that additional documentary evidence be obtained in order to use the address on the withholding certificate as a permanent residence address.

8. Revisions to Nonqualified Intermediary Withholding Statement for U.S. Payee Pool

Under § 1.1441–1(e)(3)(iv), a withholding statement provided by a nonqualified intermediary may include an allocation of a payment to a chapter 4 withholding rate pool of U.S. payees when the requirements of that paragraph are satisfied, and a similar allowance is provided for an FFI withholding statement provided by a nonqualified intermediary in the case of a withholdable payment for chapter 4 purposes. A chapter 4 withholding rate pool of U.S. payees is defined as a pool of payees described in either § 1.1471–3(c)(3)(iii)(B)(*2*)(*ii*) or (*iii*) (with § 1.1471–3(c)(3)(iii)(B)(*2*)(*ii*), as revised in the final chapter 4 regulations, being published concurrently with these regulations). See the preamble to the final chapter 4 regulations for background on this revision. Payees described in § 1.1471–3(c)(3)(iii)(B)(*2*)(*ii*) consist of account holders receiving payments not subject to withholding under chapter 3 or 4 or under section 3406 that are either (1) holders of non-consenting U.S. accounts maintained by a reporting Model 2 FFI, or (2) holders of accounts with U.S. indicia maintained by a reporting Model 1 FFI for which appropriate documentation sufficient to treat the account holders as other than U.S. persons has not been provided to the FFI. Payees described in § 1.1471–3(c)(3)(iii)(B)(*2*)(*iii*) consist of account holders of an FFI that is a non-U.S. payor for chapter 61 purposes that are account holders not subject to withholding under chapter 3 or chapter 4 or under section 3406 and that are also: (1) Holders of U.S. accounts that the FFI reports as U.S. accounts pursuant to § 1.1471–4(d)(3) or (5) for the year in which the payment is made, (2) holders of U.S. accounts that the FFI reports pursuant to the conditions of its applicable deemed-compliant status under § 1.1471–5(f)(1) for the year in which the payment is made, or (3) holders of U.S. accounts that a reporting Model 1 FFI reports as reportable U.S. accounts pursuant to an applicable Model 1 IGA, and which includes the U.S. taxpayer identification numbers (TINs) of such account holders, for the year in which the payment is made. Although an allocation of a payment to a payee described in § 1.1471–3(c)(3)(iii)(B)(*2*)(*ii*) (as revised in the final chapter 4 regulations being published concurrently with these regulations) is not permitted for a payment subject to chapter 3 withholding, no such limitation applies under § 1.1471–3(c)(3)(iii)(B)(*2*)(*iii*) for a payment that is allocable to U.S. accounts (or reportable U.S accounts) that are maintained by a non-U.S. payor and subject to comprehensive reporting (which includes the U.S. TINs of such account holders) under FATCA or an applicable IGA. As a result, these final regulations add a requirement that a withholding agent may not treat as valid an allocation of a payment subject to chapter 3 withholding to a withholding rate pool of U.S. payees that a nonqualified intermediary does not identify as described in § 1.1471–3(c)(3)(iii)(B)(*2*)(*iii*) (by citing to § 1.1471–3(c)(3)(iii)(B)(*2*)(*iii*) or describing the payees consistent with that paragraph). To allow withholding agents time to amend their procedures for validating withholding statements provided by nonqualified intermediaries, this requirement applies only to payments made on or after April 1, 2018.

9. Alternative Withholding Statement of a Nonqualified Intermediary

Section 1.1441–1T(e)(3)(iv)(C) of the 2014 temporary coordination regulations prescribes the information required to be included on a withholding statement provided by a nonqualified intermediary (NQI), such as the name, address, TIN (if any), and type of documentation received by the NQI for each payee. Comments have requested that NQIs be permitted to provide, and withholding agents be permitted to rely on, simplified withholding statements that do not include all of the information specified in § 1.1441–1T(e)(3)(iv)(C) of the 2014 temporary coordination regulations. These comments noted that withholding

agents are required to independently verify the information provided on the NQI withholding statement by reviewing and validating the beneficial owner withholding certificates that accompany the NQI's Form W–8IMY. Accordingly, the comments requested that withholding agents not be required to invalidate a withholding statement that does not provide all of the information specified in § 1.1441–1T(e)(3)(iv)(C) of the 2014 temporary coordination regulations when that information can be found on the beneficial owner withholding certificate. The Treasury Department and the IRS agree with this recommendation, and these temporary regulations add § 1.1441–1T(e)(3)(iv)(C)(*3*) to provide a new rule allowing a withholding agent to rely on an alternative withholding statement received from an NQI to the extent that the NQI provides the withholding agent with beneficial owner withholding certificates (and not only with documentary evidence). The alternative withholding statement is not required to include information that is also included on the withholding certificates and is not required to specify the rate of withholding applicable to each payee, as long as the withholding agent can determine the appropriate rate from the information on the withholding certificates. Additional requirements include that the alternative withholding statement contain any other information the withholding agent reasonably requests in order to fulfill its obligations under chapters 3, 4, and 61, and section 3406, and that the NQI certify that none of the information on the beneficial owner withholding certificates is inconsistent with information in the NQI's files. For example, under this alternative withholding statement rule, if a withholding agent is making a payment to a foreign partnership (that is not a withholding foreign partnership) and has partners who are all foreign individuals, the withholding agent can choose to accept a Form W–8IMY from the foreign partnership that is associated with Forms W–8BEN from all of its partners. The foreign partnership would provide the withholding agent with, in addition to its Form W–8IMY and the Forms W–8BEN, a withholding statement indicating the appropriate allocation among the partners and a representation that none of the information on the Forms W–8BEN is inconsistent with what the foreign partnership has in its files. However, if, for example, the foreign partnership has information in its files for one of the foreign partners such that it would be unable to rely on the withholding certificate under the rules of § 1.1441–7, the foreign partnership would not be able to provide the representation, and the withholding agent would not be allowed to rely on an alternative withholding statement.

10. Indefinite Validity of Documentation

Section 1.1441–1T(e)(4)(ii)(B)(*1*) of the 2014 temporary coordination regulations requires that documentary evidence be provided at the same time as a withholding certificate provided by an individual to support a claim of foreign status in order for the withholding certificate to remain valid indefinitely. Commenters have noted that documentary evidence and withholding certificates are often not provided at the same time, and therefore the rule should be more flexible regarding the timing of when these documents must be obtained. The Treasury Department and the IRS agree that the meaning of ''provided together'' should be clarified. These final regulations specify that ''provided together'' means that a withholding certificate and the documentary evidence must be received within 30 days of one another, regardless of which is received first. The Treasury Department and the IRS do not believe it is appropriate to allow the documentary evidence to be provided at any point before the expiration of the withholding certificate because of the risk of changes in an individual's status or residency over a three-year period. In addition, account opening procedures are generally performed within a 30-day period. See § 1.1441–7(b)(2). Corresponding changes have also been made to the chapter 4 regulations that are being published concurrently with these regulations.

In addition, § 1.1441–1T(e)(4)(ii)(B)(*2*) of the 2014 temporary coordination regulations provides that a withholding certificate (other than the portion relating to a claim for treaty benefits) described in § 1.1471–3(c)(6)(ii)(C)(*2*) and documentary evidence provided by an entity supporting the entity's claim of foreign status are valid indefinitely if they are provided together. Similar to comments on withholding certificates provided by individuals, comments on withholding certificates provided by entities noted challenges with respect to the ''provided together'' requirement. In response to these comments, the final regulations remove the phrase ''provided together'' and instead provide that a withholding certificate provided by an entity (that is, a Form W–8BEN–E) (other than the portion relating to a claim for treaty benefits) accompanied by documentary evidence will be valid indefinitely if the withholding agent receives both before either the withholding certificate or the documentary evidence would otherwise expire (even if the withholding certificate and documentary evidence are not provided simultaneously). The Treasury Department and the IRS believe it is appropriate to have different standards for documentation received from individuals and entities in this respect because it is less common for entities to change their statuses within a three-year period. In addition, comments noted that the applicability of this rule in the 2014 temporary coordination regulations, limited to the withholding certificates described in § 1.1471–3(c)(6)(ii)(C)(*2*), is too narrow. The Treasury Department and the IRS agree; accordingly, these final regulations remove the cross-reference to § 1.1471–3(c)(6)(ii)(B). However, these final regulations cross-reference the indefinite validity rules in § 1.1471–3(c)(6)(ii) that apply for chapter 4 purposes.

11. Treaty Statements Provided With Documentary Evidence

Under the chapter 3 regulations, a withholding agent may apply a reduced rate of withholding under section 1441, 1442, or 1443 on a payment to a foreign entity in certain cases under the terms of an income tax treaty if the person represents that the payment is treated as derived by a resident of the applicable treaty jurisdiction and all of the other requirements for benefits under the applicable treaty are satisfied. A withholding certificate provided by an entity that is claiming reduced withholding under an income tax treaty must contain a statement that the treaty claimant meets the limitation on benefits requirement, if any, under the treaty. Because entitlement to a reduced rate of withholding under a treaty is conditioned on the beneficial owner satisfying limitation on benefits provisions, the requirement for a beneficial owner to provide a treaty statement helps ensure that beneficial owners understand the relevant treaty provisions and qualify for the claims they are making. Under the chapter 3 regulations, a treaty statement provided on a Form W–8BEN–E expires on the last day of the third calendar year following the date the form was signed, but a treaty statement provided with documentary evidence remains valid indefinitely (unlike the documentary evidence itself in most cases). In order to enhance the reliability and increase the accuracy of the claims, to help assure that information is updated when

ownership thresholds or activity requirements in a particular treaty have changed, and to have a consistent validity period regardless of how a treaty statement is provided, these temporary regulations provide that a treaty statement regarding limitation on benefits that is associated with documentary evidence will remain valid until the last day of the third calendar year following the year in which the statement is provided to the withholding agent. For existing accounts that were documented with documentary evidence before the date of publication of these temporary regulations, the treaty statements will expire on January 1, 2019.

12. Electronic System for Form 8233

Section 1.1441–1T(e)(4)(iv)(A) of the 2014 temporary coordination regulations allows a withholding agent to establish an electronic system to collect Forms W–8 (or any other form as the IRS may prescribe) from a beneficial owner or payee. Comments requested that withholding agents be allowed to establish such an electronic system for collecting Forms 8233, ''Exemption from Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual.'' The Treasury Department and the IRS accept this request and have added § 1.1441–1T(e)(4)(iv)(C) to provide the requirements for the system.

13. Electronic Signatures

Comments requested that the regulations be amended to allow a withholding agent to accept a Form W–8 with an electronic signature when the withholding agent has not developed and maintained an electronic collection system described in § 1.1441–1(e)(4)(iv)(B). The Treasury Department and the IRS have determined that valid electronically signed withholding certificates may be accepted by a withholding agent if the withholding certificates reasonably demonstrate to the withholding agent that they have been electronically signed by the recipient identified on the form or a person authorized by the recipient to sign the form (by, for example, a signature block that includes a time and date stamp and a statement that the certificate has been electronically signed and the name of the person authorized to sign the form). If the withholding certificate contains only a typed name in the signature line and no other information regarding the method of signature, a withholding agent cannot treat the withholding certificate as validly signed. These temporary regulations reflect this change. A coordinating change is also being made to the chapter 4 regulations.

14. Authentication of Forms and Documentary Evidence Received by Facsimile or Email

Comments requested more detailed guidance on how a withholding agent could authenticate and verify a form or documentary evidence received by facsimile or email, for example by obtaining an authorization letter from the person who signed the form. The Treasury Department and the IRS have not provided prescriptive guidance on the procedures that must be used for this purpose, in part because the standard under § 1.1441–1(e)(4)(iv)(D) (§ 1.1441–1T(e)(4)(iv)(C) of the 2014 temporary coordination regulations) for a withholding agent with respect to whether a form was provided by someone authorized to provide the form is an actual knowledge standard (that is, the withholding agent must not have actual knowledge that the form was transmitted by a person not authorized to do so by the person required to execute the form). The Treasury Department and the IRS believe that the current regulations offer sufficient flexibility for withholding agents to develop the necessary procedures for authenticating and verifying that the form was transmitted to the withholding agent by a person who was authorized to do so without the need for further guidance.

15. Withholding Certificates and Documentary Evidence Furnished Through a Third Party Repository

Comments have requested clarification of guidance provided in the Frequently Asked Questions (FAQ) on the IRS Web site (see *https://www.irs.gov/businesses/corporations/frequently-asked-questions-faqs-fatca-compliance-legal*) regarding when withholding agents may rely on withholding certificates obtained from third-party repositories; specifically, clarification was requested that the principles for the appropriate use of a third-party repository outlined in the FAQ would extend to all Forms W–8. The Treasury Department and the IRS have included in these temporary regulations guidance regarding the circumstances under which a Form W–8 (and, in certain circumstances where applicable, a withholding statement) maintained by a third-party repository will be considered furnished to the withholding agent by the person whose name is on the certificate. See § 1.1441–1T(e)(4)(iv)(E).

16. Reliance on Prior Versions of Withholding Certificates

The 2014 temporary coordination regulations allow a withholding agent to continue to accept the prior version of a withholding certificate that has been revised for a period of six months after the date of release of the revised withholding certificate. Comments noted that this period may be difficult for withholding agents to comply with, depending on when the revised version of the form is released and how extensive the revisions are. Comments also noted challenges in coordinating this requirement with the renewal requirements for withholding certificates, which expire as of the end of a calendar year. The Treasury Department and the IRS agree that it is appropriate to extend the period during which prior versions of withholding certificates may be used beyond six months. These final regulations provide that withholding agents generally may use prior versions of withholding certificates until the later of six months after the date of issuance of the most recent revision to the withholding certificate, or the end of the calendar year during which the revised version was issued. However, in certain circumstances, such as when a new status must be established on the withholding certificate because of a new requirement in the regulations, the Treasury Department and the IRS may designate a shorter transition period.

17. Revisions Related to Qualified Intermediaries

On July 1, 2016, in Notice 2016–42, 2016–29 I.R.B. 67, the Treasury Department and the IRS released the proposed Qualified Intermediary (QI) agreement (the Proposed QI Agreement), which, once finalized, would be effective on or after January 1, 2017. In response to comments received following the publication of the QI agreement (the 2014 QI Agreement) in 2014 in Rev. Proc. 2014–39, 2014–29 I.R.B. 150, the Proposed QI Agreement provided more detailed compliance and review procedures for QIs, requirements applicable to qualified derivatives dealers, and other revisions and corrections. These temporary and final regulations include several revisions that align with the Proposed QI Agreement. These final regulations clarify the rule already provided in the 2014 temporary coordination regulations that when a QI is a participating FFI or a registered deemed-compliant FFI for purposes of chapter 4, it may represent that it assumes chapter 61 reporting

responsibilities (and reports accordingly) when it reports its U.S. accounts in accordance with the coordination rules of § 1.6049–4(c)(4). These regulations also clarify that, in certain cases, for purposes of the alternative procedures for allocating payments to U.S. non-exempt recipients on withholding statements described in the QI agreement, QIs may, as provided in the QI agreement, include a chapter 4 withholding rate pool of U.S. payees in the same zero-rate pool as foreign persons that are exempt from chapter 3 withholding.

Section 1.1441–1T(e)(5)(ii) of the 2014 temporary coordination regulations lists the types of entities that are eligible to enter into QI agreements, including foreign corporations that are presenting claims of treaty benefits on behalf of their shareholders. In Notice 2016–42, the Treasury Department and the IRS requested comments on the situations where a foreign corporation (other than a reverse hybrid entity) would be seeking to act as a QI on behalf of its shareholders, and questioned why the withholding foreign partnership agreement does not accommodate such situations. No comments were received in response to this request. As a result, and because § 1.1441–1(e)(5)(ii)(D) provides that ''any person acceptable to the IRS'' may be eligible to be a QI, these final regulations remove from the list of prospective QIs the specific category of foreign corporations presenting treaty benefit claims on behalf of their shareholders.

18. Requirement for a Withholding Agent to Collect Foreign Taxpayer Identification Number (Foreign TIN)

Form W–8BEN and the instructions to the form describe circumstances under which a foreign person is required to provide a foreign TIN or date of birth on the form. Similarly, Form 1042–S and the instructions to the form outline circumstances under which a withholding agent is required to report such information. These temporary regulations provide that, starting January 1, 2017, for an account maintained at a U.S. office or branch of a withholding agent that is a financial institution, the withholding agent will be required to collect the account holder's foreign TIN, and, in the case of an individual account holder, the account holder's date of birth, on a withholding certificate. A withholding certificate that does not contain a date of birth but is otherwise valid will not be invalid if the withholding agent has such information in its files. For withholding certificates associated with payments made on or after January 1, 2018, a foreign person that does not have a foreign TIN must provide a reasonable explanation as to the lack of a foreign TIN (for example, that the country of residence does not provide TINs).

B. Changes to § 1.1441–2—Amounts Subject To Withholding—Withholding on United States Source Gross Transportation Income

Under section 887(a), gross income derived by a nonresident individual or foreign corporation that constitutes United States source gross transportation income (USSGTI) is subject to a four-percent tax, and is not subject to tax under section 871, 881, or 882. For these purposes, USSGTI consists of income derived from, or in connection with, (1) the use (or hiring or leasing for use) of a vessel or aircraft or (2) the performance of services directly related to the use of a vessel or aircraft, to the extent the income is treated as derived from U.S. sources under section 863(c)(2). USSGTI does not include such income, however, if it is effectively connected with the trade or business in the United States of a nonresident alien or foreign corporation, within the meaning of section 887(b)(4), nor does it include income taxable in a possession of the United States under the provisions of the Code as made applicable in such possession. Items of income that are not USSGTI, as defined in section 887(b), are not affected by the change to the regulations described in this section, and the normal income tax rules apply.

Under sections 1441 and 1442, items of gross income from U.S. sources paid to nonresident individuals and foreign corporations may be subject to withholding at a 30-percent rate if such items are ''amounts subject to withholding'' within the meaning of § 1.1441–2. In general, under § 1.1441–2(a), the term ''amounts subject to withholding'' is broadly defined to include amounts from sources within the United States that constitute fixed or determinable annual or periodical income, which in turn is defined to include all income included in gross income under section 61 subject to certain exceptions. Given the broad definition of ''amounts subject to withholding'' and the lack of a specific exception for USSGTI, taxpayers have questioned whether amounts paid that constitute USSGTI are subject to withholding under section 1441 or 1442 at a 30-percent rate, notwithstanding that, under section 887(a), a four-percent tax is imposed on a nonresident alien individual or foreign corporation's USSGTI for the taxable year.

Because USSGTI is not subject to section 871 or 881 gross basis tax if section 887(a) applies, it is not an amount subject to withholding under section 1441 or 1442. The temporary regulations clarify this result under § 1.1441–2T(a)(8) by providing that amounts subject to withholding under section 1441 or 1442 do not include gross income of a nonresident alien or foreign corporation that is taxable under section 887(a) at four percent. Comments are requested regarding documentation requirements for applying this exception.

C. Comments and Changes to § 1.1441–3—Determination of Amounts To Be Withheld–Coordination With Withholding Under Section 1445 as Amended by the PATH Act

The regulations in § 1.1441–3 include rules for coordinating with section 1445 in the case of distributions from qualified investment entities and United States real property holding companies. Section 1445(a) generally imposes a withholding tax obligation on the transferee when a foreign person disposes of a United States real property interest. Before the enactment of the Protecting Americans from Tax Hikes Act of 2015 (PATH Act), enacted as Division Q of the Consolidated Appropriations Act, 2016, Public Law 114–113, 129 Stat. 2422, the withholding rate under the relevant provisions of section 1445 was 10 percent of either the amount realized or the fair market value of the interest, as applicable. The PATH Act generally increased the withholding rate under section 1445 from 10 percent to 15 percent for dispositions occurring after February 16, 2016 (with certain exceptions for acquisitions of residences). These final regulations incorporate the PATH Act's rate change for these dispositions when referenced in § 1.1441–3.

D. Comments and Changes to § 1.1441–4—Exemptions from Withholding for Certain Effectively Connected Income and Other Amounts—Form 8233 TIN Requirement

Compensation for personal services paid to a nonresident alien individual is not subject to withholding under section 1441 if the compensation is effectively connected with the conduct of a trade or business in the United States and is exempt from U.S. federal income tax under an income tax treaty. In order for a nonresident alien individual to claim treaty benefits for reduced withholding, the chapter 3 regulations require that he or she provide a Form 8233 that includes a TIN or proof that an

application for a TIN has been filed. Comments requested that individuals in these circumstances be exempt from the requirement to include a TIN on the Form 8233. The Treasury Department and the IRS decline to accept this request because these individuals also generally have an obligation to file a Form 1040NR to claim the exemption from tax provided by the income tax treaty and must have a TIN to file the Form 1040NR. The requirement that the TIN (or proof of application for a TIN) also be provided on the Form 8233 therefore does not place an additional burden on these individuals and helps ensure appropriate treaty benefits are provided.

E. Comments and Changes to § 1.1441–6—Claim of Reduced Withholding Under an Income Tax Treaty

1. Form W–8BEN–E and Limitation on Benefits Requirements

In April 2016, the IRS released a revised Form W–8BEN–E, ''Certification of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities),'' and revised instructions, which require an entity claiming treaty benefits to identify the specific type of limitation on benefits provision that the entity meets to be eligible to claim benefits under the treaty (for example, the publicly traded test or the stock ownership and base erosion test, the active trade or business test, etc.). These temporary regulations modify the chapter 3 regulations, consistent with the revised Form W–8BEN–E and instructions, to require that a limitation on benefits statement on Form W–8BEN–E identify the specific limitation on benefits provision on which the taxpayer is relying to claim treaty benefits. This revision to the form and the chapter 3 regulations will further improve the compliance of treaty claimants with the specific requirements of the applicable limitation on benefits provisions in the treaty pursuant to which they seek at-source relief from chapter 3 withholding.

Comments requested that more guidance be provided on when a payee's limitation on benefits claim is unreliable or incorrect. Accordingly, these temporary regulations provide that a withholding agent may rely on a valid Form W–8BEN–E that includes limitation on benefits information unless it has actual knowledge that the information provided with respect to the limitation on benefits is unreliable or incorrect. Withholding agents are generally expected to report this information beginning in 2018.

Under the chapter 3 regulations, a withholding agent may, in certain circumstances, use documentary evidence to document a payee and reduce the rate of withholding if the withholding agent obtains a treaty statement that the payee meets the limitation on benefits provision contained in the applicable income tax treaty. These temporary regulations provide, consistent with the requirements for withholding certificates, that the treaty statement associated with documentary evidence to support a treaty claim must also identify the specific limitation on benefits provision on which the entity relies to claim benefits under the applicable income tax treaty.

2. Reason To Know That a Treaty is in Force

More generally, these temporary regulations also clarify a withholding agent's responsibility with respect to claims of benefits under an income tax treaty, whether they are made by an individual or an entity. By way of example, these temporary regulations provide that if the income tax treaty that the treaty claimant references on the form does not exist or is not in force (which a withholding agent can determine by consulting the list of jurisdictions with which the United States has an income tax treaty in force maintained on the IRS Web site, or the State Department's *Treaties in Force* publication), a withholding agent will have reason to know that the information provided on the Form W–8BEN–E is incorrect and the form is therefore not valid for purposes of claiming treaty benefits.

F. Comments and Changes to § 1.1441–7—General Provisions Relating To Withholding Agents

1. Curing of U.S. Indicia

Under § 1.1441–7(b), a withholding agent must withhold at the full 30-percent rate if it has actual knowledge or reason to know that a payee's claim of U.S. status or of entitlement to a reduced rate of withholding is unreliable or incorrect. Comments requested that a withholding agent should be able to presume that an undocumented entity payee is a foreign person if the withholding agent has on file for the payee a GIIN and confirms that the payee's name and GIIN appear on the IRS FFI list. These comments noted that under § 1.1471–3(e)(4)(ii)(B), for chapter 4 purposes, a withholding agent can reliably associate a withholding certificate with a payment to a participating FFI, a registered deemed-compliant FFI, a sponsoring entity, or a sponsored FFI without applying the rules of § 1.1441–7(b)(5) (relating to when a withholding agent has reason to know that a withholding certificate is unreliable or incorrect due to the presence of U.S. indicia) if the withholding agent has confirmed the entity's GIIN on the current published FFI list. The Treasury Department and the IRS have declined to adopt this suggestion. Because U.S. entities can obtain GIINs, and if they do so, their names would appear on the IRS FFI list (as is the case for U.S. entities that are sponsoring entities, for example), it is not appropriate to allow a GIIN to cure U.S. indicia for purposes of chapter 3.

2. Modification of Applicability Date for Revised Standards of Knowledge as Previewed in Notice 2014–33

The 2014 temporary coordination regulations revised the standards of knowledge regarding additional U.S. indicia that will cause a withholding agent to have reason to know that a payee's claim of foreign status is unreliable or incorrect for purposes of chapter 3 or 61 to coordinate with the standards of knowledge that apply for purposes of chapter 4. These revised standards of knowledge generally do not require a withholding agent to take the additional U.S. indicia into account for a preexisting obligation of a direct account holder if the foreign status of the account holder was documented by the withholding agent for purposes of chapter 3 or chapter 61 before July 1, 2014. On May 19, 2014, Treasury and the IRS published Notice 2014–33, 2014–21 I.R.B. 1033, which, among other things, generally allowed a withholding agent or FFI to treat an obligation held by an entity that was issued, opened, or executed on or after July 1, 2014, and before January 1, 2015, as a preexisting obligation described in §§ 1.1471–2(a)(4)(ii), 1.1472–1(b)(2), and 1.1471–4(c)(3). Following the publication of Notice 2014–33, comments noted that, while the modifications made to § 1.1441–7(b) addressed the application of the revised reason to know standards for obligations that were documented by a withholding agent before July 1, 2014, Notice 2014–33 did not address how the standards would apply to entity accounts opened on or after July 1, 2014, and before January 1, 2015, that are treated as preexisting obligations by withholding agents and participating FFIs for purposes of chapter 4, pursuant to Notice 2014–33. These comments requested that a similar modified applicability date be added to § 1.1441–7(b) to allow withholding agents to treat

an entity account opened during the transition period between July 1, 2014, and January 1, 2015 as a preexisting entity account for purposes of the standards of knowledge applicable to accounts under chapters 3 and 61. Accordingly, these final regulations allow withholding agents to apply the rules under § 1.1441–7(b)(5) and (b)(8) as in effect and contained in 26 CFR part 1 revised April 1, 2013, to accounts opened, and obligations entered into, by an entity on or after July 1, 2014, and before January 1, 2015. In addition, these final regulations provide that, with respect to an obligation held by an entity, a withholding agent will not be required to treat the existence of the additional U.S. indicia specified in § 1.1441–7(b) as giving rise to a change in circumstances under § 1.1441–1(e)(4)(ii)(D) before January 1, 2015. These changes to the chapter 3 regulations were previewed in Notice 2014–59, 2014–44 I.R.B. 747.

3. Indicia of U.S. Status on Form W–8ECI

The 2014 temporary coordination regulations describe the U.S. indicia that will cause a withholding agent to have reason to know that a withholding certificate is unreliable or incorrect for purposes of establishing the account holder's status as a foreign person. Comments have noted that foreign persons that have a trade or business in the United States are likely to have U.S. indicia; therefore, the existence of U.S. indicia on a Form W–8ECI should not cause the withholding agent to have reason to know that the Form W–8ECI is unreliable or incorrect. The Treasury Department and the IRS agree. These final regulations reflect this change by providing that the existence of U.S. indicia on a Form W–8ECI will not cause a withholding agent to have reason to know that the form is unreliable or incorrect for purposes of establishing the account holder's status as a foreign person.

4. Reason to Know—Specific Standards of Knowledge Applicable to Documentation Received from Intermediaries and Flow-Through Entities

The chapter 3 regulations permit a withholding agent to accept a Form W–8 (or a substitute Form W–8) electronically through a system established by the withholding agent that meets the requirements described in § 1.1441–1(e)(3)(iv)(B). Announcement 98–27, 1998–1 C.B. 865, and Announcement 2001–91, 2001–2 C.B. 221, provide similar requirements for an electronic system established by a withholding agent to receive a Form W–9. Comments requested that specific guidance be given to clarify that a withholding agent is allowed to rely on documentation provided to it by an intermediary or flow-through entity that has established an electronic system to collect documentation from a payee. The primary concern raised in these comments was how a withholding agent was supposed to validate, and whether a withholding agent could rely on, a signature on a beneficial owner withholding certificate received through an electronic system. In Notice 2016–08, 2016–6 I.R.B 304, the Treasury Department and the IRS announced an intent to modify the standards of knowledge under §§ 1.1441–7(b)(10) and 1.1471–3(e)(4)(vi)(A)(*2*) to allow a withholding agent to rely on a withholding certificate collected through an electronic system maintained by a nonqualified intermediary, nonwithholding foreign partnership, or nonwithholding foreign trust. However, in light of the new provisions in § 1.1441–1T(e)(4)(i)(B) describing when withholding agents may accept withholding certificates signed electronically, the Treasury Department and the IRS have determined that it is not necessary to modify the standards of knowledge for payments to intermediary and flow-through entities as previewed in Notice 2016–08.

5. Authorized Agents and Form 8655

Under the 2014 temporary coordination regulations, a withholding agent must file Form 8655, ''Reporting Agent Authorization,'' with the IRS if it appoints an agent to act as its reporting agent for filing Form 1042, ''Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,'' or making tax deposits and payments with respect to Form 1042. A comment suggested that a Form 8655 should be required to be filed only when an agent files a Form 1042 in its own name (and under its own EIN) on behalf of one or more other withholding agents. In response to the comment, these final regulations amend the 2014 temporary coordination regulations to provide that a withholding agent must file a Form 8655 only when its agent files a Form 1042 as the filer on behalf of one or more other withholding agents. This revision is also included in temporary regulations under chapter 4 that are being published concurrently with these temporary and final regulations.

G. Comments and Changes to § 1.1461–1—Payment and Returns of Tax Withheld

1. Electronic Furnishing of Form 1042–S

The chapter 3 regulations generally require withholding agents to file an information return on Form 1042–S to report the amounts subject to reporting that were paid during the preceding calendar year and to provide a copy of the form to the recipient of the payment, on or before March 15 of the calendar year following the payment. The withholding agent must retain a copy of each Form 1042–S for the period corresponding to the statute of limitations on assessment and collection applicable to the Form 1042 to which the Form 1042–S relates. The Treasury Department and the IRS have determined that it is appropriate to allow withholding agents to furnish the recipient copy of the Form 1042–S electronically under the same conditions applicable to furnishers of recipient copies of other forms (for example, Form W–2, Form 1099–K), and for this reason, these final regulations include a cross-reference to the requirements under § 1.6050W–2 for certain information statements that are furnished electronically. Statements can be furnished electronically beginning in calendar year 2017 for payments made in calendar year 2016 that are reportable on Form 1042–S.

2. Provision of Foreign TINs on Recipient Copies of Form 1042–S

The Form 1042–S requires, among other information, the foreign TIN of a recipient if (A) the recipient is claiming a reduced rate of, or exemption from, tax under a tax treaty, the person did not provide a U.S. TIN, and the income is not the type of income for which an exemption from the U.S. TIN requirement applies; (B) the recipient receives a payment made with respect to an obligation maintained at a U.S. office or branch of the withholding agent, the withholding agent is a financial institution, and the foreign TIN is available in the withholding agent's electronically searchable information; or (C) the withholding agent is required to collect the foreign TIN on the Form W–8. Comments have requested that the form instructions or the chapter 3 regulations be modified to allow a foreign TIN to be truncated on the recipient copy of the Form 1042–S consistent with the truncation of U.S. TINs on the Form 1042–S. The Treasury Department and the IRS agree with these comments and will modify the Form 1042–S instructions accordingly.

H. Comments and Changes to § 1.6041–4—Foreign-Related Items and Other Exceptions—Definition of ''Paid and Received Outside the United States''

Under § 1.6041–4, returns of information are not required for payments of certain amounts from sources outside the United States that are paid by a non-U.S. payor or a non-U.S. middleman and that are paid and received outside the United States. Section 1.6049–4(f)(16) describes the circumstances under which a payment is considered ''paid and received outside the United States'' (and is therefore not a reportable payment). Comments have suggested that the definition of ''paid and received outside the United States'' be limited to allow a broader range of payments to be treated as reportable payments, such as payments for services performed outside the United States. The Treasury Department and the IRS continue to consider this issue but have not incorporated this suggestion into these temporary and final regulations.

I. Comments and Changes to § 1.6042–2 and § 1.6045–1—Returns of Information as to Dividends Paid and Brokers and Barter Exchanges—Extended Period of Validity for PFIC Statements

Under § 1.6042–2, every person who makes a payment of dividends to any other person during a calendar year must file an information return (that is, Form 1099) that contains the aggregate amount of the dividends, identifying information about the payee, the amount of tax deducted and withheld under section 3406, and such other information as the form requires. The 2014 temporary coordination regulations provide an exception to this filing requirement for payments made by a paying agent on behalf of a passive foreign investment company (PFIC), as defined in section 1297(a), with respect to a shareholder in the PFIC if, among other things, the paying agent obtains from the corporation a written certification signed by an officer of the corporation that states that the corporation is described in section 1297(a) for each calendar year during which the exception is to be applied, and the paying agent has no reason to know that the written certification is unreliable or incorrect. The paying agent must also identify, before payment, that the PFIC is a participating FFI or a reporting Model 1 FFI, and must obtain annually a written certification from the PFIC representing that it will report payments made by the paying agent pursuant to its reporting obligations under chapter 4 or under an applicable intergovernmental agreement (IGA).

Comments have requested that, rather than obtaining an annual certification that is signed by an officer of the corporation, the paying agent should be able to rely on a single written certification of PFIC status until there is a change in circumstances or the paying agent knows or has reason to know that the certification is unreliable or incorrect, and that such certification can be signed by any person that has the authority to sign the certification on behalf of the corporation. The Treasury Department and the IRS decline to accept the request for a single written certification of PFIC status at this time because the annual certification requirement does not appear to present a significant compliance burden and helps assure that the paying agent is meeting its due diligence standards. However, the request that the certification be signed by any person that has the authority to sign the certification on behalf of the corporation has been accepted. A similar change has been made in § 1.6045–1(c)(3)(xiv)(A).

J. Comments and Changes to § 1.6049–5—Interest and Original Discount Subject To Reporting After December 31, 1982

1. Modification of Applicability Date for Use of Documentary Evidence With Respect to an Offshore obligation

The regulations under § 1.6049–5(c)(1) provide guidance on a payor's use of documentary evidence to establish a payee's foreign status for certain amounts paid outside the United States (as determined under § 1.6049–5(e)) with respect to an offshore obligation. The 2014 temporary coordination regulations included a series of modifications, made in coordination with modifications to regulations under chapter 4, to the conditions under which a withholding agent or a payor (as defined for chapter 61 purposes in § 1.6049–5(c)(5)) may rely on documentary evidence to document a payee's foreign status, and also provided guidance on when an amount is considered paid outside the United States. The 2014 temporary coordination regulations under § 1.6049–5T(c)(1) apply to payments made on or after July 1, 2014, except for certain payments made with respect to preexisting obligations, as described in § 1.1441–7(b)(3)(ii).

In response to requests to allow payors additional time to modify their systems to implement the revised requirements of § 1.6049–5(c)(1), these final regulations allow a payor to continue to use, for accounts opened on or after July 1, 2014, and before January 1, 2015, the rules regarding the use of documentary evidence under § 1.6049–5(c)(1) and (c)(4) as in effect and contained in 26 CFR part 1 revised April 1, 2013 (prior § 1.6049–5(c)), instead of the new rules regarding documentary evidence for offshore obligations under § 1.6049–5T(c)(1) and (c)(4) of the 2014 temporary coordination regulations. For consistency, a payor that applies prior § 1.6049–5(c) to an account or obligation will also be required to apply § 1.1441–6(c)(2) (for documentary evidence used to support a treaty claim) and § 1.6049–5(e) as in effect and contained in 26 CFR part 1 revised April 1, 2013, with respect to the account or obligation. These modifications to the 2014 temporary coordination regulations were previewed in Notice 2014–59.

2. Presumption Rules for Bank Deposit Interest

These regulations also include a change to the presumption rule for U.S. source bank deposit interest in § 1.6049–5(d)(3)(iii)(A). This presumption rule was inadvertently removed in the 2014 temporary coordination regulations and the 2014 QI Agreement, and it was corrected in the Proposed QI Agreement. It is expected to apply only in cases in which chapter 4 withholding does not apply.

K. Minor and Non-Substantive Clarifications and Corrections

These final regulations also include various non-substantive clarifications and corrections to the 2014 temporary coordination regulations, including corrections of erroneous cross-references. For example, these final regulations clarify in § 1.1441–5(c)(2)(iii) that a withholding foreign partnership is required to assume primary withholding responsibility under chapters 3 and 4 to the extent required by the withholding foreign partnership agreement.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13653. Therefore, a regulatory assessment is not required.

For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the cross-referenced notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, the notice

of proposed rulemaking preceding the final regulations in this document were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these proposed regulations is Leni C. Perkins, Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR parts 1, 31, and 301 are amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.871–14 is amended by revising paragraphs (b), (c)(2) introductory text, (c)(2)(i) through (iv), (c)(3)(i), (c)(4), and (e)(1), removing paragraph (e)(4)(iv), and revising paragraph (j).

The revisions read as follows:

§ 1.871–14 Rules relating to repeal of tax on interest of nonresident alien individuals and foreign corporations received from certain portfolio debt investments.

* * * * *

(b) *Rules concerning obligations in bearer form before March 19, 2012*—(1) *In general.* Interest (including original issue discount) with respect to an obligation in bearer form is portfolio interest within the meaning of section 871(h)(2)(A) or 881(c)(2)(A) only if it is paid with respect to an obligation issued after July 18, 1984, and issued before March 19, 2012, that is described in section 163(f)(2)(B), as in effect before the amendment by section 502 of the Hiring Incentives to Restore Employment Act of 2010 (HIRE Act), Public Law 111–147, and the regulations under that section and an exception under section 871(h) or 881(c) does not apply. Any obligation that is not in registered form as defined in paragraph (c)(1)(i) of this section is an obligation in bearer form.

(2) *Coordination with withholding and reporting rules.* For an exemption from withholding under section 1441 with respect to obligations described in this paragraph (b), see § 1.1441–1(b)(4)(i). See § 1.1471–2 for rules relating to withholding under chapter 4 of the Code that may apply to withholdable payments (as defined in § 1.1471–4(b)(145)) made on or after July 1, 2014, with respect to an agreement or instrument that is not treated as an obligation outstanding before March 19, 2012. For purposes of the preceding sentence, the terms *obligation* and *outstanding* are described in § 1.1471–2(b)). See also § 1.1471–4(d)(6) for the reporting requirements of participating foreign financial institutions (as defined in § 1.1471–1(b)(91)) with respect to accounts held by recalcitrant account holders (as defined in § 1.1471–5(g)). For rules relating to an exemption from Form 1099 reporting and backup withholding under section 3406, see section 6049 and § 1.6049–5(b)(8) for the payment of interest and § 1.6045–1(g)(1)(ii) for the redemption, retirement, or sale of an obligation in bearer form.

(c) * * *

(2) *Required statement.* For purposes of paragraph (c)(1)(ii)(C) of this section, a U.S. person will be considered to have received a statement that meets the requirements of section 871(h)(5) if either it complies with one of the procedures described in this paragraph (c)(2) and does not have actual knowledge or reason to know that the beneficial owner is a U.S. person or it complies with the procedures described in paragraph (d) or (e) of this section (to the extent applicable).

(i) The U.S. person (or its authorized agent described in § 1.1441–7(c)(2)) can reliably associate the payment with documentation upon which it can rely to treat the payment as made to a foreign beneficial owner in accordance with § 1.1441–1(e)(1)(ii). See § 1.1441–1(b)(2)(vii) for rules regarding reliable association with documentation.

(ii) The U.S. person (or its authorized agent described in § 1.1441–7(c)(2)) can reliably associate the payment with a withholding certificate described in § 1.1441–5(c)(2)(iv) from a person claiming to be a withholding foreign partnership or § 1.1441–5(e)(v) for a person claiming to be a withholding foreign trust.

(iii) The U.S. person (or its authorized agent described in § 1.1441–7(c)(2)) can reliably associate the payment with a withholding certificate described in § 1.1441–1(e)(3)(ii) from a person representing to be a qualified intermediary that has assumed primary withholding responsibility for the payment in accordance with § 1.1441–1(e)(5)(iv) or a qualified intermediary that has provided a withholding statement that meets the requirements of § 1.1441–1(e)(5)(v)(C) or that includes the payment in a withholding rate pool for payments excepted from withholding.

(iv) The U.S. person (or its authorized agent described in § 1.1441–7(c)(2)) can reliably associate the payment with a withholding certificate described in § 1.1441–1(e)(3)(v) from a person claiming to be a U.S. branch of a foreign bank or of a foreign insurance company that is described in § 1.1441–1(b)(2)(iv)(A) or a U.S. branch designated in accordance with § 1.1441–1(b)(2)(iv)(E).

* * * * *

(3) *Time for providing certificate or documentary evidence*—(i) *General rule.* Interest on a registered obligation shall qualify as portfolio interest if the withholding certificate or documentary evidence that must be provided is furnished before expiration of the beneficial owner's period of limitation for claiming a refund of tax with respect to such interest. See, however, § 1.1441–1(b)(7) for consequences to a withholding agent that makes a payment without withholding even though it cannot reliably associate the payment with the documentation prior to the payment. If a withholding agent withholds an amount under chapter 3 of the Code because it cannot reliably associate the payment with the documentation for the beneficial owner on the date of payment, the beneficial owner may nevertheless claim the benefit of an exemption from tax under this section by claiming a refund or credit for the amount withheld based upon the procedures described in §§ 1.1464–1 and 301.6402–3(e) of this chapter. See §§ 1.1474–5 and 301.6402–3(e) of this chapter for the allowance and requirements for a refund with respect to an amount (including a payment of interest) that was withheld upon under chapter 4 of the Code. In the alternative, adjustments to any amount of overwithheld tax may be made under the procedures described in § 1.1461–2(a) for a payment withheld upon under

chapter 3 of the Code or in § 1.1474–2 for a payment withheld upon under chapter 4 of the Code.

* * * * *

(4) *Coordination with withholding and reporting rules.* For an exemption from withholding under section 1441 with respect to obligations described in this paragraph (c)(4), see § 1.1441–1(b)(4)(i). For rules applicable to withholding certificates, see § 1.1441–1(e)(4). For rules regarding documentary evidence, see § 1.6049–5(c)(1). For application of presumptions when the U.S. person cannot reliably associate the payment with documentation, see § 1.1441–1(b)(3). For standards of knowledge applicable to withholding agents, see § 1.1441–7(b). For rules relating to reporting on Forms 1042 and 1042–S, see § 1.1461–1(b) and (c). For rules relating to an exemption from Form 1099 reporting and backup withholding under section 3406, see section 6049 and § 1.6049–5(b)(8) for the payment of interest and § 1.6045–1(g)(1)(i) for the redemption, retirement, or sale of an obligation in registered form. For rules relating to withholding under sections 1471 and 1472 that may apply notwithstanding the exemption for payments of portfolio interest under section 1441, see §§ 1.1471–2(a), 1.1471–4(b), and 1.1472–1(b).

* * * * *

(e) *Foreign-targeted registered obligations*—(1) *General rule.* The statement described in paragraph (c)(1)(ii) of this section is not required with respect to interest paid on an obligation issued before January 1, 2016, that is a registered obligation targeting foreign markets in accordance with the provisions of paragraph (e)(2) of this section if the interest is paid by a U.S. person, a withholding foreign partnership, or a U.S. branch described in § 1.1441–1(b)(2)(iv)(A) or (E) to a registered owner at an address outside the United States, provided that the registered owner is a financial institution described in section 871(h)(5)(B). In that case, the U.S. person otherwise required to deduct and withhold tax may treat the interest as portfolio interest if it does not have actual knowledge that the beneficial owner is a United States person and if it receives the certificate described in paragraph (e)(3)(i) of this section from a financial institution or member of a clearing organization, which member is the beneficial owner of the obligation, or the documentary evidence or statement described in paragraph (e)(3)(ii) of this section from the beneficial owner, in accordance with the procedures described in paragraph (e)(4) of this section.

* * * * *

(j) *Effective/applicability date*—(1) *In general.* Except as otherwise provided in paragraph (j)(2) and (3) of this section, this section applies to payments of interest made on or after January 6, 2017. (For the rules that apply after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments of interest made after December 31, 2000, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.)

(2) *Portfolio interest not to include interest received by 10-percent shareholders.* Paragraph (g) applies to interest paid after April 12, 2007. Taxpayers may choose to apply the rules of paragraph (g) to interest paid in any taxable year not closed by the period of limitations as of April 12, 2007, provided they do so consistently for all relevant partnerships during such years.

(3) *Portfolio interest not to include certain contingent interest.* The rules of paragraph (h) of this section apply beginning September 18, 2015.

§ 1.871–14T [Removed]

■ Par. 3. Section 1.871–14T is removed.

■ **Par. 4.** Section 1.1441–0 is amended by:

■ 1. Revising entries for § 1.1441–1(b)(2)(vii)(D) through (F) and (b)(3)(ii)(C).

■ 2. Adding entries for § 1.1441–1 (b)(3)(iii)(A)(*1*) and (*2*).

■ 3. Revising entry for § 1.1441–1(b)(3)(iii)(D).

■ 4. Adding entry for § 1.1441–1(b)(3)(iii)(E).

■ 5. Removing entries for § 1.1441–1(b)(3)(v)(C) and (D).

■ 6. Revising entries for § 1.1441–1(b)(3)(vi) through (b)(3)(vii)(B).

■ 7. Revising entries for § 1.1441–1(b)(6)(ii) through (b)(7)(v).

■ 8. Adding entries for § 1.1441–1(c)(2)(i) and (ii).

■ 9. Revising entries for § 1.1441–1(c)(5), (c)(10), and (c)(28) and (29).

■ 10. Adding entries for § 1.1441–1(c)(30) through (56).

■ 11. Adding entries for § 1.1441–1(e)(2)(ii)(A) and (B).

■ 12. Revising the entry for § 1.1441–1(e)(3)(iv).

■ 13. Adding entries for § 1.1441–1(e)(3)(iv)(C)(1) through (4) and § 1.1441–1(e)(3)(iv)(D)(*1*) through (*8*).

■ 14. Revising the entry for § 1.1441–1(e)(3)(v).

■ 15. Adding entries for § 1.1441–1(e)(4)(i)(A) and (B).

■ 16. Revising the entry for § 1.1441–1(e)(4)(ii)(A) and adding entries for § 1.1441–1(e)(4)(ii)(A)(*1*) and (*2*).

■ 17. Adding entries for § 1.1441–1(e)(4)(ii)(D)(*1*) through (*3*)

■ 18. Revising the entries for § 1.1441–1(e)(4)(iii).

■ 19. Adding entries from § 1.1441–1(e)(4)(iv)(B)(*1*) through (*4*).

■ 20. Revising the entry from § 1.1441–1(e)(4)(iv)(C) and adding entries for § 1.1441–1(e)(4)(iv)(D) and (E).

■ 21. Revising the entries for § 1.1441–1(e)(4)(v), § 1.1441–1(e)(4)(viii)(C), § 1.1441–1(e)(4)(ix) introductory text and § 1.1441–1(e)(4)(ix)(A) and (B).

■ 22. Adding entries for § 1.1441–1(e)(4)(ix)(B)(*1*) and (*2*)..

■ 23. Revising entry for § 1.1441–1(e)(4)(ix)(C) and adding entries for § 1.1441(e)(4)(ix)(C)(*1*) and (*2*) and § 1.1441–1(e)(4)(ix)(D).

■ 24. Revising entries for § 1.1441–1(e)(5)(i) and

■ 25. Adding entries for § 1.1441–1(e)(5)(v)(C)(1) through (f)(3).

■ 26. Adding entries for § 1.1441–2(b)(3)(iii), (b)(6), and (e)(7).

■ 27. Revising the entry for § 1.1441–3(a) and adding entries for § 1.1441–3(a)(1) and (2).

■ 28. Revising the entry for § 1.1441–3(c)(4)(i)(C).

■ 29. Adding entries for § 1.1441–3(g)(1) and (2).

■ 30. Revising entry for § 1.1441–3(h) and adding entries for § 1.1441–3(h)(1) and (2) and § 1.1441–3(i).

■ 31. Adding an entry for § 1.1441–4(a)(3)(iii); and revising entries for § 1.1441–4(b)(4) and (g).

■ 32. Removing entries for § 1.1441–4(g)(1) through (2).

■ 33. Adding an entry for § 1.1441–5(b)(2)(vi).

■ 34. Revising and adding entries for § 1.1441–5(c)(1)(iv) and (v).

■ 35. Revising entries for § 1.1441–5(c)(3)(iv) through (d)(2).

■ 36. Revising the entry for § 1.1441–5(e)(2).

■ 37. Adding an entry for § 1.1441–5(e)(3)(iii).

■ 38. Revising entries for § 1.1441–5(e)(5)(iv) and (g).

■ 39. Removing entries for § 1.1441–5(g)(1) and (2).

■ 40. Adding entries for § 1.1441–6(b)(1)(i) and (ii).

■ 41. Revising the entry for § 1.1441–6(c)(1).

■ 42. Revising the entry for § 1.1441–6(h).

■ 43. Adding an entry for § 1.1441–6(i).

■ 44. Revising the entry for § 1.1441–7(a)(2), and adding entries for § 1.1441–7(a)(3) and (4).

■ 45. Adding entries for § 1.1441–7(b)(3)(i) and (ii).

■ 46. Adding entries for § 1.1441–7(b)(5)(i) through (c)(3), § 1.1441–7(b)(6)(i) through (iii), § 1.1441–7(b)(8)(i) through (iv), and § 1.1441–7(b)(9)(i) and (ii).
■ 47. Revising entries for § 1.1441–7(b)(10) and (11) and adding entries for § 1.1441–7(b)(12) and (13).
■ 48. Revising the entry for § .1441–7(c).
■ 49. Adding entries for § 1.1441–7(f)(1) through (f)(2)(ii).
■ 50. Revising entry for § 1.1441–7(g).
■ 51. Adding an entry for § 1.1441–10.

The revisions and additions read as follows:

§ 1.1441–0 Outline for regulations provisions for section 1441.

This section lists captions contained in §§ 1.1441–1 through 1.1441–10.

§ 1.1441–1 Requirement for the deduction and withholding of tax on payments to foreign persons.

* * * * *

(b) * * *

(2) * * *

(vii) * * *

(D) Special rules applicable to a withholding certificate provided by a qualified intermediary that assumes primary withholding responsibility under chapter 3 and chapter 4 of the Internal Revenue Code.

(E) Special rules applicable to a withholding certificate provided by a qualified intermediary that assumes primary Form 1099 reporting and backup withholding responsibility but not primary withholding under chapter 3 and chapter 4.

(F) Special rules applicable to a withholding certificate provided by a qualified intermediary that assumes primary withholding responsibility under chapter 3 and chapter 4 and primary Form 1099 reporting and backup withholding responsibility and a withholding certificate provided by a withholding foreign partnership or a withholding foreign trust.

(3) * * *

(ii) * * *

(C) Documentary evidence furnished for offshore obligation.

(iii) Presumption of U.S. or foreign status.

(A) Payments to exempt recipients.

(*1*) In general.

(*2*) Special rule for withholdable payments made to exempt recipients.

* * * * *

(D) Payments with respect to offshore obligations.

(E) Certain payments for services.

* * * * *

(vi) U.S. branches and territory financial institutions not treated as U.S. persons.

(vii) Joint payees.

(A) In general.

(B) Special rule for offshore obligations.

* * * * *

(6) * * *

(ii) Examples.

(7) Liability for failure to obtain documentation timely or to act in accordance with applicable presumptions.

(i) General rule.

(ii) Proof that tax liability has been satisfied.

(A) In general.

(B) Special rule for establishing that income is effectively connected with the conduct of a U.S. trade or business.

(iii) Liability for interest and penalties.

(iv) Special rule for determining validity of withholding certificate containing inconsequential errors.

(v) Special effective date.

* * * * *

(c) * * *

(2) * * *

(i) In general.

(ii) Dual residents.

* * * * *

(5) Financial institution and foreign financial institution (or FFI).

* * * * *

(10) Chapter 3 of the Code (or chapter 3).

* * * * *

(28) Nonwithholding foreign partnership (or NWP).

(29) Withholding foreign partnership (or WP).

(30) Possession of the United States or U.S. territory.

(31) Amount subject to chapter 3 withholding.

(32) EIN.

(33) Flow-through withholding certificate.

(34) Foreign payee.

(35) Intermediary withholding certificate.

(36) Nonwithholding foreign trust (or NWT).

(37) Payment with respect to an offshore obligation.

(38) Permanent residence address.

(i) In general.

(ii) Hold mail instruction.

(39) Standing instructions to pay amounts.

(40) Territory financial institution.

(41) TIN.

(42) Withholding foreign trust (or WT).

(43) Certified deemed-compliant FFI.

(44) Chapter 3 withholding rate pool.

(45) Chapter 3 status.

(46) Chapter 4 of the Code (or chapter 4).

(47) Chapter 4 status.

(48) Chapter 4 withholding rate pool.

(49) Deemed-compliant FFI.

(50) GIIN (or Global Intermediary Identification Number).

(51) NFFE.

(52) Nonparticipating FFI.

(53) Participating FFI.

(54) Preexisting obligation.

(55) Registered deemed-compliant FFI.

(56) Withholdable payment.

* * * * *

(e) * * *

(2) * * *

(ii) * * *

(A) In general.

(B) Requirement to collect foreign TIN and date of birth beginning January 1, 2017.

(3) * * *

(iv) Withholding statement provided by nonqualified intermediary.

* * * * *

(C) * * *

(*1*) In general.

(*2*) Nonqualified intermediary withholding statement for withholdable payments.

(*3*) Alternative withholding statement.

(*4*) Example.

(D) Alternative procedures.

(*1*) In general.

(*2*) Withholding rate pools.

(*i*) In general.

(*ii*) Withholding rate pools for .chapter 4 purposes.

(*3*) Allocation information.

(*4*) Failure to provide allocation information.

(*5*) Cure provision.

(*6*) Form 1042–S reporting in case of allocation failure.

(*7*) Liability for tax, interest, and penalties.

(*8*) Applicability to flow-through entities and certain U.S. branches.

(E) Notice procedures.

(v) Withholding certificate from certain U.S. branches (including territory financial institutions).

(vi) Reportable amounts.

(4) Applicable rules.

(i) Who may sign the certificate.

(A) In general.

(B) Electronic signatures.

(ii) Period of validity.

(A) General rule.

(*1*) Withholding certificates and documentary evidence.

(*2*) Documentary evidence for treaty claims and treaty statements.

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(D) * * *

(*1*) Defined.

(*2*) Obligation to notify a withholding agent of a change in circumstances.

(*3*) Withholding agent's obligation with respect to a change in circumstances.

(iii) Retention of documentation.
(iv) Electronic transmission of information
(A) In general.
(B) Requirements.
(*1*) In general.
(*2*) Same information as paper Form W–8.
(*3*) Perjury statement and signature requirements.
(*i*) Perjury statement.
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(*4*) Requests for electronic Form W–8 data.
(C) Form 8233.
(D) Forms and documentary evidence received by facsimile or email.
(E) Third party repositories.
(v) Additional procedures for certificates provided electronically.
* * * * *
(viii) * * *
(C) Reliance on a prior version of a withholding certificate.
(ix) Certificates to furnished for each obligation unless exception applies.
(A) Exception for certain branch or account systems or system maintained by agent.
(B) Reliance on certification provided by introducing brokers.
(*1*) In general.
(*2*) Example.
(C) Reliance on documentation and certifications provided between principals and agents.
(*1*) Withholding agent as agent.
(*2*) Withholding agent as principal.
(D) Reliance upon documentation for accounts acquired in merger or bulk acquisition for value.
(5) Qualified intermediaries.
(i) In general.
* * * * *
(v) * * *
(A) In general.
(B) Content of withholding statement.
(C) Withholding rate pools
(*1*) In general.
(*2*) Withholding rate pool requirements for a withholdable payment.
(*3*) Alternative procedure for U.S. non-exempt recipients.
(D) Example.
(6) Qualified derivatives dealers.
(f) Effective/applicability date.
(1) In general.
(2) Lack of documentation for past years.
(3) Section 871(m) transactions.

§ 1.1441–2 Amounts subject to withholding.

* * * * *
(b) * * *
(3) * * *
(iii) Exceptions to withholding.
* * * * *
(6) Dividend equivalents.
* * * * *
(e) * * *
(7) Payments of dividend equivalents.
(i) In general.
(ii) Payment.
(iii) Premiums and other upfront payments.
* * * * *

§ 1.1441–3 Determination of amounts to be withheld.

(a) General rule.
(1) Withholding on gross amount.
(2) Coordination with chapter 4.
* * * * *
(c) * * *
(4) * * *
(i) * * *
(C) Coordination with REIT/QIE withholding.
* * * * *
(g) * * *
(1) Duty to withhold.
(2) Effective date.
(h) Dividend equivalents.
(1) Withholding on gross amount.
(2) Reliance by withholding agent on reasonable determinations.
(3) Effective/applicability date.
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§ 1.1441–4 Exemptions from withholding for certain effectively connected income and other amounts.

(a) * * *
(3) * * *
(iii) Exception for specified notional principal contracts.
(b) * * *
(4) Final payment exemption.
* * * * *
(g) Effective/applicability date.

§ 1.1441–5 Withholding on payments to partnerships, trusts, and estates.

* * * * *
(b) * * *
(2) * * *
(vi) Coordination with chapter 4 requirements for U.S. partnerships, trusts, and estates.
(c) * * *
(1) * * *
(iv) Coordination with chapter 4 for payments made to foreign partnerships.
(v) Examples.
* * * * *
(3) * * *
(iv) Withholding statement provided by nonwithholding foreign partnership and coordination with chapter 4.
(v) Withholding and reporting by a foreign partnership.
(d) Presumption rules.
(1) In general.
(2) Determination of partnership status as U.S. or foreign in the absence of documentation.
* * * * *
(e) * * *
(2) Payments to foreign complex trusts and foreign estates.
(3) * * *
(iii) Coordination with chapter 4 for payments made to foreign simple trusts and foreign grantor trusts.
* * * * *
(5) * * *
(iv) Withholding statement provided by foreign simple trust or foreign grantor trust and coordination with chapter 4.
* * * * *
(g) Effective/applicability date.

§ 1.1441–6 Claim of reduced withholding under an income tax treaty.

* * * * *
(b) * * *
(1) * * *
(i) Identification of limitation on benefits provisions.
(ii) Reason to know based on existence of treaty.
* * * * *
(c) * * *
(1) General rule.
* * * * *
(h) Dividend equivalents.
(i) Effective/applicability dates.
(1) General rule.
(2) Dividend equivalents.

§ 1.1441–7 General provisions relating to withholding agents.

(a) * * *
(2) Withholding agent with respect to dividend equivalents.
(3) Examples.
(4) Effective/applicability date.
(b) * * *
(3) * * *
(i) In general.
(ii) Limits on reason to know for preexisting obligations.
* * * * *
(5) * * *
(i) Classification of U.S. status, U.S. address, or U.S. telephone number.
(ii) U.S. place of birth.
(iii) Standing instructions with respect to offshore obligations.
(6) Withholding certificate—claim of reduced rate of withholding under.
(i) Permanent residence address.
(ii) Mailing address.
(iii) Standing instructions.
(7) Documentary evidence.
(8) Documentary evidence—establishment of foreign status.
(i) Documentary evidence received prior to January 1, 2001.
(ii) Documentary evidence received after December 31, 2000.
(A) Treatment of individual's foreign status.
(B) Presumption of entity's foreign status.

(iii) U.S. place of birth.

(iv) Standing instructions with respect of offshore obligations.

(9) Documentary evidence—claim of reduced rate of withholding under treaty.

(i) Permanent residence address and mailing address.

(ii) Standing instructions.

(10) Indirect account holders.

(11) Limits on reason to know for multiple obligations belonging to a single person.

(12) Reasonable explanation supporting claim of foreign status.

(13) Additional guidance.

(c) Agent.

(1) In general.

(2) Authorized agent.

(3) Liability of withholding agent acting through an agent.

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(f) * * *

(1) Liability of withholding agent.

(2) Exception for withholding agents that do not know of conduit financing arrangement.

(i) In general.

(ii) Examples.

(g) Effective/applicability date.

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§ 1.1441–10 Withholding agents with respect to fast-pay arrangements.

(a) In general.

(b) Exception.

(c) Liability.

(d) Examples.

(e) Effective date.

■ **Par. 5.** Section 1.1441–1 is amended by:

■ 1. Revising paragraphs (a), (b)(1), (b)(2)(i), (b)(2)(iii)(A), (b)(2)(iv)(A), (b)(2)(iv)(B)(*2*) though (*4*), (b)(2)(iv)(C), (b)(2)(iv)(E), (b)(2)(vi), (b)(2)(vii)(B) through (b)(2)(vii)(F), (b)(3)(i), (b)(3)(ii), (b)(3)(iii) introductory text, (b)(3)(iii)(A)(*1*), and (b)(3)(iii)(A)(*1*)(*i*) through (b)(3)(iii)(A)(*1*)(*v*), (b)(3)(iii)(*A*)(*2*), (b)(3)(iii)(D), (b)(3)(iv) introductory text, (b)(3)(iv)(A), (b)(3)(v)(B), (b)(3)(vi), (b)(3)(vii), (b)(3)(ix)(A), (b)(3)(x), (b)(4) introductory text, (b)(4)(i), (b)(5)(ix), (b)(6), (b)(7)(i) introductory text, and (b)(7)(i)(A) through (b)(7)(i)(C).

■ 2. Redesignating paragraph (b)(7)(ii) as (b)(7)(ii)(A) and revising it.

■ 3. Adding reserved paragraph (b)(7)(ii)(C).

■ 4. Revising paragraphs (b)(7)(iv) and (v) and (c) introductory text.

■ 5. Redesignating paragraph (c)(2) as (c)(2)(i) and revising it.

■ 6. Adding reserved paragraph (c)(2)(ii).

■ 7. Revising paragraphs (c)(3)(ii), (c)(5), (c)(10), (c)(12), (c)(16) and (17), (c)(23), (c)(25), and (c)(28) through (37).

■ 8. Redesignating paragraph (c)(38) as (c)(38)(i) and revising it.

■ 9. Adding reserved paragraph (c)(38)(ii).

■ 10. Revising paragraphs (c)(39) through (56), (d)(4), and (e)(1)(ii)(A)(*2*) and (*3*).

■ 11. Redesignating paragraph (e)(2)(ii) as (e)(2)(ii)(A) and revising new paragraph (e)(2)(ii)(A).

■ 12. Adding reserved paragraph (e)(2)(ii)(B).

■ 13. Revising paragraphs (e)(3)(ii) introductory text, (e)(3)(ii)(A), (e)(3)(ii)(C), (e)(3)(ii)(D), (e)(3)(ii)(F), (e)(3)(iii) introductory text, (e)(3)(iii)(A), (e)(3)(iii)(C) through (E), and (e)(3)(iv)(A) through (e)(3)(iv)(C)(*2*)(*v*).

■ 14. Adding paragraph (e)(3)(iv)(C)(*2*)(*v*).

■ 15. Redesignating paragraph (e)(3)(iv)(C)(*3*) as (e)(3)(iv)(C)(*4*) and revising it.

■ 16. Adding reserved new paragraph (e)(3)(iv)(C)(*3*)

■ 17. Revising paragraphs (e)(3)(iv)(D)(*1*) through (*6*), (e)(3)(iv)(E), (e)(3)(v), and (e)(4) introductory text.

■ 18. Redesignating paragraph (e)(4)(i) as (e)(4)(i)(A) and revising it.

■ 19. Adding reserved paragraph (e)(4)(i)(B).

■ 20. Revising paragraph (e)(4)(ii)(A).

■ 22. Revising paragraphs (e)(4)(ii)(B) introductory text, (e)(4)(ii)(B)(*1*) through (*6*), and (e)(4)(ii)(B)(*8*) through (*10*).

■ 23. Removing paragraph (e)(4)(ii)(B)(*11*) and redesignating paragraph (e)(4)(ii)(B)(*12*) as paragraph (e)(4)(ii)(B)(*11*).

■ 24. Revising paragraphs (e)(4)(ii)(C) and (D), (e)(4)(iii), and (e)(4)(iv)(A).

■ 25. Redesignating paragraph (e)(4)(iv)(C) as (e)(4)(iv)(D) and revising it.

■ 26. Adding reserved paragraph (e)(4)(iv)(C).

■ 27. Adding reserved paragraph (e)(4)(iv)(E).

■ 28. Revising paragraphs (e)(4)(v), (e)(4)(vi), (e)(4)(vii) introductory text, (e)(4)(vii)(A), (e)(4)(vii)(F), (e)(4)(vii)(H), (e)(4)(vii)(l), (e)(4)(viii) introductory text, (e)(4)(viii)(B) and (C), (e)(4)(ix), (e)(5)(ii) introductory text, and (e)(5)(ii)(A) through (D).

■ 29. Revising paragraphs (e)(5)(iii) and (iv), (e)(5)(v)(A), (e)(5)(v)(B) introductory text, and (e)(5)(v)(B)(*1*) through (*3*).

■ 30. Redesignating paragraph (e)(5)(v)(B)(*4*) as (e)(5)(v)(B)(*5*) and revising it.

■ 31. Revising paragraphs (e)(5)(v)(C) and (D) and (f)(1)(4).

The additions and revisions read as follows:

§ 1.1441–1 Requirement for the deduction and withholding of tax on payments to foreign persons.

(a) *Purpose and scope.* This section, §§ 1.1441–2 through 1.1441–9, and 1.1443–1 provide rules for withholding under sections 1441, 1442, and 1443 when a payment is made to a foreign person. This section provides definitions of terms used in chapter 3 of the Internal Revenue Code (Code) and regulations thereunder. It prescribes procedures to determine whether an amount must be withheld under chapter 3 of the Code and documentation that a withholding agent may rely upon to determine the status of a payee or a beneficial owner as a U.S. person or as a foreign person and other relevant characteristics of the payee that may affect a withholding agent's obligation to withhold under chapter 3 of the Code and the regulations thereunder. Special procedures regarding payments to foreign persons that act as intermediaries are also provided. Section 1.1441–2 defines the income subject to withholding under sections 1441, 1442, and 1443 and the regulations under these sections. Section 1.1441–3 provides rules regarding the amount subject to withholding and rules for coordinating withholding under this section with withholding under section 1445 and under chapter 4 of the Code. Section 1.1441–4 provides exemptions from withholding for, among other things, certain income effectively connected with the conduct of a trade or business in the United States, including certain compensation for the personal services of an individual. Section 1.1441–5 provides rules for withholding on payments made to flow-through entities and other similar arrangements. Section 1.1441–6 provides rules for claiming a reduced rate of withholding under an income tax treaty. Section 1.1441–7 defines the term withholding agent and provides due diligence rules governing a withholding agent's obligation to withhold. Section 1.1441–8 provides rules for relying on claims of exemption from withholding for payments to a foreign government, an international organization, a foreign central bank of issue, or the Bank for International Settlements. Sections 1.1441–9 and 1.1443–1 provide rules for relying on claims of exemption from withholding for payments to foreign tax exempt organizations and foreign private foundations.

(b) *General rules of withholding*—(1) *Requirement to withhold on payments to foreign persons.* A withholding agent must withhold 30 percent of any payment of an amount subject to

withholding made to a payee that is a foreign person unless it can reliably associate the payment with documentation upon which it can rely to treat the payment as made to a payee that is a U.S. person or as made to a beneficial owner that is a foreign person entitled to a reduced rate of withholding. However, a withholding agent making a payment to a foreign person need not withhold where the foreign person assumes responsibility for withholding on the payment under chapter 3 of the Code and the regulations thereunder as a qualified intermediary (see paragraphs (e)(5) and (e)(6) of this section), as a U.S. branch of a foreign person (see paragraph (b)(2)(iv) of this section), as a withholding foreign partnership (see § 1.1441–5(c)(2)(i)), or as a withholding foreign trust (see § 1.1441–5(e)(5)(v)). When withholding under chapter 4 was applied to a payment, the withholding obligation under this section is satisfied. See § 1.1441–3(a)(2). This section (dealing with general rules of withholding and claims of foreign or U.S. status by a payee or a beneficial owner) and §§ 1.1441–4, 1.1441–5, 1.1441–6, 1.1441–8, 1.1441–9, and 1.1443–1 provide rules for determining whether documentation is required as a condition for reducing the rate of withholding on a payment to a foreign beneficial owner or to a U.S. payee and if so, the nature of the documentation upon which a withholding agent may rely in order to reduce such rate. Paragraph (b)(2) of this section prescribes the rules for the determination of who the payee is, the extent to which a payment is treated as made to a foreign payee, and reliable association of a payment with documentation. Paragraph (b)(3) of this section describes the applicable presumptions for determining the payee's status as U.S. or foreign and the payee's other characteristics (*e.g.,* as an owner or intermediary, as an individual, partnership, corporation, etc.). Paragraph (b)(4) of this section lists the types of payments for which the 30-percent withholding rate may be reduced. Because the treatment of a payee as a U.S. or a foreign person also has consequences for purposes of making an information return under the provisions of chapter 61 of the Code and for withholding under other provisions of the Code, such as sections 3402, 3405, or 3406, paragraph (b)(5) of this section lists applicable provisions outside chapter 3 of the Code that require certain payees to establish their foreign status (*e.g.,* in order to be exempt from information reporting). Paragraph (b)(6) of this section describes the withholding obligations of a foreign person making a payment that it has received in its capacity as an intermediary. Paragraph (b)(7) of this section describes the liability of a withholding agent that fails to withhold at the required 30-percent rate in the absence of documentation. Paragraph (b)(8) of this section deals with adjustments and refunds in the case of overwithholding. Paragraph (b)(9) of this section deals with determining the status of the payee when the payment is jointly owned. See paragraph (c)(6) of this section for a definition of beneficial owner. See § 1.1441–7(a) for a definition of withholding agent. See § 1.1441–2(a) for the determination of an amount subject to withholding. See § 1.1441–2(e) for the definition of a payment and when it is considered made. Except as otherwise provided, the provisions of this section apply only for purposes of determining a withholding agent's obligation to withhold under chapter 3 of the Code and the regulations thereunder.

(2) *Determination of payee and payee's status*—(i) *In general.* Except as otherwise provided in this paragraph (b)(2) and § 1.1441–5(c)(1) and (e)(3), a payee is the person to whom a payment is made, regardless of whether such person is the beneficial owner of the amount (as defined in paragraph (c)(6) of this section). A foreign payee is a payee who is a foreign person. A U.S. payee is a payee who is a U.S. person. Generally, the determination by a withholding agent of the U.S. or foreign status of a payee and of its other relevant characteristics (*e.g.,* as a beneficial owner or intermediary, or as an individual, corporation, or flow-through entity) is made on the basis of a withholding certificate that is a Form W–8 or a Form 8233 (indicating foreign status of the payee or beneficial owner) or a Form W–9 (indicating U.S. status of the payee). The provisions of this paragraph (b)(2), paragraph (b)(3) of this section, and § 1.1441–5(c), (d), and (e) dealing with determinations of payee and applicable presumptions in the absence of documentation apply only to payments of amounts subject to withholding under chapter 3 of the Code (within the meaning of § 1.1441–2(a)). However, for a payment that is both an amount subject to withholding under chapter 3 and a withholdable payment under chapter 4, first apply the rules of § 1.1471–3 for determining the payee of a withholdable payment under chapter 4 and the applicable presumptions in the absence of documentation applicable to such payments. See also § 1.6049–5(d) for payments of amounts that are not subject to withholding under chapter 3 of the Code (or the regulations thereunder) but that may be reportable under provisions of chapter 61 of the Code (and the regulations thereunder). See paragraph (d) of this section for documentation upon which the withholding agent may rely in order to treat the payee or beneficial owner as a U.S. person. See paragraph (e) of this section for documentation upon which the withholding agent may rely in order to treat the payee or beneficial owner as a foreign person. For applicable presumptions of status in the absence of documentation, see paragraph (b)(3) of this section and § 1.1441–5(d). For definitions of a foreign person and U.S. person, see paragraph (c)(2) of this section.

* * * * *

(iii) *Payments to wholly-owned entities*—(A) *Foreign-owned domestic entity.* A payment to a wholly-owned domestic entity that is disregarded for federal tax purposes under § 301.7701–2(c)(2) of this chapter as an entity separate from its owner and whose single owner is a foreign person shall be treated as a payment to the owner of the entity, subject to the provisions of paragraph (b)(2)(iv) of this section. For purposes of this paragraph (b)(2)(iii)(A), a domestic entity means a person that would be treated as a U.S. person if it had an election in effect under § 301.7701–3(c)(1)(i) of this chapter to be treated as a corporation. For example, a limited liability company, A, organized under the laws of the State of Delaware, opens an account at a U.S. bank. Upon opening of the account, the bank requests A to furnish a Form W–9 as required under section 6049(a) and the regulations under that section. A does not have an election in effect under § 301.7701–3(c)(1)(i) of this chapter and, therefore, is not treated as an organization taxable as a corporation, including for purposes of the exempt recipient provisions in § 1.6049–4(c)(1). If A has a single owner and the owner is a foreign person (as defined in paragraph (c)(2) of this section), then A may not furnish a Form W–9 because it may not represent that it is a U.S. person for purposes of the provisions of chapters 3, 4, and 61 of the Code, and section 3406. Therefore, A must furnish a Form W–8 with the name, address, and taxpayer identifying number (TIN) (if required) of the foreign person who is the single owner in the same manner as if the account were opened directly by the foreign single owner. See §§ 1.894–1(d) and 1.1441–6(b)(2) for

special rules where the entity's owner is claiming a reduced rate of withholding under an income tax treaty.

* * * * *

(iv) *Payments to a U.S. branch of certain foreign banks or foreign insurance companies*—(A) *U.S. branch treated as a U.S. person in certain cases.* A payment to a U.S. branch of a foreign person is a payment to a foreign person. However, a U.S. branch of a foreign person that is described in this paragraph (b)(2)(iv)(A) may agree to be treated as a U.S. person for purposes of withholding on specified payments to the U.S. branch. If a U.S. branch agrees to be treated as a U.S. person with a withholding agent, it is required to act as a U.S. person with respect to all other withholding agents, including when acting as an intermediary with respect to withholdable payments for purposes of chapter 4. See § 1.1471–3(a)(3)(vi). In such cases, the U.S. branch is treated as a payee that is a U.S. person. See paragraph (C) of this section for additional requirements for the U.S. branch when treated as a payor that is a U.S. person. Notwithstanding the preceding sentence, a withholding agent making a payment to a U.S. branch treated as a U.S. person under this paragraph (b)(2)(iv)(A) shall not treat the branch as a U.S. person for purposes of reporting the payment made to the branch. Therefore, a payment to such U.S. branch shall be reported on Form 1042–S under § 1.1461–1(c) and § 1.1474–1(d)(1)(i) for a payment of U.S. source FDAP income that is a chapter 4 reportable amount as defined in § 1.1471–1(b)(18). Further, a U.S. branch that is treated as a U.S. person under this paragraph (b)(2)(iv)(A) shall not be treated as a U.S. person for purposes of the withholding certificate it provides to a withholding agent. Therefore, the U.S. branch must furnish a U.S. branch withholding certificate on a Form W–8IMY as provided in paragraph (e)(3)(v) of this section and not a Form W–9. An agreement to treat a U.S. branch as a U.S. person must be evidenced by a U.S. branch withholding certificate described in paragraph (e)(3)(v) of this section furnished by the U.S. branch to the withholding agent. A U.S. branch described in this paragraph (b)(2)(iv)(A) and eligible to be treated as a U.S. person is any U.S. branch of a foreign bank subject to regulatory supervision by the Federal Reserve Board or a U.S. branch of a foreign insurance company required to file an annual statement on a form approved by the National Association of Insurance Commissioners with the Insurance Department of a State, a Territory, or the District of Columbia. In addition, a territory financial institution (including a territory financial institution that is a flow-through entity) will be treated as a U.S. branch for purposes of this paragraph (b)(2)(iv)(A) and therefore is eligible to be treated as a U.S. person. The Internal Revenue Service (IRS) may approve a list of U.S. branches that may be eligible for treatment as U.S. persons under this paragraph (b)(2)(iv)(A) (see § 601.601(d)(2) of this chapter). See § 1.6049–5(c)(5)(vi) for the treatment of U.S. branches as U.S. payors if they make a payment that is subject to reporting under chapter 61 of the Code. Also see § 1.6049–5(d)(1)(ii) for the treatment of U.S. branches as foreign payees under chapter 61 of the Code.

(B) * * *

(*2*) As a payment directly to the persons whose names are on withholding certificates or other appropriate documentation forwarded by the U.S. branch to the withholding agent when no agreement is in effect to treat the U.S. branch as a U.S. person for such payment, to the extent the withholding agent can reliably associate the payment with such certificates or documentation;

(*3*) As a payment to a foreign person of income that is effectively connected with the conduct of a trade or business in the United States if the withholding agent has obtained an EIN for the branch and cannot reliably associate the payment with a withholding certificate from a U.S. branch (or any other certificate or other appropriate documentation from another person). See § 1.1441–4(a)(2)(ii); or

(*4*) As a payment to a foreign person of income that is not effectively connected with the conduct of a trade or business in the United States if the withholding agent has not obtained an EIN for the branch and cannot reliably associate the payment with a withholding certificate from the U.S. branch.

(C) *Consequences to the U.S. branch.* A U.S. branch that is treated as a U.S. person under paragraph (b)(2)(iv)(A) of this section shall be treated as a separate person for purposes of section 1441(a) and all other provisions of chapters 3 and 4 of the Code and the regulations thereunder (other than for purposes of reporting the payment to the U.S. branch under § 1.1461–1(c) and § 1.1474–1(d)(1)(i) for a chapter 4 reportable amount by a withholding agent) or for purposes of the documentation such a branch must furnish under paragraph (e)(3)(v) of this section) for any payment that it receives as such. Thus, the U.S. branch shall be responsible for withholding on a payment as a U.S. person in accordance with the provisions under chapters 3 and 4 of the Code and the regulations thereunder and other applicable withholding provisions of the Code. For this purpose, it shall obtain and retain documentation from payees or beneficial owners of the payments that it receives as an intermediary as a U.S. person in the same manner as if it were a separate entity. For example, if a U.S. branch receives a payment as an intermediary on behalf of customers of its home office and the home office is a qualified intermediary, the U.S. branch must obtain a qualified intermediary withholding certificate described in paragraph (e)(3)(ii) of this section from its home office. Similarly, if a U.S. branch of an FFI treated as a U.S. person receives a payment on behalf of another branch of the FFI that is treated as a nonparticipating FFI, the U.S. branch must withhold on the payment made to the other branch as if it were a separate person to the extent required under chapter 4. In addition, a U.S. branch that has not provided documentation to the withholding agent for a payment that is, in fact, not effectively connected income is a withholding agent with respect to that payment. See paragraph (b)(6) of this section and § 1.1441–4(a)(2)(ii).

* * * * *

(E) *Payments to other U.S. branches.* Similar withholding procedures may apply to payments to U.S. branches that are not described in paragraph (b)(2)(iv)(A) of this section to the extent permitted by the IRS. Any such branch must establish that its situation is analogous to that of a U.S. branch described in paragraph (b)(2)(iv)(A) of this section. In the alternative, the branch must establish that the withholding and reporting requirements under chapter 3 of the Code and the regulations thereunder impose an undue administrative burden and that the collection of the tax imposed by section 871(a) or 881(a) on the foreign person (or its members in the case of a foreign partnership) will not be jeopardized by the exemption from withholding. Generally, an undue administrative burden will be found to exist in a case where the person entitled to the income, such as a foreign insurance company, receives from the withholding agent income on securities issued by a single corporation, some of which is, and some of which is not, effectively connected with conduct of a trade or business within the United States and the criteria for determining the effective connection are unduly difficult to apply because of the circumstances under which such

securities are held. No exemption from withholding shall be granted under this paragraph (b)(2)(iv)(E) unless the person entitled to the income complies with such other requirements as may be imposed by the IRS and unless the IRS is satisfied that the collection of the tax on the income involved will not be jeopardized by the exemption from withholding. The IRS may prescribe such procedures as are necessary to make these determinations (see § 601.601(d)(2) of this chapter).

* * * * *

(vi) *Other payees.* A payment to a person described in § 1.6049–4(c)(1)(ii) that the withholding agent would treat as a payment to a foreign person without obtaining documentation for purposes of information reporting under section 6049 (if the payment were interest) is treated as a payment to a foreign payee for purposes of chapter 3 of the Code and the regulations thereunder (or to a foreign beneficial owner to the extent provided in paragraph (e)(1)(ii)(A)(*6*) or (*7*) of this section). Further, a payment that the withholding agent can reliably associate with documentary evidence described in § 1.6049–5(c)(1) relating to the payee is treated as a payment to a foreign payee. See § 1.1441–5(b)(1) and (c)(1) for payee determinations for payments to partnerships. See § 1.1441–5(e) for payee determinations for payments to foreign trusts or foreign estates.

(vii) * * *

(B) *Special rules applicable to a withholding certificate from a nonqualified intermediary or flow-through entity.* (*1*) In the case of a payment made to a nonqualified intermediary, a flow-through entity (as defined in paragraph (c)(23) of this section), or a U.S. branch described in paragraph (b)(2)(iv) of this section (other than a U.S. branch that is treated as a U.S. person), a withholding agent can reliably associate the payment with valid documentation only to the extent that, prior to the payment, the withholding agent can allocate the payment to a valid nonqualified intermediary, flow-through entity, or U.S. branch withholding certificate (and a withholding certificate provided by a nonparticipating FFI with respect to a portion of a payment that is a withholdable payment allocated to an exempt beneficial owner as described in § 1.1471–3(c)(3)(iii)(B)(*4*)); the withholding agent can reliably determine how much of the payment relates to valid documentation provided by a payee as determined under paragraph (c)(12) of this section (*i.e.,* a person that is not itself an intermediary, flow-through entity, or U.S. branch); and the withholding agent has sufficient information to report the payment on Form 1042–S or Form 1099, if reporting is required. See, however, paragraph (e)(3)(iv) of this section for when a nonqualified intermediary may report payees to the withholding agent in a chapter 4 withholding rate pool, in which case a withholding agent need not associate the portion of the payment attributable to such payees with documentation from each such payee. See also paragraph (e)(3)(iii) of this section for the requirements of a nonqualified intermediary withholding certificate, paragraph (e)(3)(v) of this section for the requirements of a U.S. branch withholding certificate, and §§ 1.1441–5(c)(3)(iii) and (e)(5)(iii) for the requirements of a flow-through withholding certificate (including the requirements for a withholding certificate associated with a withholdable payment). Thus, a payment cannot be reliably associated with valid documentation provided by a payee to the extent such documentation is lacking or unreliable, or to the extent that information required to allocate and report all or a portion of the payment to each payee is lacking or unreliable. If a withholding certificate attached to an intermediary, U.S. branch, or flow-through withholding certificate is another intermediary, U.S. branch, or flow-through withholding certificate, the rules of this paragraph (b)(2)(vii)(B) apply by treating the share of the payment allocable to the other intermediary, U.S. branch, or flow-through entity as if the payment were made directly to such other entity. See paragraph (e)(3)(iv)(D) of this section for rules permitting information allocating a payment to documentation to be received after the payment is made.

(*2*) The rules of paragraph (b)(2)(vii)(B)(*1*) of this section are illustrated by the following examples. Each example illustrates a payment that is not a withholdable payment and, as a result of which, neither the chapter 4 status of the NQI nor payee specific documentation with respect to the chapter 4 status is required to be provided to the withholding agent (and no withholding applies under chapter 4 on each payment). See paragraph (e)(3)(iv)(C) of this section for the requirements of a withholding statement provided by a nonqualified intermediary that receives a withholdable payment and for an example illustrating the requirements of an NQI providing a withholding statement to a withholding agent for a withholdable payment.

Example 1. WA, a withholding agent, makes a payment of U.S. source interest with respect to a grandfathered obligation as described in § 1.1471–2(b) (and thus the payment is not a withholdable payment) to NQI, an intermediary that is a nonqualified intermediary. NQI provides a valid intermediary withholding certificate under paragraph (e)(3)(iii) of this section. NQI does not, however, provide valid documentation from the persons on whose behalf it receives the interest payment, and, therefore, the interest payment cannot be reliably associated with valid documentation provided by a payee. WA must apply the presumption rules of paragraph (b)(3)(v) of this section to the payment.

Example 2. The facts are the same as in *Example 1,* except that NQI does attach valid beneficial owner withholding certificates (as defined in paragraph (e)(2)(i) of this section) from A, B, C, and D establishing their statuses as foreign persons. NQI does not, however, provide WA with any information allocating the payment among A, B, C, and D and, therefore, WA cannot determine the portion of the payment that relates to each beneficial owner withholding certificate. The interest payment cannot be reliably associated with valid documentation from a payee, and WA must apply the presumption rules of paragraph (b)(3)(v) of this section to the payment. See, however, paragraph (e)(3)(iv)(D) of this section providing for alternative procedures that allow a nonqualified intermediary to provide allocation information after a payment is made.

Example 3. The facts are the same as in *Example 2,* except that NQI provides allocation information associated with its intermediary withholding certificate indicating that 25% of the interest payment is allocable to A and 25% to B. NQI does not provide any allocation information regarding the remaining 50% of the payment. WA may treat 25% of the payment as made to A and 25% as made to B. The remaining 50% of the payment cannot be reliably associated with valid documentation from a payee, however, since NQI did not provide information allocating the payment. Thus, the remaining 50% of the payment is subject to the presumption rules of paragraph (b)(3)(v) of this section.

Example 4. WA makes a payment of U.S. source interest to NQI1, an intermediary that is not a qualified intermediary. NQI1 provides WA with a valid nonqualified intermediary withholding certificate as well valid beneficial owner withholding certificates from A and B and a valid nonqualified intermediary withholding certificate from NQI2. NQI2 has provided valid beneficial owner documentation from C sufficient to establish C's status as a foreign person. Based on information provided by NQI1, WA can allocate 20% of the interest payment to A, and 20% to B. Based on information that NQI2 provided NQI1 and that NQI1 provides to WA, WA can allocate 60% of the payment to NQI2, but can only allocate one half of that payment (30%) to C. Therefore, WA cannot reliably associate the remainder of the payment made to NQI2 (30% of the total payment) with valid

documentation and must apply the presumption rules of paragraph (b)(3)(v) of this section to that portion of the payment.

(C) *Special rules applicable to a withholding certificate provided by a qualified intermediary that does not assume primary withholding responsibility*—(*1*) If a payment is made to a qualified intermediary that does not assume primary withholding responsibility under chapters 3 and 4 of the Code or primary Form 1099 reporting and backup withholding responsibility under chapter 61 and section 3406 of the Code for the payment, a withholding agent can reliably associate the payment with valid documentation only to the extent that, prior to the payment, the withholding agent has received a valid qualified intermediary withholding certificate described in paragraph (e)(3)(ii) of this section and the withholding agent can reliably determine the portion of the payment that relates to a chapter 3 withholding rate pool, as defined in paragraph (c)(44) of this section; a chapter 4 withholding rate pool (including for a withholdable payment as described in paragraph (e)(5)(v)(C)(*2*) of this section), as defined in paragraph (c)(48) of this section; or a pool attributable to U.S. exempt recipients. In the case of a withholding rate pool attributable to a U.S. non-exempt recipient, a payment cannot be reliably associated with valid documentation unless, prior to the payment, the qualified intermediary has provided the U.S. person's Form W–9 (or, in the absence of the form, the name, address, and TIN, if available, of the U.S. person) and sufficient information for the withholding agent to report the payment on Form 1099. See, however, paragraph (e)(5)(v)(C)(*3*) of this section for alternative procedures for allocating payments among U.S. non-exempt recipients and paragraphs (e)(5)(v)(C)(*1*) and (*2*) of this section for when a chapter 4 withholding rate pool of U.S. payees may be provided by a qualified intermediary instead of documentation with respect to each U.S. non-exempt recipient.

(*2*) The rules of this paragraph (b)(2)(vii)(C) are illustrated by the following examples:

Example 1. WA, a withholding agent, makes a payment of U.S. source dividends that is a withholdable payment to QI. QI provides WA with a valid qualified intermediary withholding certificate on which it indicates that it does not assume primary withholding responsibility under chapters 3 and 4 or primary Form 1099 reporting and backup withholding responsibility under chapter 61 and section 3406. QI does not provide any information allocating the dividend to withholding rate pools. WA cannot reliably associate the payment with valid payee documentation and therefore must apply the presumption rules applicable to a withholdable payment under § 1.1471–3(f)(5) to determine the status of the payee for purposes of chapter 4. See *Example 2* for an application of the presumption rules under § 1.1471–3(f).

Example 2. WA makes a payment of U.S. source dividends that is a withholdable payment to QI, which is an NFFE. QI has 5 customers: A, B, C, D, and E, all of whom are individuals except for C. QI has obtained valid documentation from A and B establishing their entitlement to a 15% rate of tax on U.S. source dividends under an income tax treaty. C is a U.S. person that is an exempt recipient as defined in paragraph (c)(20) of this section. D and E are U.S. non-exempt recipients who have provided Forms W–9 to QI. A, B, C, D, and E are each entitled to 20% of the dividend payment. QI provides WA with a valid qualified intermediary withholding certificate as described in paragraph (e)(3)(ii) of this section with which it associates the Forms W–9 from D and E. QI associates the following allocation information with its qualified intermediary withholding certificate: 40% of the payment is allocable to the 15% chapter 3 withholding rate pool, and 20% is allocable to each of D and E. QI does not provide any allocation information regarding the remaining 20% of the payment. WA cannot reliably associate 20% of the payment with valid documentation and, therefore, must apply the presumption rules applicable to a withholdable payment. Because QI is receiving a withholdable payment as an intermediary, under paragraph (b)(3)(iii) of this section WA must apply the presumption rule of § 1.1471–3(f)(5) to treat the portion of the payment that cannot reliably be associated with valid documentation as made to a nonparticipating FFI account holder of QI. As a result, WA is required to withhold at a 30% rate of tax under chapter 4. See § 1.1441–3(a)(2) permitting WA to credit the amount withheld under chapter 4 against the liability for tax due on the payment under section 1441 or 1442. The 40% of the payment allocable to the 15% withholding rate pool and the portion of the payments allocable to D and E are payments that can be reliably associated with documentation.

(D) *Special rules applicable to a withholding certificate provided by a qualified intermediary that assumes primary withholding responsibility under chapter 3 and chapter 4 of the Internal Revenue Code.* (*1*) In the case of a payment made to a qualified intermediary that assumes primary withholding responsibility under chapters 3 and 4 of the Code with respect to that payment (but does not assume primary Form 1099 reporting and backup withholding responsibility under chapter 61 of the Code and section 3406), a withholding agent can reliably associate the payment with valid documentation only to the extent that, prior to the payment, the withholding agent has received a valid qualified intermediary withholding certificate and the withholding agent can reliably determine the portion of the payment that relates to the withholding rate pool for which the qualified intermediary assumes primary withholding responsibility and the portion of the payment attributable to withholding rate pools for each U.S. non-exempt recipient for whom the qualified intermediary has provided a Form W–9 (or, in absence of the form, the name, address, and TIN, if available, of the U.S. non-exempt recipient). See paragraph (e)(5)(iv) of this section (requiring a qualified intermediary assuming primary withholding responsibility under chapter 3 to assume primary withholding responsibility under chapter 4). See also paragraph (e)(5)(v)(C)(*3*) of this section for alternative allocation procedures for payments made to U.S. persons that are not exempt recipients and paragraphs (e)(5)(v)(C)(*1*) and (*2*) of this section for when a qualified intermediary may provide a chapter 4 withholding rate pool of U.S. payees to a withholding agent instead of documentation with respect to each U.S. non-exempt recipient.

(*2*) *Examples.* The following examples illustrate the rules of paragraph (b)(2)(vii)(D)(*1*) of this section. See also the example in paragraph (e)(5)(v)(D) for rules for reporting of U.S. non-exempt recipients when a qualified intermediary that is an FFI reports a U.S. account under chapter 4.

Example 1. WA makes a payment of U.S. source interest that is a withholdable payment to QI, a qualified intermediary that is an NFFE. QI provides WA with a withholding certificate that indicates that QI will assume primary withholding responsibility under chapters 3 and 4 of the Code with respect to the payment. In addition, QI attaches a Form W–9 from A, a U.S. non-exempt recipient, as defined in paragraph (c)(21) of this section, and provides the name, address, and TIN of B, a U.S. person that is also a non-exempt recipient but who has not provided a Form W–9. QI associates a withholding statement with its qualified intermediary withholding certificate indicating that 10% of the payment is attributable to A and 10% to B, and that QI will assume primary withholding responsibility under chapters 3 and 4 with respect to the remaining 80% of the payment. WA can reliably associate the entire payment with valid documentation. Although under the presumption rule of paragraph (b)(3)(v) of this section, an undocumented person receiving U.S. source interest is generally presumed to be a foreign person, WA has actual knowledge that B is a U.S. non-exempt recipient and therefore must report the payment on Form 1099 and backup withhold on the interest payment under section 3406.

Example 2. The facts are the same as in *Example 1,* except that no information has been provided for the 20% of the payment that is allocable to A and B. Thus, QI has accepted withholding responsibility for 80% of the payment but has provided no information for the remaining 20%. In this case, 20% of the payment cannot be reliably associated with valid documentation, and, under paragraph (b)(3)(iii) of this section, WA must apply the presumption rule of § 1.1471–3(f)(5) to treat the payment as made to a nonparticipating FFI and withhold 30% of the gross amount of the payment (because the payment is a withholdable payment and is treated as made to a foreign payee under paragraph (b)(3)(v) of this section). See *Example 2* in paragraph (b)(2)(vii)(C)(*2*) and § 1.1471–3(f)(1).

(E) *Special rules applicable to a withholding certificate provided by a qualified intermediary that assumes primary Form 1099 reporting and backup withholding responsibility but not primary withholding under chapter 3 and chapter 4.* (*1*) If a payment is made to a qualified intermediary that assumes primary Form 1099 reporting and backup withholding responsibility for the payment (but does not assume primary withholding responsibility under chapters 3 and 4 of the Code), a withholding agent can reliably associate the payment with valid documentation only to the extent that, prior to the payment, the withholding agent has received a valid qualified intermediary withholding certificate and the withholding agent can reliably determine the portion of the payment that relates to a withholding rate pool or pools provided as part of the qualified intermediary's withholding statement and the portion of the payment for which the qualified intermediary assumes primary Form 1099 reporting and backup withholding responsibility. See paragraph (e)(5)(v)(C)(*2*) of this section for when a qualified intermediary may include a chapter 4 withholding rate pool on a withholding statement provided to a withholding agent with respect to a withholdable payment.

(*2*) The following example illustrates the rules of paragraph (b)(2)(vii)(D)(*1*) of this section:

Example. WA, a withholding agent, makes a payment of U.S. source dividends that is a withholdable payment to QI, a qualified intermediary that is a participating FFI. QI has provided WA with a valid qualified intermediary withholding certificate. QI states on its withholding statement accompanying the certificate that it assumes primary Form 1099 reporting and backup withholding responsibility but does not assume primary withholding responsibility under chapters 3 and 4 of the Code. QI represents that 15% of the dividend is subject to a 30% rate of withholding, 75% of the dividend is subject to a 15% rate of withholding. QI represents that it assumes primary Form 1099 reporting and backup withholding for the remaining 10% of the payment and will not need to provide a chapter 4 withholding rate pool with respect to this portion of the payment or documentation with respect to U.S. non-exempt recipients. WA can reliably associate the entire payment with valid documentation.

(F) *Special rules applicable to a withholding certificate provided by a qualified intermediary that assumes primary withholding responsibility under chapter 3 and chapter 4 and primary Form 1099 reporting and backup withholding responsibility and a withholding certificate provided by a withholding foreign partnership or a withholding foreign trust.* If a payment is made to a qualified intermediary that assumes both primary withholding responsibility under chapters 3 and 4 of the Code and primary Form 1099 reporting and backup withholding responsibility under chapter 61 and section 3406 of the Code for the payment, a withholding agent can reliably associate a payment with valid documentation provided that it receives a valid qualified intermediary withholding certificate as described in paragraph (e)(3)(ii) of this section. In the case of a payment made to a withholding foreign partnership or a withholding foreign trust, the withholding agent can reliably associate the payment with valid documentation to the extent it can associate the payment with a valid withholding certificate described in § 1.1441–5(c)(2)(iv) or in § 1.1441–5(e)(5)(v) (respectively). See paragraph (e)(5)(iv) of this section, providing that a qualified intermediary assuming primary withholding responsibility under chapter 3 must also assume primary withholding responsibility under chapter 4 with respect to a withholdable payment.

(3) *Presumptions regarding payee's status in the absence of documentation*—(i) *General rules.* A withholding agent that cannot, prior to the payment, reliably associate (within the meaning of paragraph (b)(2)(vii) of this section) a payment of an amount subject to withholding (as described in § 1.1441–2(a)) with valid documentation may rely on the presumptions of this paragraph (b)(3) to determine the status of the person receiving the payment as a U.S. or a foreign person and the person's other relevant characteristics (*e.g.,* as an owner or intermediary, as an individual, trust, partnership, or corporation). The determination of withholding and reporting requirements applicable to payments to a person presumed to be a foreign person is governed only by the provisions of chapters 3 and 4 of the Code and the regulations thereunder. For the determination of withholding and reporting requirements applicable to payments to a person presumed to be a U.S. person, see chapter 61 of the Code, section 3402, 3405, or 3406, and, with respect to the reporting requirements of a participating FFI or registered deemed-compliant FFI, see chapter 4 of the Code and the related regulations. A presumption that a payee is a foreign payee is not a presumption that the payee is a foreign beneficial owner. Therefore, the provisions of this paragraph (b)(3) have no effect for purposes of reducing the withholding rate if associating the payment with documentation of foreign beneficial ownership is required as a condition for such rate reduction. See paragraph (b)(3)(ix) of this section for consequences to a withholding agent that fails to withhold in accordance with the presumptions set forth in this paragraph (b)(3) or if the withholding agent has actual knowledge or reason to know of facts that are contrary to the presumptions set forth in this paragraph (b)(3). See paragraph (b)(2)(vii) of this section for rules regarding the extent to which a withholding agent can reliably associate a payment with documentation.

(ii) *Presumptions of classification as individual, corporation, partnership, etc.*—(A) *In general.* A withholding agent that cannot reliably associate a payment with a valid withholding certificate or that has received valid documentary evidence under §§ 1.1441–1(e)(1)(ii)(A)(*2*) and 1.6049–5(c)(1) or (4) but cannot determine a payee's classification from the documentary evidence must apply the rules of this paragraph (b)(3)(ii) to determine the payee's classification as an individual, trust, estate, corporation, or partnership. The fact that a payee is presumed to have a certain status under the provisions of this paragraph (b)(3)(ii) does not mean that it is excused from furnishing documentation if documentation is otherwise required to obtain a reduced rate of withholding under this section. For example, if, for purposes of this paragraph (b)(3)(ii), a payee is presumed to be a tax-exempt organization based on § 1.6049–4(c)(1)(ii)(B), the withholding agent cannot rely on this presumption to reduce the rate of withholding on payments to such person (if such person is also presumed to be a foreign person under paragraph (b)(3)(iii)(A) of this

section) because a reduction in the rate of withholding for payments to a foreign tax-exempt organization generally requires that a valid Form W–8 described in § 1.1441–9(b)(2) be furnished to the withholding agent.

(B) *No documentation provided.* If the withholding agent cannot reliably associate a payment with a valid withholding certificate or valid documentary evidence, it must presume that the payee is an individual, a trust, or an estate, if the payee appears to be such person (*e.g.,* based on the payee's name or information in the customer file). In the absence of reliable indications that the payee is an individual, a trust, or an estate, the withholding agent must presume that the payee is a corporation or one of the persons enumerated under § 1.6049–4(c)(1)(ii)(B) through (Q) if it can be so treated under § 1.6049–4(c)(1)(ii)(A)(*1*) or any one of the paragraphs under § 1.6049–4(c)(1)(ii)(B) through (Q) without the need to furnish documentation. If the withholding agent cannot treat a payee as a person described in § 1.6049–4(c)(1)(ii)(A)(*1*) through (Q), then the payee shall be presumed to be a partnership. If such a partnership is presumed to be foreign, it is not the beneficial owner of the income paid to it. See paragraph (c)(6) of this section. If such a partnership is presumed to be domestic, it is a U.S. non-exempt recipient for purposes of chapter 61 of the Code.

(C) *Documentary evidence furnished for offshore obligation.* If the withholding agent receives valid documentary evidence, as described in § 1.6049–5(c)(1) or (c)(4), with respect to an offshore obligation from an entity but the documentary evidence does not establish the entity's classification as a corporation, trust, estate, or partnership, the withholding agent may presume (in the absence of actual knowledge otherwise) that the entity is the type of person enumerated under § 1.6049–4 (c)(1)(ii)(B) through (Q) if it can be so treated under any one of those paragraphs without the need to furnish documentation. If the withholding agent cannot treat a payee as a person described in § 1.6049–4(c)(1)(ii)(B) through (Q), then the payee shall be presumed to be a corporation unless the withholding agent knows, or has reason to know, that the entity is not classified as a corporation for U.S. tax purposes. If a payee is, or is presumed to be, a corporation under this paragraph (b)(3)(ii)(C) and a foreign person under paragraph (b)(3)(iii) of this section, a withholding agent shall not treat the payee as the beneficial owner of income if the withholding agent knows, or has reason to know, that the payee is not the beneficial owner of the income. For this purpose, a withholding agent will have reason to know that the payee is not a beneficial owner if the documentary evidence indicates that the payee is a bank, broker, intermediary, custodian, or other agent, or is treated under § 1.6049–4(c)(1)(ii)(B) through (Q) as such a person. A withholding agent may, however, treat such a person as a beneficial owner if the foreign person provides a statement, in writing and signed by a person with authority to sign the statement, that is attached to the documentary evidence and that states that the foreign person is the beneficial owner of the income.

(iii) *Presumption of U.S. or foreign status.* A payment that the withholding agent cannot reliably associate with documentation is presumed to be made to a U.S. person, except as otherwise provided in this paragraph (b)(3)(iii), in paragraphs (b)(3)(iv) and (v) of this section, or in § 1.1441–5(d) or (e). A withholding agent must treat a payee that is presumed or known to be a trust but for which the withholding agent cannot determine the type of trust in accordance with the presumptions specified in § 1.1441–5(e)(6)(ii). In the case of a payment that is a withholdable payment, a withholding agent must apply the presumption rule under § 1.1471–3(f) for purposes of chapter 4.

(A) *Payments to exempt recipients*—(*1*) *In general.* If a withholding agent cannot reliably associate a payment with documentation from the payee and the payee is an exempt recipient (as determined under the provisions of § 1.6049–4(c)(1)(ii) in the case of interest, or under similar provisions under chapter 61 of the Code applicable to the type of payment involved, but not including a payee that the withholding agent may treat as a foreign intermediary in accordance with paragraph (b)(3)(v) of this section), the payee is presumed to be a foreign person and not a U.S. person—

(*i*) If the withholding agent has actual knowledge of the payee's employer identification number and that number begins with the two digits ''98'';

(*ii*) If the withholding agent's communications with the payee are mailed to an address in a foreign country;

(*iii*) If the name of the payee indicates that the entity is the type of entity that is on the per se list of foreign corporations contained in § 301.7701–2(b)(8)(i) of this chapter (and, in the case of a name which contains the designation ''corporation'' or ''company,'' the withholding agent has a document that reasonably demonstrates the payee was incorporated in the relevant jurisdiction);

(*iv*) If the payment is made with respect to an offshore obligation (as defined in paragraph (c)(37) of this section); or

(*v*) With respect to an account opened after July 1, 2014, if the withholding agent has a telephone number for the person outside of the United States.

(*2*) *Special rule for withholdable payments made to exempt recipients.* Notwithstanding the provisions of paragraph (b)(3)(iii)(A)(*1*) of this section, a payment that is also a withholdable payment made to an entity determined to be an exempt recipient under § 1.6049–4(c)(1)(ii)(A)(*1*), (F), (G), (H), (M), (O), (P), or (Q) in the case of interest (or under similar provisions in chapter 61 applicable to the type of income) shall be presumed made to a foreign payee in the absence of documentation (including documentary evidence) establishing the entity as a U.S. person. Additionally, a withholding agent may apply the rule provided in this paragraph (b)(3)(iii)(A)(*2*) instead of the rule in provided in paragraph (b)(3)(iii)(A)(*1*) of this section for all payments with respect to an obligation. The provisions of this paragraph (b)(3)(iii)(A)(*2*) will not apply, however, to a withholdable payment made with respect to a preexisting obligation to a payee that the withholding agent determined prior to July 1, 2014, to be a U.S. exempt recipient.

* * * * *

(D) *Payments with respect to offshore obligations.* A payment is presumed made to a foreign payee if the payment is made outside the United States (as defined in § 1.6049–5(e)) with respect to an offshore obligation (as defined in paragraph (c)(37) of this section) and the withholding agent does not have actual knowledge that the payee is a U.S. person. See § 1.6049–5(d)(2) and (3) for exceptions to this rule.

* * * * *

(iv) *Grace period.* A withholding agent may choose to apply the provisions of § 1.6049–5(d)(2)(ii) regarding a 90-day grace period for purposes of this paragraph (b)(3) (by applying the term withholding agent instead of the term payor) to amounts described in § 1.1441–6(c)(2) and to amounts covered by a Form 8233 described in § 1.1441–4(b)(2)(ii). Thus, for these amounts, a withholding agent may choose to treat the payee as a foreign person and withhold under chapter 3 of the Code (and the regulations thereunder) while awaiting documentation. For purposes of

determining the rate of withholding under this section, the withholding agent must withhold at the unreduced 30-percent rate at the time that the amounts are credited to an account. For reporting of amounts credited both before and after the grace period, see § 1.1461–1(c)(4)(i)(A). The following adjustments shall be made at the expiration of the grace period:

(A) If, at the end of the grace period, the documentation is not furnished in the manner required under this section and the account holder is presumed to be a U.S. non-exempt recipient, then backup withholding only applies to amounts credited to the account after the expiration of the grace period. Amounts credited to the account during the grace period shall be treated as owned by a foreign payee and adjustments must be made to correct any underwithholding on such amounts in the manner described in § 1.1461–2.

* * * * *

(v) * * *

(B) *Beneficial owner documentation or allocation information is lacking or unreliable.* Except as otherwise provided in this paragraph (b)(3)(v)(B), any portion of a payment that the withholding agent may treat as made to a foreign intermediary (whether a nonqualified or a qualified intermediary) but that the withholding agent cannot treat as reliably associated with valid documentation under the rules of paragraph (b)(2)(vii) of this section is presumed made to an unknown, undocumented foreign payee. As a result, a withholding agent must deduct and withhold 30 percent from any payment of an amount subject to withholding. If a withholding certificate attached to an intermediary certificate is another intermediary withholding certificate or a flow-through withholding certificate, the rules of this paragraph (b)(3)(v)(B) (or § 1.1441–5(d)(3) or (e)(6)(iii)) apply by treating the portion of the payment allocable to the other intermediary or flow-through entity as if it were made directly to the other intermediary or flow-through entity. Any payment of an amount subject to withholding that is presumed made to an undocumented foreign person must be reported on Form 1042–S. See § 1.1461–1(c). See § 1.6049–5(d) for payments that are not subject to withholding under chapter 3. However, in the case of a payment that is a withholdable payment made to a foreign intermediary, the presumption rules under § 1.1471–3(f)(5) shall apply.

(vi) *U.S. branches and territory financial institutions not treated as U.S. persons.* The rules of paragraph (b)(3)(v)(B) of this section shall apply to payments to a U.S. branch or a territory financial institution described in paragraph (b)(2)(iv)(A) of this section that has provided a withholding certificate as described in paragraph (e)(3)(v) of this section on which it has not agreed to be treated as a U.S. person.

(vii) *Joint payees*—(A) *In general.* Except as provided in paragraph (b)(3)(vii)(B) of this section and this paragraph (b)(3)(vii)(A), if a withholding agent makes a payment to joint payees and cannot reliably associate the payment with valid documentation from all payees, the payment is presumed made to an unidentified U.S. person. If, however, a withholding agent makes a payment that is a withholdable payment and any joint payee does not appear, by its name and other information contained in the account file, to be an individual, then the entire amount of the payment will be treated as made to an undocumented foreign person. See paragraph (b)(3)(iii) of this section for presumption rules that apply in the case of a payment that is a withholdable payment. However, if one of the joint payees provides a Form W–9 furnished in accordance with the procedures described in §§ 31.3406(d)–1 through 31.3406(d)–5 of this chapter, the payment shall be treated as made to that payee. See § 31.3406(h)–2 of this chapter for rules to determine the relevant payee if more than one Form W–9 is provided. For purposes of applying this paragraph (b)(3), the grace period rules in paragraph (b)(3)(iv) of this section shall apply only if each payee meets the conditions described in paragraph (b)(3)(iv) of this section.

(B) *Special rule for offshore obligations.* If a withholding agent makes a payment to joint payees and cannot reliably associate a payment with valid documentation from all payees, the payment is presumed made to an unknown foreign payee if the payment is made outside the United States (as defined in § 1.6049–5(e)) with respect to an offshore obligation (as defined in § 1.6049–5(c)(1)).

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(ix) *Effect of reliance on presumptions and of actual knowledge or reason to know otherwise*—(A) *General rule.* Except as otherwise provided in paragraph (b)(3)(ix)(B) of this section, a withholding agent that withholds on a payment under section 3402, 3405, or 3406 in accordance with the presumptions set forth in this paragraph (b)(3) shall not be liable for withholding under this section even if it is later established that the beneficial owner of the payment is, in fact, a foreign person. Similarly, a withholding agent that withholds on a payment under this section in accordance with the presumptions set forth in this paragraph (b)(3) shall not be liable for withholding under section 3402 or 3405 or for backup withholding under section 3406 even if it is later established that the payee or beneficial owner is, in fact, a U.S. person. A withholding agent that, instead of relying on the presumptions described in this paragraph (b)(3), relies on its own actual knowledge to withhold a lesser amount, not withhold, or not report a payment, even though reporting of the payment or withholding a greater amount would be required if the withholding agent relied on the presumptions described in this paragraph (b)(3), shall be liable for tax, interest, and penalties to the extent provided under section 1461 and the regulations under that section. See paragraph (b)(7) of this section for provisions regarding such liability if the withholding agent fails to withhold in accordance with the presumptions described in this paragraph (b)(3).

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(x) *Examples.* The provisions of this paragraph (b)(3) are illustrated by the following examples:

Example 1. A withholding agent, W, makes a payment of U.S. source interest with respect to a grandfathered obligation as described in § 1.1471–2(b) (and thus the payment is not a withholdable payment) to X, Inc. with respect to an account W maintains for X, Inc. outside the United States. W cannot reliably associate the payment to X, Inc. with documentation. Under § 1.6049–4(c)(1)(ii)(A)(*1*), W may treat X, Inc. as a corporation that is an exempt recipient under chapter 61. Thus, under the presumptions described in paragraph (b)(3)(iii) of this section as applicable to a payment to an exempt recipient that is not a withholdable payment, W must presume that X, Inc. is a foreign person (because the payment is made with respect to an offshore obligation). However, W knows that X, Inc. is a U.S. person who is an exempt recipient. W may not rely on its actual knowledge to not withhold under this section. If W's knowledge is, in fact, incorrect, W would be liable for tax, interest, and, if applicable, penalties, under section 1461. W would be permitted to reduce or eliminate its liability for the tax by establishing, in accordance with paragraph (b)(7) of this section, that the tax is not due or has been satisfied. If W's actual knowledge is, in fact, correct, W may nevertheless be liable for tax, interest, or penalties under section 1461 for the amount that W should have withheld based upon the presumptions. W would be permitted to reduce or eliminate its liability for the tax by establishing, in accordance with paragraph (b)(7) of this section, that its actual knowledge was, in fact, correct and that no tax or a lesser amount of tax was due.

Example 2. A withholding agent, W, makes a payment of U.S. source interest with respect to a grandfathered obligation as described in § 1.1471–2(b) (and thus the payment is not a withholdable payment) to Y who does not qualify as an exempt recipient under § 1.6049–4(c)(1)(ii). W cannot reliably associate the payment to Y with documentation. Under the presumptions described in paragraph (b)(3)(iii) of this section, W must presume that Y is a U.S. person who is not an exempt recipient for purposes of section 6049. However, W knows that Y is a foreign person. W may not rely on its actual knowledge to withhold under this section rather than backup withhold under section 3406. If W's knowledge is, in fact, incorrect, W would be liable for tax, interest, and, if applicable, penalties, under section 3403. If W's actual knowledge is, in fact, correct, W may nevertheless be liable for tax, interest, or penalties under section 3403 for the amount that W should have withheld based upon the presumptions. Paragraph (b)(7) of this section does not apply to provide relief from liability under section 3403.

Example 3. A withholding agent, W, makes a payment of U.S. source dividends to X, Inc. with respect to an account that X, Inc. opened with W after June 30, 2014. W cannot reliably associate the payment to X, Inc. with documentation but may treat X, Inc. as an exempt recipient for purposes of this section applying the rules of § 1.6042–3(b)(1)(vii). However, because the dividend payment is a withholdable payment and W did not determine the chapter 3 status of X, Inc. before July 1, 2014, W may treat X, Inc. as a U.S. person that is an exempt recipient only if W obtains documentary evidence supporting X, Inc.'s status as a U.S. person. See paragraph (b)(3)(iii)(A)(*2*) of this section.

Example 4. A withholding agent, W, is a plan administrator who makes pension payments to person X with a mailing address in a foreign country with which the United States has an income tax treaty in effect. Under that treaty, the type of pension income paid to X is taxable solely in the country of residence. The plan administrator has a record of X's U.S. social security number. W has no actual knowledge or reason to know that X is a foreign person. W may rely on the presumption of paragraph (b)(3)(iii)(C) of this section in order to treat X as a U.S. person. Therefore, any withholding and reporting requirements for the payment are governed by the provisions of section 3405 and the regulations under that section.

(4) *List of exemptions from, or reduced rates of, withholding under chapter 3 of the Code.* A withholding agent that has determined that the payee is a foreign person for purposes of paragraph (b)(1) of this section must determine whether the payee is entitled to a reduced rate of withholding under section 1441, 1442, or 1443. This paragraph (b)(4) identifies items for which a reduction in the rate of withholding may apply and whether the rate reduction is conditioned upon documentation being furnished to the withholding agent. Documentation required under this paragraph (b)(4) is documentation that a withholding agent must be able to associate with a payment upon which it can rely to treat the payment as made to a foreign person that is the beneficial owner of the payment in accordance with paragraph (e)(1)(ii) of this section. This paragraph (b)(4) also cross-references other sections of the Code and applicable regulations in which some of these exceptions, exemptions, or reductions are further explained. See, for example, paragraph (b)(4)(viii) of this section, dealing with effectively connected income, that cross-references § 1.1441–4(a); see paragraph (b)(4)(xv) of this section, dealing with exemptions from, or reductions of, withholding under an income tax treaty, that cross-references § 1.1441–6. This paragraph (b)(4) is not an exclusive list of items to which a reduction of the rate of withholding may apply and, thus, does not preclude an exemption from, or reduction in, the rate of withholding that may otherwise be allowed under the regulations under the provisions of chapter 3 of the Code for a particular item of income identified in this paragraph (b)(4). The exclusions and limitations specified in this paragraph (b)(4) apply for purposes of chapter 3. Additional withholding and documentation requirements may apply to withholding agents under chapter 4 with respect to payments that are withholdable payments. See, for example, § 1.1471–2(a) requiring withholding on withholdable payments made to certain FFIs and § 1.1471–2(a)(4) for payments exempted from withholding under section 1471(a).

(i) Portfolio interest described in section 871(h) or 881(c) and substitute interest payments described in § 1.871–7(b)(2) or § 1.881–2(b)(2) are exempt from withholding under section 1441(a). See § 1.871–14 for regulations regarding portfolio interest and section 1441(c)(9) for the exemption from withholding for portfolio interest. Documentation establishing foreign status is required for interest on an obligation in registered form to qualify as portfolio interest. See section 871(h)(2)(B)(ii) and § 1.871–14(c)(1)(ii)(C). For special documentation rules regarding foreign-targeted registered obligations described in § 1.871–14(e)(2) (and issued before January 1, 2016), see § 1.871–14(e)(3) and (4) and, in particular, § 1.871–14(e)(4)(i)(A) and (ii)(A) regarding when the withholding agent must receive the documentation. The documentation furnished for purposes of qualifying interest as portfolio interest serves as the basis for the withholding exemption for purposes of this section and establishing foreign status for purposes of section 6049. See § 1.6049–5(b)(8). Documentation establishing foreign status is not required for qualifying interest on an obligation in bearer form described in § 1.871–14(b)(1) (and issued before March 19, 2012) as portfolio interest. However, in certain cases, documentation for portfolio interest on a bearer obligation may have to be furnished in order to establish foreign status for purposes of the information reporting provisions of section 6049 and backup withholding under section 3406. See § 1.6049–5(b)(7).

* * * * *

(5) * * *

(ix) Payments to a foreign person that are governed by section 6050W (dealing with payment card and third party network transactions) are exempt from information reporting under § 1.6050W–1(a)(5)(ii).

(6) *Rules of withholding for payments by a foreign intermediary or certain U.S. branches*—(i) *In general.* A foreign intermediary described in paragraph (e)(3)(i) of this section or a U.S. branch or territory financial institution described in paragraph (b)(2)(iv) of this section that receives an amount subject to withholding (as defined in § 1.1441–2(a)) shall be required to withhold (if another withholding agent has not withheld the full amount required) and report such payment under chapter 3 of the Code and the regulations thereunder except as otherwise provided in this paragraph (b)(6). A nonqualified intermediary, U.S. branch, or territory financial institution described in paragraph (b)(2)(iv) of this section (other than a U.S. branch or territory financial institution that is treated as a U.S. person) shall not be required to withhold or report if it has provided a valid nonqualified intermediary withholding certificate or a U.S. branch withholding certificate, it has provided all of the information required by paragraph (e)(3)(iv) of this section (withholding statement), and it does not know, and has no reason to know, that another withholding agent failed to withhold the correct amount or failed to report the payment correctly under § 1.1461–1(c). The withholding requirement of a nonqualified intermediary under the previous sentence also excludes a case in which withholding under chapter 4 was applied by a withholding agent on the

payment. See § 1.1441–3(a)(2) (coordinating withholding under chapter 3 with withholding applied under chapter 4 of the Code). A qualified intermediary's obligations to withhold and report shall be determined in accordance with its qualified intermediary withholding agreement.

(ii) *Examples.* The following examples illustrate the rules of paragraph (b)(6)(i) of this section and coordinate rules for withholding that apply under chapter 4 with those that apply under chapter 3. See also paragraph (e)(3)(iv)(C) of this section for the requirements of withholding statements provided by nonqualified intermediaries.

Example 1. FB, a foreign bank, acts as intermediary for five different individuals, A, B, C, D, and E, each of whom owns U.S. securities that generate U.S. source dividends (that are withholdable payments). The dividends are paid by USWA, a U.S. withholding agent. FB furnished USWA with a nonqualified intermediary withholding certificate, described in paragraph (e)(3)(iii) of this section, on which FB certifies its status as a participating FFI (such that withholding under chapter 4 does not apply), to which it attached valid withholding certificates for A, B, C, D, and E. The withholding certificates from A and B claim a 15% reduced rate of withholding under an income tax treaty. C, D, and E claim no reduced rate of withholding. FB provides a withholding statement that meets all of the requirements of paragraph (e)(3)(iv) of this section, including information allocating 20% of each dividend payment to each of A, B, C, D, and E. FB does not have actual knowledge or reason to know that USWA did not withhold the correct amounts or report the dividends on Forms 1042–S to each of A, B, C, D, and E. FB is not required to withhold or to report the dividends to A, B, C, D, and E.

Example 2. The facts are the same as in *Example 1,* except that FB did not provide any information for USWA to determine how much of the dividend payments were made to A, B, C, D, and E. Because USWA could not reliably associate the dividend payments with documentation under paragraph (b)(2)(vii) of this section with respect to a payment that is a withholdable payment, USWA applied the presumption rule of § 1.1471–3(f)(5) and withheld 30% from all dividend payments under chapter 4 and filed a Form 1042–S reporting the payment to an account holder of FB that is a non-participating FFI. FB is deemed to know that USWA did not report the payment to A, B, C, D, and E because it did not provide all of the information required on a withholding statement under paragraph (e)(3)(iv) of this section (*i.e.,* allocation information). Although FB is not required to withhold on the payment under this section because the full 30% withholding was imposed by USWA, it is required to report the payments on Forms 1042–S to A, B, C, D, and E. FB's intentional failure to do so will subject it to intentional disregard penalties under sections 6721 and 6722.

(7) *Liability for failure to obtain documentation timely or to act in accordance with applicable presumptions*—(i) *General rule.* A withholding agent that cannot reliably associate a payment with valid documentation on the date of payment and that does not withhold under this section, or withholds at less than the 30-percent rate prescribed under section 1441(a) and paragraph (b)(1) of this section, is liable under section 1461 for the tax required to be withheld under chapter 3 of the Code and the regulations thereunder, without the benefit of a reduced rate unless—

(A) The withholding agent has appropriately relied on the presumptions described in paragraph (b)(3) of this section (including the grace period described in paragraph (b)(3)(iv) of this section) in order to treat the payee as a U.S. person or, if applicable, on the presumptions described in § 1.1441–4(a)(2)(ii) or (a)(3)(i) to treat the payment as effectively connected income;

(B) The withholding agent can demonstrate to the satisfaction of the district director or the Assistant Commissioner (International) that the proper amount of tax, if any, was in fact paid to the IRS;

(C) No documentation is required under section 1441 or this section in order for a reduced rate of withholding to apply; or

* * * * *

(ii) *Proof that tax liability has been satisfied*—(A) *In general.* Proof of payment of tax may be established for purposes of paragraph (b)(7)(i)(B) of this section on the basis of a Form 4669 (or such other form as the IRS may prescribe in published guidance (see § 601.601(d)(2) of this chapter)) establishing the amount of tax, if any, actually paid by or for the beneficial owner on the income. Proof that a reduced rate of withholding was, in fact, appropriate under the provisions of chapter 3 of the Code and the regulations thereunder may also be established after the date of payment by the withholding agent on the basis of a valid withholding certificate or other appropriate documentation received after that date that was effective as of the date of payment. A withholding certificate furnished after the date of payment will be considered effective as of the date of the payment if the certificate contains a signed affidavit (either at the bottom of the form or on an attached page) that states that the information and representations contained on the certificate were accurate as of the time of the payment. A withholding certificate received within 30 days after the date of the payment will not be considered to be unreliable solely because it does not contain the affidavit described in the preceding sentence. However, in the case of a withholding certificate of an individual received more than a year after the date of payment, the withholding agent will be required to obtain, in addition to the withholding certificate and affidavit, documentary evidence, as described in § 1.1471–3(c)(5)(i), that supports the individual's claim of foreign status or documentary evidence described in § 1.1441–6(c)(4)(i) to support any treaty claim made on the certificate. In the case of a withholding certificate of an entity received more than a year after the date of payment, the withholding agent will be required to obtain, in addition to the withholding certificate and affidavit, documentary evidence described in § 1.1471–3(c)(5)(i) that supports the entity's claim of foreign status or documentary evidence described in § 1.1441–6(c)(4)(ii) to support any treaty claim made on the certificate. If documentation other than a withholding certificate is submitted from a payee more than a year after the date of payment, the withholding agent will be required to obtain from the payee a withholding certificate and affidavit supporting the claim of chapter 3 status as of the time of the payment. See, however, paragraph (b)(7)(ii)(B) of this section for special rules that apply when a withholding certificate is received after the date of the payment to claim that income is effectively connected with the conduct of a U.S. trade or business. See § 1.1471–3(c)(7)(ii) for additional requirements that may apply under chapter 4 for documentation obtained after the date of payment of a withholdable payment.

(B) [Reserved]. For further guidance, see § 1.1441–1T(b)(7)(ii)(B).

* * * * *

(iv) *Special rule for determining validity of withholding certificate containing inconsequential errors.* A withholding agent may treat a withholding certificate as valid when the certificate includes an error described as an inconsequential error in § 1.1471–3(c)(7)(i) for which the withholding agent obtains documentation sufficient for supporting a payee's claim of status as a foreign person or, for a payee that is an entity, its classification to the extent permitted under § 1.1471–3(c)(7)(i). For example, if the country of residence is abbreviated in an ambiguous way on a

beneficial owner withholding certificate provided to establish the beneficial owner's foreign status, a withholding agent may treat the withholding certificate as valid if it has obtained documentary evidence supporting that the beneficial owner's residence is in a country other than the United States.

(v) *Special effective date.* See paragraph (f)(2)(ii) of this section for the special effective date applicable to this paragraph (b)(7).

* * * * *

(c) *Definitions.* The following definitions apply for purposes of sections 1441 through 1443, 1461, and regulations under those sections. For definitions of terms used in these regulations that are defined under sections 1471 through 1474, see subparagraphs (43) through (56) of this paragraph.

* * * * *

(2) *Foreign and U.S. person*—(i) *In general.* The term foreign person means any person that is not a U.S. person, including a QI branch of a U.S. financial institution (as defined in § 1.1471–1(b)(109). Such a branch continues to be a U.S. payor for purposes of chapter 61 of the Code. See § 1.6049–5(c)(4). A U.S. person is a person described in section 7701(a)(30), the U.S. government (including an agency or instrumentality thereof), a State (including an agency or instrumentality thereof), or the District of Columbia (including an agency or instrumentality thereof).

(ii) [Reserved]. For further guidance, see § 1.1441–1T(c)(2)(ii).

(3) * * *

(ii) [Reserved]. For further guidance, see § 1.1441–1T(c)(3)(ii).

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(5) *Financial institution and foreign financial institution (or FFI).* The term financial institution means a person described in § 1.1471–1(b)(50). The term foreign financial institution or FFI has the meaning set forth in § 1.1471–1(b)(47).

* * * * *

(10) *Chapter 3 of the Code (or chapter 3).* For purposes of the regulations under sections 1441, 1442, and 1443, any reference to chapter 3 of the Code (or chapter 3) shall not include references to sections 1445 and 1446, unless the context indicates otherwise.

* * * * *

(12) *Payee.* For purposes of chapter 3 of the Code, the term payee of a payment is determined under paragraph (b)(2) of this section, § 1.1441–5(c)(1) (relating to partnerships), and § 1.1441–5(e)(2) and (3) (relating to trusts and estates) and includes foreign persons, U.S. exempt recipients, and U.S. non-exempt recipients. A nonqualified intermediary and a qualified intermediary (to the extent it does not assume primary withholding responsibility) are not payees if they are acting as intermediaries and not the beneficial owner of income. In addition, a flow-through entity (other than a withholding foreign partnership, withholding foreign trust, or qualified intermediary that assumes primary withholding responsibility) is not a payee unless the income is (or is deemed to be) effectively connected with the conduct of a trade or business in the United States. See § 1.6049–5(d)(1) for rules to determine the payee for purposes of chapter 61 of the Code. See §§ 1.1441–1(b)(3), 1.1441–5(d), and (e)(6) and § 1.6049–5(d)(3) for presumption rules that apply if a payee's identity cannot be determined on the basis of valid documentation. For purposes of chapter 4, the term payee has the meaning set forth in § 1.1471–3(a) with respect to a withholdable payment.

* * * * *

(16) *Withholding certificate.* The term withholding certificate means a Form W–8 described in paragraph (e)(2)(i) of this section (relating to foreign beneficial owners), paragraphs (e)(3)(i) or (e)(5)(i) of this section (relating to foreign intermediaries or qualified intermediaries), § 1.1441–5(c)(2)(iv), (c)(3)(iii), and (e)(5)(iii) (relating to flow-through entities), a Form 8233 described in § 1.1441–4(b)(2), a Form W–9 as described in paragraph (d) of this section, a statement described in § 1.871–14(c)(2)(v) (relating to portfolio interest), or any other certificates that under the Code or regulations certifies or establishes the status of a payee or beneficial owner as a U.S. or a foreign person.

(17) *Documentary evidence; other appropriate documentation.* The terms documentary evidence or other appropriate documentation refer to documentary evidence that may be provided for payments made outside the United States with respect to offshore obligations in accordance with § 1.6049–5(c)(1) or any other evidence that under the Code or regulations certifies or establishes the status of a payee or beneficial owner as a U.S. or foreign person. See §§ 1.1441–6(b)(2), (c)(3) and (4) (relating to treaty benefits), and 1.6049–5(c)(1) and (4) (relating to chapter 61 reporting). Also see § 1.1441–4(a)(3)(ii) regarding documentary evidence for notional principal contracts.

* * * * *

(23) *Flow-through entity.* A flow-through entity means any entity that is described in this paragraph (c)(23) and that may provide documentation on behalf of its partners, beneficiaries, or owners to a withholding agent. The entities described in this paragraph are a foreign partnership (other than a withholding foreign partnership), a foreign simple trust (other than a withholding foreign trust) that is described in paragraph (c)(24) of this section, a foreign grantor trust (other than a withholding foreign trust) that is described in paragraph (c)(26) of this section, or, for any payments for which a reduced rate of withholding under an income tax treaty is claimed, any entity to the extent the entity is considered to be fiscally transparent under section 894 with respect to the payment by an interest holder's jurisdiction.

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(25) *Foreign complex trust.* A foreign complex trust is a foreign trust other than a foreign simple trust or foreign grantor trust.

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(28) *Nonwithholding foreign partnership (or NWP).* A nonwithholding foreign partnership is a foreign partnership that is not a withholding foreign partnership, as defined in § 1.1441–5(c)(2)(i).

(29) *Withholding foreign partnership (or WP).* A withholding foreign partnership is defined in § 1.1441–5(c)(2)(i).

(30) *Possessions of the United States or U.S. territory.* For purposes of the regulations under chapters 3 and 61 of the Code, the term possessions of the United States or U.S. territory means Guam, American Samoa, the Northern Mariana Islands, Puerto Rico, or the Virgin Islands.

(31) *Amount subject to chapter 3 withholding.* An amount subject to withholding under chapter 3 is an amount described in § 1.1441–2(a).

(32) *EIN.* The term EIN means an employer identification number (also known as a federal tax identification number) described in § 301.6109–1(a)(1)(i).

(33) *Flow-through withholding certificate.* The term flow-through withholding certificate means a Form W–8IMY submitted by a foreign partnership, foreign simple trust, or foreign grantor trust.

(34) *Foreign payee.* The term foreign payee means any payee other than a U.S. payee.

(35) *Intermediary withholding certificate.* The term intermediary withholding certificate means a Form W–8IMY submitted by an intermediary or qualified intermediary.

(36) *Nonwithholding foreign trust (or NWT).* The term nonwithholding foreign trust or NWT means a foreign trust as defined in section 7701(a)(31)(B) that is a simple trust or grantor trust and is not a withholding foreign trust.

(37) *Payment with respect to an offshore obligation.* The term payment with respect to an offshore obligation means a payment made outside of the United States, within the meaning of § 1.6049–5(e), with respect to an offshore obligation (as defined in § 1.6049–5(c)(1), § 1.6041–1(d), or § 1.6042–3(b) (depending on the type of payment)).

(38) *Permanent residence address*—(i) *In general.* The term permanent residence address is the address in the country of which the person claims to be a resident for purposes of that country's income tax. In the case of a withholding certificate furnished in order to claim a reduced rate of withholding under an income tax treaty, whether a person is a resident of a treaty country must be determined in the manner prescribed under the applicable treaty. See § 1.1441–6(b). The address of a financial institution with which the person maintains an account, a post office box, or an address used solely for mailing purposes is not a permanent residence address unless such address is the only permanent address used by the person and appears as the person's registered address in the person's organizational documents. Further, an address that is provided subject to instructions to hold all mail to that address is not a permanent residence address. If the person is an individual who does not have a tax residence in any country, the permanent residence address is the place at which the person normally resides. If the person is an entity and does not have a tax residence in any country, then the permanent residence address of the entity is the place at which the person maintains its principal office.

(ii) [Reserved]. For further guidance, see § 1.1441–1T(c)(38)(ii).

(39) *Standing instructions to pay amounts.* The term standing instructions to pay amounts has the meaning set forth in § 1.1471–1(b)(126).

(40) *Territory financial institution.* The term territory financial institution has the meaning set forth in § 1.1471–1(b)(130).

(41) *TIN.* The term TIN means the tax identifying number assigned to a person under section 6109.

(42) *Withholding foreign trust (or WT).* The term withholding foreign trust (or WT) means a foreign grantor trust or foreign simple trust that has executed the agreement described in § 1.1441–5(e)(5)(v).

(43) *Certified deemed-compliant FFI.* The term certified deemed-compliant FFI means an FFI described in § 1.1471–5(f)(2).

(44) *Chapter 3 withholding rate pool.* The term chapter 3 withholding rate pool has the meaning described in paragraph (e)(5)(v)(C)(*1*) of this section.

(45) *Chapter 3 status.* The term chapter 3 status refers to the attributes of a payee relevant for determining the rate of withholding with respect to a payment made to the payee for purposes of chapter 3.

(46) *Chapter 4 of the Code (or chapter 4).* The term chapter 4 of the Code (or chapter 4) means sections 1471 through 1474 and the regulations thereunder.

(47) *Chapter 4 status.* The term chapter 4 status means a person's status as a U.S. person, a specified U.S. person, an individual that is a foreign person, a participating FFI, a deemed-compliant FFI, a restricted distributor, an exempt beneficial owner, a nonparticipating FFI, a territory financial institution, an excepted NFFE, or a passive NFFE.

(48) *Chapter 4 withholding rate pool.* The term chapter 4 withholding rate pool has the meaning set forth § 1.1471–1(b)(20). For when a withholding statement may include a chapter 4 withholding rate pool of U.S. payees for purposes of this section and § 1.1441–5, however, see paragraph (e)(3)(iv)(A) of this section (for a withholding statement provided by a nonqualified intermediary) or paragraph (e)(5)(v)(C)(*2*) of this section (for a withholding statement provided by a qualified intermediary).

(49) *Deemed-compliant FFI.* The term deemed-compliant FFI means an FFI that is treated, pursuant to section 1471(b)(2) and § 1.1471–5(f), as meeting the requirements of section 1471(b). The term deemed-compliant FFI also includes a QI branch of a U.S. financial institution that is a reporting Model 1 FFI.

(50) *GIIN (or Global Intermediary Identification Number).* The term GIIN or Global Intermediary Identification Number means the identification number that is assigned to a participating FFI or registered deemed-compliant FFI. The term GIIN or Global Intermediary Identification Number also includes the identification number assigned to a reporting Model 1 FFI (as defined in § 1.1471–1(b)(114)) for purposes of identifying such entity to withholding agents. All GIINs will appear on the IRS FFI list.

(51) *NFFE.* The term NFFE or non-financial foreign entity has the meaning set forth in § 1.1471–1(b)(80).

(52) *Nonparticipating FFI.* The term nonparticipating FFI means an FFI other than a participating FFI, a deemed-compliant FFI, or an exempt beneficial owner.

(53) *Participating FFI.* The term participating FFI has the meaning set forth in § 1.1471–1(b)(91).

(54) *Preexisting obligation.* The term preexisting obligation has the meaning set forth in § 1.1471–1(b)(104).

(55) *Registered deemed-compliant FFI.* The term registered deemed-compliant FFI has the meaning set forth in § 1.1471–5(f)(1).

(56) *Withholdable payment.* The term withholdable payment has the meaning set forth in § 1.1473–1(a).

(d) * * *

(4) *When a payment to an intermediary or flow-through entity may be treated as made to a U.S. payee.* A withholding agent that makes a payment to an intermediary (whether a qualified intermediary or nonqualified intermediary), a flow-through entity, or a U.S. branch or territory financial institution described in paragraph (b)(2)(iv) of this section may treat the payment as made to a U.S. payee to the extent that, prior to the payment, the withholding agent can reliably associate the payment with a Form W–9 described in paragraph (d)(2) or (3) of this section attached to a valid intermediary, flow-through, or U.S. branch withholding certificate described in paragraph (e)(3)(i) of this section or to the extent the withholding agent can reliably associate the payment with a Form W–8 described in paragraph (e)(3)(v) of this section that evidences an agreement to treat a U.S. branch or territory financial institution described in paragraph (b)(2)(iv) of this section as a U.S. person. In addition, a withholding agent may treat the payment as made to a U.S. payee only if it complies with the electronic confirmation procedures described in paragraph (e)(4)(v) of this section, if required, and it has not been notified by the IRS that any of the information on the withholding certificate or other documentation is incorrect or unreliable. In the case of a Form W–9 that is required to be furnished for a reportable payment that may be subject to backup withholding, the withholding agent may be notified in accordance with section 3406(a)(1)(B) and the regulations under that section. See applicable procedures under section 3406(a)(1)(B) and the regulations under that section for payors who have been notified with regard to such a Form W–

9. Withholding agents who have been notified in relation to other Forms W–9, including under section 6724(b) pursuant to section 6721, may rely on the withholding certificate or other documentation only to the extent provided under procedures as prescribed by the IRS (see § 601.601(d)(2) of this chapter).

(e) * * *

(1) * * *

(ii) * * *

(A) * * *

(*2*) That the payment is made outside the United States (within the meaning of § 1.6049–5(e)) with respect to an offshore obligation (within the meaning of paragraph (c)(37) of this section) and the withholding agent can reliably associate the payment with documentary evidence described in §§ 1.1441–6(c)(3) or (4), or 1.6049–5(c)(1) relating to the beneficial owner;

(*3*) That the withholding agent can reliably associate the payment with a valid qualified intermediary withholding certificate, as described in paragraph (e)(3)(ii) of this section, and the qualified intermediary has provided sufficient information for the withholding agent to allocate the payment to a chapter 3 withholding rate pool;

* * * * *

(2) * * *

(ii) *Requirements for validity of certificate*—(A) *In general.* A beneficial owner withholding certificate is valid for purposes of a payment of an amount subject to chapter 3 withholding only if it is provided on a Form W–8 or a Form 8233 in the case of personal services income described in § 1.1441–4(b) or certain scholarship or grant amounts described in § 1.1441–4(c) (or a substitute form described in paragraph (e)(4)(vi) of this section or such other form as the IRS may prescribe). A Form W–8 is valid only if its validity period has not expired, it is signed under penalties of perjury by the beneficial owner, and it contains all of the information required on the form. The required information is the beneficial owner's name, permanent residence address (as defined in § 1.1441–1(c)(38)), TIN (if required), a certification that the person is not a U.S. citizen (if the person is an individual) or a certification of the country under the laws of which the beneficial owner is created, incorporated, or governed (if a person other than an individual), the classification of the entity, and such other information as may be required by the regulations under section 1441 or by the form or accompanying instructions in addition to, or in lieu of, the information described in this paragraph (e)(2)(ii) (including when a foreign TIN and an individual's date of birth are required). A beneficial owner withholding certificate must also include the chapter 4 status of a beneficial owner when required for chapter 4 purposes in order to be valid. See paragraph (e)(4)(vii) of this section for circumstances in which a TIN is required on a beneficial owner withholding certificate.

(B) [Reserved]. For further guidance, see § 1.1441–1T(e)(2)(ii)(B).

(3) * * *

(ii) *Intermediary withholding certificate from a qualified intermediary.* A qualified intermediary shall provide a qualified intermediary withholding certificate for withholdable payments or reportable amounts received by the qualified intermediary. See paragraph (e)(3)(vi) of this section for the definition of reportable amount. A qualified intermediary withholding certificate is valid only if it is furnished on a Form W–8, an acceptable substitute form, or such other form as the IRS may prescribe, it is signed under penalties of perjury by a person with authority to sign for the qualified intermediary, its validity has not expired, and it contains the following information, statement, and certifications—

(A) The name, permanent residence address, qualified intermediary employer identification number (QI–EIN), and the country under the laws of which the qualified intermediary is created, incorporated, or governed. If required for purposes of chapter 4 or if the qualified intermediary is a participating FFI or registered deemed-compliant FFI and certifies that it is providing (or will provide) a chapter 4 withholding rate pool of U.S. payees under § 1.6049–4(c)(4) with respect to accounts that the qualified intermediary maintains, the withholding certificate must also include the chapter 4 status of the qualified intermediary and its GIIN (if applicable). See paragraph (e)(5)(ii) for the chapter 4 status required of a qualified intermediary, including when a qualified intermediary withholding certificate may include a chapter 4 status of limited FFI (as defined in § 1.1471–1(b)(77)). A qualified intermediary that does not act in its capacity as a qualified intermediary must not use its QI–EIN. Rather, it should provide a nonqualified intermediary withholding certificate, if it is acting as an intermediary, and should use the taxpayer identification number (if any) that it uses for all other purposes and GIIN (if applicable);

* * * * *

(C) A certification that the qualified intermediary has provided, or will provide, a withholding statement as required by paragraph (e)(5)(v) of this section;

(D) A certification that the qualified intermediary meets the requirements of § 1.6049–4(c)(4) when the qualified intermediary provides (or will provide) a withholding statement associated with its Form W–8 that allocates a payment to a chapter 4 withholding rate pool of U.S. payees that hold accounts with the qualified intermediary. Additionally, when the qualified intermediary provides a chapter 4 withholding rate pool of U.S. payees that do not hold accounts maintained by the qualified intermediary, the qualified intermediary provides a certification on the Form W–8 that the qualified intermediary has obtained (or will obtain) documentation from the intermediary or flow through entity allocating the payment to the pool to establish that the entity's status is as a participating FFI, registered deemed-compliant FFI, or qualified intermediary under § 1.1471–3(d)(4) (or, as applicable, § 1.1471–3(e)(4)(vi)(B) or § 1.1441–1(b)(2)(vii)); and

* * * * *

(F) Any other information, certifications, or statements as may be required by the form or accompanying instructions in addition to, or in lieu of, the information and certifications described in this paragraph (e)(3)(ii) or paragraph (e)(3)(v) of this section. See paragraph (e)(5)(v) of this section for the requirements of a withholding statement associated with the qualified intermediary withholding certificate.

(iii) *Intermediary withholding certificate from a nonqualified intermediary.* A nonqualified intermediary shall provide a nonqualified intermediary withholding certificate for reportable amounts received by the nonqualified intermediary. See paragraph (e)(3)(vi) of this section for the definition of reportable amount. A nonqualified intermediary withholding certificate is valid only to the extent it is furnished on a Form W–8, an acceptable substitute form, or such other form as the IRS may prescribe, it is signed under penalties of perjury by a person authorized to sign for the nonqualified intermediary, it contains the information, statements, and certifications described in this paragraphs (e)(3)(iii) and (iv) of this section, its validity has not expired, and the withholding certificates and other appropriate documentation for all persons to whom the certificate relates are associated with the certificate. Withholding certificates and other

appropriate documentation consist of beneficial owner withholding certificates described in paragraph (e)(2)(i) of this section, intermediary and flow-through withholding certificates described in paragraph (e)(3)(i) of this section, withholding foreign partnership and withholding foreign trust certificates described in § 1.1441–5(c)(2)(iv) and (e)(5)(iii), documentary evidence described in §§ 1.1441–6(c)(3) or (4) and 1.6049–5(c)(1), and any other documentation or certificates applicable under other provisions of the Code or regulations that certify or establish the status of the payee or beneficial owner as a U.S. or a foreign person. If a nonqualified intermediary is acting on behalf of another nonqualified intermediary or a flow-through entity, then the nonqualified intermediary must associate with its own withholding certificate the other nonqualified intermediary withholding certificate or the flow-through withholding certificate and separately identify all of the withholding certificates and other appropriate documentation that are associated with the withholding certificate of the other nonqualified intermediary or flow-through entity. Nothing in this paragraph (e)(3)(iii) shall require an intermediary to furnish original documentation. Copies of certificates or documentary evidence may be transmitted to the U.S. withholding agent, in which case the nonqualified intermediary must retain the original documentation for the same time period that the copy is required to be retained by the withholding agent under paragraph (e)(4)(iii) of this section and must provide it to the withholding agent upon request. For purposes of this paragraph (e)(3)(iii), a valid intermediary withholding certificate also includes a statement described in § 1.871–14(c)(2)(v) furnished for interest to qualify as portfolio interest for purposes of sections 871(h) and 881(c). The information and certifications required on a Form W–8 described in this paragraph (e)(3)(iii) are as follows—

(A) The name and permanent resident address of the nonqualified intermediary, chapter 4 status (if required for chapter 4 purposes or if the nonqualified intermediary provides the certification described in paragraph (e)(3)(iii)(D) of this section), GIIN (if applicable), and the country under the laws of which the nonqualified intermediary is created, incorporated, or governed;

* * * * *

(C) If the nonqualified intermediary withholding certificate is used to transmit withholding certificates or other appropriate documentation for more than one person on whose behalf the nonqualified intermediary is acting, a withholding statement associated with the Form W–8 that provides all the information required by paragraph (e)(3)(iv) of this section;

(D) If the nonqualified intermediary provides a withholding statement associated with the Form W–8 allocating a payment to a chapter 4 withholding rate pool of U.S. payees, a certification that the nonqualified intermediary meets the requirements of § 1.6049–4(c)(4) with respect to any payees included in such pool that hold accounts maintained (as defined in § 1.1471–5(b)(5)) by the nonqualified intermediary; and

(E) Any other information, certifications, or statements as may be required by the form or accompanying instructions in addition to, or in lieu of, the information, certifications, and statements described in this paragraph (e)(3)(iii) or paragraph (e)(5)(iv) of this section.

(iv) *Withholding statement provided by nonqualified intermediary*—(A) *In general.* A nonqualified intermediary shall provide a withholding statement required by this paragraph (e)(3)(iv) to the extent the nonqualified intermediary is required to furnish, or does furnish, documentation for payees on whose behalf it receives reportable amounts (as defined in paragraph (e)(3)(vi) of this section) or to the extent it otherwise provides the documentation of such payees to a withholding agent. A nonqualified intermediary, however, that is subject to withholding under chapter 4 due to its chapter 4 status as a nonparticipating FFI need not provide a withholding statement unless it is providing documentation to allocate a portion of the payment as made to an exempt beneficial owner as described in § 1.1471–3(c)(3)(iii)(B)(*4*). A nonqualified intermediary that is subject to withholding under chapter 4 due to its chapter 4 status is not required to disclose to the withholding agent information regarding persons for whom it collects reportable amounts unless it has actual knowledge that any such person is a U.S. non-exempt recipient as defined in paragraph (c)(21) of this section. Information regarding U.S. non-exempt recipients required under this paragraph (e)(3)(iv) must be provided irrespective of any requirement under foreign law that prohibits the disclosure of the identity of an account holder of a nonqualified intermediary or financial information relating to such account holder. A nonqualified intermediary is not required to provide information on a withholding statement regarding U.S. non-exempt recipients, provided that the nonqualified intermediary is a participating FFI (including a reporting Model 2 FFI) or registered deemed-compliant FFI (including a reporting Model 1 FFI) that identifies on the withholding statement the portion of a payment allocable to a chapter 4 withholding rate pool of U.S. payees to the extent that the nonqualified intermediary is permitted to include such U.S. payees in a pool under § 1.6049–4(c)(4)(iii). See § 1.1471–3(d)(4) for the requirements of an entity to identify itself as a participating FFI or registered deemed-compliant FFI to a withholding agent for purposes of chapter 4. Although a nonqualified intermediary is not required to provide documentation and other information required by this paragraph (e)(3)(iv) for persons other than U.S. non-exempt recipients not included in a chapter 4 withholding rate pool of U.S. payees, a withholding agent that does not receive documentation and such information must apply the presumption rules of paragraph (b) of this section, §§ 1.1441–5(d) and (e)(6), 1.6049–5(d), and 1.1471–3(f)(5) (for a withholdable payment) or the withholding agent shall be liable for tax, interest, and penalties. A withholding agent must apply the presumption rules even if it is not required under chapter 61 of the Code to obtain documentation to treat a payee as an exempt recipient and even though it has actual knowledge that the payee is a U.S. person. For example, if a nonqualified intermediary receives a payment that is not a withholdable payment and fails to provide a withholding agent with a Form W–9 for an account holder that is a U.S. exempt recipient that is not included in a chapter 4 withholding rate pool of U.S. payees to the extent permitted in this paragraph (e)(3)(iv)(A), the withholding agent must presume (even if it has actual knowledge that the account holder is a U.S. exempt recipient) that the account holder is an undocumented foreign person with respect to amounts subject to chapter 3 withholding. See paragraph (b)(3)(v) of this section for applicable presumptions. Therefore, the withholding agent must withhold 30 percent from the payment even though if a Form W–9 had been provided, no withholding or reporting on the payment attributable to a U.S. exempt recipient would apply. Further, a nonqualified intermediary that fails to provide the documentation and the information under this paragraph (e)(3)(iv) for another withholding agent to report the payments on Forms 1042–

S (including under the requirements of § 1.1474–1(d)(2) for a payment of a chapter 4 reportable amount) and Forms 1099 is not relieved of its responsibility to file information returns. See paragraph (b)(6) of this section. Therefore, unless the nonqualified intermediary itself files such returns and provides copies to the payees, it shall be liable for penalties under sections 6721 (failure to file information returns), and 6722 (failure to furnish payee statements), including the penalties under those sections for intentional failure to file information returns. In addition, failure to provide either the documentation or the information required by this paragraph (e)(3)(iv) results in a payment not being reliably associated with valid documentation. Therefore, the beneficial owners of the payment are not entitled to reduced rates of withholding and if the full amount required to be held under the presumption rules is not withheld by the withholding agent, the nonqualified intermediary must withhold the difference between the amount withheld by the withholding agent and the amount required to be withheld. Failure to withhold shall result in the nonqualified intermediary being liable for tax under section 1461, interest, and penalties, including penalties under section 6656 (failure to deposit) and section 6672 (failure to collect and pay over tax).

(B) *General requirements.* A withholding statement must be provided prior to the payment of a reportable amount and must contain the information specified in paragraph (e)(3)(iv)(C) of this section. The statement must be updated as often as required to keep the information in the withholding statement correct prior to each subsequent payment. The withholding statement forms an integral part of the withholding certificate provided under paragraph (e)(3)(iii) of this section, and the penalties of perjury statement provided on the withholding certificate shall apply to the withholding statement. The withholding statement may be provided in any manner the nonqualified intermediary and the withholding agent mutually agree, including electronically. If the withholding statement is provided electronically as part of a system established by the withholding agent or nonqualified intermediary to provide the statement, however, there must be sufficient safeguards to ensure that the information received by the withholding agent is the information sent by the nonqualified intermediary and all occasions of user access that result in the submission or modification of the withholding statement information must be recorded. In addition, the electronic system must be capable of providing a hard copy of all withholding statements provided by the nonqualified intermediary. A withholding statement may otherwise be transmitted by a nonqualified intermediary via email or facsimile to a withholding agent under the requirements specified in paragraph (e)(4)(iv)(D) of this section (substituting the term withholding statement for the term Form W–8 or the term document, as applicable). A withholding agent will be liable for tax, interest, and penalties in accordance with paragraph (b)(7) of this section to the extent it does not follow the presumption rules of paragraph (b)(3) of this section or §§ 1.1441–5(d) and (e)(6), and 1.6049–5(d) for any payment of a reportable amount, or portion thereof, for which it does not have a valid withholding statement prior to making a payment. A withholding agent may not treat as valid an allocation of a payment to a chapter 4 withholding rate pool of U.S. payees described in paragraph (e)(3)(iv)(A) of this section or an allocation of a payment to a chapter 4 withholding rate pool of recalcitrant account holders described in paragraph (e)(3)(iv)(C)(*2*) of this section unless the withholding agent identifies the nonqualified intermediary maintaining the account (as described in § 1.1471–5(b)(5)) as a participating FFI (including a reporting Model 2 FFI) or registered deemed-compliant FFI (including a reporting Model 1 FFI) by applying the rules of § 1.1471–3(d)(4). Additionally, in the case of a withholdable payment that is an amount subject to withholding made on or after April 1, 2017, a withholding agent may not treat as valid an allocation of the payment to a chapter 4 withholding rate pool of U.S. payees unless the nonqualified intermediary identifies the pool of U.S. payees as one described in § 1.1471–3(c)(3)(iii)(B)(*2*)(*iii*) (or by describing such payees consistent with the description provided in § 1.1471–3(c)(3)(ii)(B)(*2*)(*iii*)).

(C) *Content of withholding statement.* The withholding statement provided by a nonqualified intermediary must contain the information required by this paragraph (e)(3)(iv)(C).

(*1*) *In general.* Except as otherwise provided by paragraph (e)(3)(iv)(C)(*2*) and (*3*) of this section), the withholding statement provided by a nonqualified intermediary must contain the information required by this paragraph (e)(3)(iv)(C)(*1*).

(*i*) Except as otherwise provided in (e)(3)(iv)(A) of this section (which excludes reporting of information with respect to certain U.S. persons on the withholding statement), the withholding statement must contain the name, address, TIN (if any), and the type of documentation (documentary evidence, Form W–9, or type of Form W–8) for every person from whom documentation has been received by the nonqualified intermediary and provided to the withholding agent and whether that person is a U.S. exempt recipient, a U.S. non-exempt recipient, or a foreign person. See paragraphs (c)(2), (20), and (21) of this section for the definitions of foreign person, U.S. exempt recipient, and U.S. non-exempt recipient. In the case of a foreign person, the statement must indicate whether the foreign person is a beneficial owner or an intermediary, flow-through entity, U.S. branch, or territory financial institution described in paragraph (b)(2)(iv) of this section and include the type of recipient, based on recipient codes applicable for chapter 3 purposes used for filing Forms 1042–S, if the foreign person is a recipient as defined in § 1.1461–1(c)(1)(ii).

(*ii*) The withholding statement must allocate each payment, by income type, to every payee required to be reported on the withholding statement for whom documentation has been provided (including U.S. exempt recipients except as provided in paragraph (e)(3)(iv)(A) of this section). Any payment that cannot be reliably associated with valid documentation from a payee shall be treated as made to an unknown payee in accordance with the presumption rules of paragraph (b) of this section and §§ 1.1441–5(d) and (e)(6) and 1.6049–5(d). For this purpose, a type of income is determined by the types of income required to be reported on Forms 1042–S or 1099, as appropriate. Notwithstanding the preceding sentence, deposit interest (including original issue discount) described in section 871(i)(2)(A) or 881(d) and interest or original issue discount on short-term obligations as described in section 871(g)(1)(B) or 881(e) is only required to be allocated to the extent it is required to be reported on Form 1099 or Form 1042–S. See § 1.6049–8 (regarding reporting of bank deposit interest to certain foreign persons). If a payee receives income through another nonqualified intermediary, flow-through entity, or U.S. branch or territory financial institution described in paragraph (e)(2)(iv) of this section (other than a U.S. branch or territory financial

institution treated as a U.S. person), the withholding statement must also state, with respect to the payee, the name, address, and TIN, if known, of the other nonqualified intermediary or U.S. branch from which the payee directly receives the payment or the flow-through entity in which the payee has a direct ownership interest. If another nonqualified intermediary, flow-through entity, or U.S. branch fails to allocate a payment, the name of the nonqualified intermediary, flow-through entity, or U.S. branch that failed to allocate the payment shall be provided with respect to such payment.

(*iii*) If a payee is identified as a foreign person, the nonqualified intermediary must specify the rate of withholding to which the payee is subject, the payee's country of residence and, if a reduced rate of withholding is claimed, the basis for that reduced rate (*e.g.,* treaty benefit, portfolio interest, exempt under section 501(c)(3), 892, or 895). The allocation statement must also include the TINs of those foreign persons for whom such a number is required under paragraph (e)(4)(vii) of this section or § 1.1441–6(b)(1) (regarding claims for treaty benefits for which a TIN is provided unless a foreign tax identifying number described in § 1.1441–6(b)(1) is provided). In the case of a claim of treaty benefits, the nonqualified intermediary's withholding statement must also state whether the limitation on benefits and section 894 statements required by § 1.1441–6(c)(5) have been provided, if required, in the beneficial owner's Form W–8 or associated with such owner's documentary evidence.

(*iv*) The withholding statement must also contain any other information the withholding agent reasonably requests in order to fulfill its obligations under chapter 3 and chapter 61 of the Code, and section 3406.

(*2*) *Nonqualified intermediary withholding statement for withholdable payments.* This paragraph (e)(3)(iv)(C)(*2*) modifies the requirements of a withholding statement described in paragraph (e)(3)(iv)(C)(*1*) of this section that is provided by a nonqualified intermediary with respect to a reportable amount that is a withholdable payment. For such a payment, the requirements applicable to a withholding statement described in paragraph (e)(3)(iv)(A) through (e)(3)(iv)(C)(*1*) of this section shall apply, except that—

(*i*) The withholding statement must include the chapter 4 status (using the applicable status code used for filing Form 1042–S) and GIIN (when required for chapter 4 purposes under § 1.1471–3(d)) of each other intermediary or flow-through entity that is a foreign person and that receives the payment, excluding an intermediary or flow-through entity that is an account holder of or interest holder in a withholding foreign partnership, withholding foreign trust, or intermediary acting as a qualified intermediary for the payment;

(*ii*) If the nonqualified intermediary that is a participating FFI or registered deemed-compliant FFI provides a withholding statement described in § 1.1471–3(c)(3)(iii)(B)(*2*) (describing an FFI withholding statement), the withholding statement may include chapter 4 withholding rate pools with respect to the portions of the payment allocated to nonparticipating FFIs and recalcitrant account holders (to the extent permitted on an FFI withholding statement described in that paragraph) in lieu of providing specific payee information with respect to such persons on the statement (including persons subject to chapter 4 withholding) as described in paragraph (e)(3)(iv)(C)(*1*) of this section;

(*iii*) If the nonqualified intermediary provides a withholding statement described in § 1.1471–3(c)(3)(iii)(B)(*3*) (describing a chapter 4 withholding statement), the withholding statement may include chapter 4 withholding rate pools with respect to the portions of the payment allocated to nonparticipating FFIs;

(*iv*) For a payment allocated to a payee that is a foreign person (other than a person included in a chapter 4 withholding rate pool described in paragraphs (e)(3)(iv)(C)(*2*)(*ii*) and (*iii*) of this section) that is reported on a withholding statement described in § 1.1471–3(c)(3)(iii)(B)(*2*) or (*3*), the withholding statement must include the chapter 4 status of the payee (unless an exception applies for purposes of providing such status under chapter 4) and, for a payee other than an individual, the recipient code for chapter 4 purposes used for filing Form 1042–S; and

(*v*) To the extent that a withholdable payment is not reportable on a Form 1042–S, Form 1099 under the rules of chapter 61, or Form 8966 ''FATCA Report,'' no allocation of the payment is required on the withholding statement.

(*3*) [Reserved]. For further guidance, see § 1.1441–1T(e)(3)(iv)(C)(*3*).

(*4*)

Example. This example illustrates the principles of paragraph (e)(3)(iv)(C) of this section. WA makes a withholdable payment of U.S. source dividends to NQI, a nonqualified intermediary. NQI provides WA with a valid intermediary withholding certificate under paragraph (e)(3)(iii) of this section that includes NQI's certification of its status for chapter 4 purposes as a participating FFI. NQI provides a withholding statement on which NQI allocates 20% of the payment to a chapter 4 withholding rate pool of recalcitrant account holders of NQI for purposes of chapter 4 and allocates 80% of the payment equally to A and B, individuals that are account holders of NQI. NQI also provides WA with valid beneficial owner withholding certificates from A and B establishing their status as foreign persons entitled to a 15% rate of withholding under an applicable income tax treaty. Because NQI has certified its status as a participating FFI, withholding under chapter 4 is not required with respect to NQI. See § 1.1471–2(a)(4). Based on the documentation NQI provided to WA with respect to A and B, WA can reliably associate the payment with valid documentation on the portion of the payment allocated to them and, because the payment is a withholdable payment, may rely on the allocation of the payment for NQI's recalcitrant account holders in a chapter 4 withholding rate pool in lieu of payee information with respect to such account holders. See paragraph (e)(3)(iv)(C)(*2*) of this section for the special rules for a withholding statement provided by a nonqualified intermediary for a withholdable payment. Also see § 1.1471–2(a) for WA's withholding requirements under chapter 4 with respect to the portion of the payment allocated to NQI's recalcitrant account holders and § 1.1441–3(a)(2) for coordinating withholding under chapter 3 for payments to which withholding is applied under chapter 4.

(D) *Alternative procedures*—(*1*) *In general.* Under the alternative procedures of this paragraph (e)(3)(iv)(D), a nonqualified intermediary may provide information allocating a payment of a reportable amount to each payee (including U.S. exempt recipients) otherwise required under paragraph (e)(3)(iv)(B)(*2*) of this section after a payment is made. To use the alternative procedure of this paragraph (e)(3)(iv)(D), the nonqualified intermediary must inform the withholding agent on a statement associated with its nonqualified intermediary withholding certificate that it is using the procedure under this paragraph (e)(3)(iv)(D) and the withholding agent must agree to the procedure. If the requirements of the alternative procedure are met, a withholding agent, including the nonqualified intermediary using the procedures, can treat the payment as reliably associated with documentation and, therefore, the presumption rules of paragraph (b)(3) of this section and §§ 1.1441–5(d) and (e)(6) and 1.6049–5(d) do not apply even though information allocating the payment to each payee has not been received prior to the payment. See paragraph (e)(3)(iv)(D)(*7*) of this section, however, for a nonqualified intermediary's

liability for tax and penalties if the requirements of this paragraph (e)(3)(iv)(D) are not met. These alternative procedures shall not be used for payments that are allocable to U.S. non-exempt recipients except as provided in paragraph (e)(3)(iv)(D)(*2*)(*ii*) of this section. Therefore, a nonqualified intermediary is required to provide a withholding agent with information allocating payments of reportable amounts to U.S. non-exempt recipients prior to the payment being made by the withholding agent.

(*2*) *Withholding rate pools*—(*i*) *In general.* In place of the information required in paragraph (e)(3)(iv)(C)(*2*) of this section allocating payments to each payee, the nonqualified intermediary must provide a withholding agent with withholding rate pool information prior to the payment of a reportable amount. The withholding statement must contain all other information required by paragraph (e)(3)(iv)(C) of this section. Further, each payee listed in the withholding statement must be assigned to an identified withholding rate pool. To the extent a nonqualified intermediary is required to provide, or does provide, documentation, the alternative procedures do not relieve the nonqualified intermediary from the requirement to provide documentation prior to the payment being made. Therefore, withholding certificates or other appropriate documentation and all information required by paragraph (e)(3)(iv)(C) of this section (other than allocation information) must be provided to a withholding agent before any new payee receives a reportable amount. In addition, the withholding statement must be updated by assigning a new payee to a withholding rate pool prior to the payment of a reportable amount. A withholding rate pool is a payment of a single type of income, determined in accordance with the categories of income used to file Form 1042–S, that is subject to a single rate of withholding. A withholding rate pool may be established by any reasonable method to which the nonqualified intermediary and a withholding agent agree (*e.g.,* by establishing a separate account for a single withholding rate pool, or by dividing a payment made to a single account into portions allocable to each withholding rate pool). The nonqualified intermediary shall determine withholding rate pools based on valid documentation or, to the extent a payment cannot be reliably associated with valid documentation, the presumption rules of paragraph (b)(3) of this section and §§ 1.1441–5(d) and (e)(6) and 1.6049–5(d).

(*ii*) *Withholding rate pools for chapter 4 purposes.* This paragraph (e)(3)(iv)(D)(*2*)(*ii*) modifies the provisions of paragraph (e)(3)(iv)(D)(*2*)(*i*) of this section with respect to the withholding rate pools permitted for the alternative procedures described in paragraph (e)(3)(iv)(D)(*1*) of this section in the case of a payment that is allocable on a withholding statement to a chapter 4 withholding rate pool as described in this paragraph. In the case of a withholdable payment, a nonqualified intermediary may include reportable amounts allocable to a chapter 4 withholding rate pool (other than a chapter 4 withholding rate pool of U.S. payees) in a 30-percent rate pool together with a withholding rate pool for amounts subject to chapter 3 withholding at the 30-percent rate. For a payment of a reportable amount that is allocable to a chapter 4 withholding rate pool of U.S. payees on a withholding statement, a nonqualified intermediary may include such amount in a single withholding rate pool with the amount of the payment that is exempt from withholding under chapter 3 instead of providing documentation regarding U.S. non-exempt recipients included in the pool or separately allocating the amount to the chapter 4 withholding rate pool. To the extent that a nonqualified intermediary allocates an amount to any chapter 4 withholding rate pool, the nonqualified intermediary is required to notify the withholding agent of the allocation before receiving the payment and is not required to provide documentation with respect to the payees included in such pool. The nonqualified intermediary shall determine the chapter 4 withholding rate pools permitted to be used under this paragraph (e)(3)(iv)(D)(*2*)(*ii*) in accordance with the nonqualified intermediary's applicable chapter 4 status and under § 1.1471–3(c)(3)(iii)(B)(*2*) (for an FFI withholding statement) or (c)(3)(iii)(B)(*3*) (for a chapter 4 withholding statement) or under § 1.6049–4(c)(4) for a chapter 4 withholding rate pool of U.S. payees (or similar applicable coordination rule in chapter 61 for payments other than interest). Additionally, the nonqualified intermediary shall identify those payees to which withholding under chapter 4 applies that are not included in a chapter 4 reporting pool (including payees that could be included in a chapter 4 withholding rate pool for whom the nonqualified intermediary chooses to provide payee specific information).

(*3*) *Allocation information.* The nonqualified intermediary must provide the withholding agent with sufficient information to allocate the income in each withholding rate pool to each payee (including U.S. exempt recipients or any chapter 4 withholding rate pool identified by the withholding agent under paragraph (e)(3)(iv)(D)(*2*)(*ii*) of this section) within the pool no later than January 31 of the year following the year of payment. Any payments that are not allocated to payees for whom documentation has been provided or a chapter 4 withholding rate pool referred to in the previous sentence shall be allocated to an undocumented payee in accordance with the presumption rules of paragraph (b)(3) of this section and §§ 1.1441–5(d) and (e)(6), 1.6049–5(d), and 1.1471–3(f)(5) (for a withholdable payment for chapter 4 purposes). Notwithstanding the preceding sentence, deposit interest (including original issue discount) described in section 871(i)(2)(A) or 881(d) and interest or original issue discount on short-term obligations as described in section 871(g)(1)(B) or 881(e) is not required to be allocated to a U.S. exempt recipient or a foreign payee, except as required under § 1.6049–8 (regarding reporting of deposit interest paid to certain foreign persons).

(*4*) *Failure to provide allocation information.* Except as provided in paragraph (e)(3)(iv)(D)(*5*) of this section, if a nonqualified intermediary fails to provide allocation information, if required, by January 31 for any withholding rate pool to the extent required in paragraph (e)(3)(iv)(D)(*3*) of this section, a withholding agent shall not apply the alternative procedures of this paragraph (e)(3)(iv)(D) to any payments of reportable amounts paid after January 31 in the taxable year following the calendar year for which allocation information was not given and any subsequent taxable year. Further, the alternative procedures shall be unavailable for any other withholding rate pool (other than a chapter 4 withholding rate pool as otherwise permitted) even though allocation information was given for that other pool. Therefore, the withholding agent must withhold on a payment of a reportable amount in accordance with the presumption rules of paragraph (b)(3) of this section, and §§ 1.1441–5(d) and (e)(6), 1.6049–5(d), and 1.1471–3(f)(5) (for a withholdable payment for chapter 4 purposes), unless the nonqualified intermediary provides all of the information, including information sufficient to allocate the payment to each specific payee or chapter 4 withholding rate pool (as permitted), required by paragraph

(e)(3)(iv)(A) through (C) of this section prior to the payment. A nonqualified intermediary must allocate at least 90 percent of the income required to be allocated for each withholding rate pool as required under this paragraph (e)(3)(iv)(D)(*4*) or the nonqualified intermediary will be treated as having failed to provide allocation information for purposes of this paragraph (e)(3)(iv)(D). For purposes of the allocation, a nonqualified intermediary is required to identify by January 31 the portion of the payment that is allocated to each chapter 4 withholding rate pool (rather than the payees included in each such pool). See paragraph (e)(3)(iv)(D)(*7*) of this section for liability for tax and penalties if a nonqualified intermediary fails to provide allocation information in whole or in part.

(*5*) *Cure provision.* A nonqualified intermediary may cure any failure to provide allocation information by providing the required allocation information to the withholding agent no later than February 14 following the calendar year of payment. If the withholding agent receives the allocation information by that date, it may apply the adjustment procedures of § 1.1461–2 (or of § 1.1474–2 for an amount withheld under chapter 4) to any excess withholding for payments made on or after February 1 and on or before February 14. Any nonqualified intermediary that fails to cure by February 14 may request the ability to use the alternative procedures of this paragraph (e)(3)(iv)(D) by submitting a request, in writing, to the IRS. The request must state the reason that the nonqualified intermediary did not comply with the alternative procedures of this paragraph (e)(3)(iv)(D) and steps that the nonqualified intermediary has taken, or will take, to ensure that no failures occur in the future. If the IRS determines that the alternative procedures of this paragraph (e)(3)(iv)(D) may apply, a determination to that effect will be issued by the IRS to the nonqualified intermediary.

(*6*) *Form 1042–S reporting in case of allocation failure.* If a nonqualified intermediary fails to provide allocation information by February 14 following the year of payment for a withholding rate pool, the withholding agent must file Forms 1042–S for payments made to each payee in that pool (other than U.S. exempt recipients) in the prior calendar year by pro rating the payment to each payee (including U.S. exempt recipients) listed in the withholding statement for that withholding rate pool, treating as a payee for this purpose each chapter 4 withholding rate pool identified by the nonqualified intermediary under paragraph (e)(3)(iv)(D)(*2*)(*ii*) of this section. If the nonqualified intermediary fails to allocate 10 percent or less of an amount required to be allocated for a withholding rate pool, a withholding agent shall report the unallocated amount as paid to a single unknown payee in accordance with the presumption rules of paragraph (b) of this section and §§ 1.1441–5(d) and (e)(6), 1.6049–5(d), and § 1.1471–3(f)(5) (for a withholdable payment for chapter 4 purposes). The portion of the payment that can be allocated to specific recipients, as defined in § 1.1461–1(c)(1)(ii), shall be reported to each recipient in accordance with the rules of § 1.1461–1(c) and § 1.1474–1(d)(2) (for a withholdable payment).

* * * * *

(E) *Notice procedures.* The IRS may notify a withholding agent that the alternative procedures of paragraph (e)(3)(iv)(D) of this section are not applicable to a specified nonqualified intermediary, a U.S. branch described in paragraph (b)(2)(iv) of this section, or a flow-through entity. If a withholding agent receives such a notice, it must commence withholding under this section or chapter 4 (if applicable) in accordance with the presumption rules of paragraph (b)(3) of this section and §§ 1.1441–5(d) and (e)(6), 1.6049–5(d), and1.1471–3(f)(5) (for a withholdable payment for chapter 4 purposes) unless the nonqualified intermediary, U.S. branch, or flow-through entity complies with the procedures in paragraphs (e)(3)(iv)(A) through (C) of this section. In addition, the IRS may notify a withholding agent, in appropriate circumstances, that it must apply the presumption rules of paragraph (b)(3) of this section and §§ 1.1441–5(d) and (e)(6), 1.6049–5(d), and § 1.1471–3(f)(5) (for a withholdable payment for chapter 4 purposes) to payments made to a nonqualified intermediary, a U.S. branch, or a flow-through entity even if the nonqualified intermediary, U.S. branch, or flow-through entity provides allocation information prior to the payment. A withholding agent that receives a notice under this paragraph (e)(3)(iv)(E) must commence withholding in accordance with the presumption rules within 30 days of the date of the notice. The IRS may withdraw its prohibition against using the alternative procedures of paragraph (e)(3)(iv)(D) of this section, or its requirement to follow the presumption rules, if the nonqualified intermediary, U.S. branch, or flow-through entity can demonstrate to the satisfaction of the IRS that it is capable of complying with the rules under chapter 3 of the Code and any other conditions required by the IRS.

(v) *Withholding certificate from certain U.S. branches (including territory financial institutions).* A U.S. branch certificate is a withholding certificate provided by a U.S. branch (including a territory financial institution) described in paragraph (b)(2)(iv) of this section that is not the beneficial owner of the income. The withholding certificate is provided with respect to reportable amounts and must state that such amounts are not effectively connected with the conduct of a trade or business in the United States. The withholding certificate must either transmit the appropriate documentation for the persons for whom the branch receives the payment (*i.e.,* as an intermediary) or be provided as evidence of its agreement with the withholding agent to be treated as a U.S. person with respect to any payment associated with the certificate. A U.S. branch withholding certificate is valid only if it is furnished on a Form W–8, an acceptable substitute form, or such other form as the IRS may prescribe, it is signed under penalties of perjury by a person authorized to sign for the branch, its validity has not expired, and it contains the information, statements, and certifications described in this paragraph (e)(3)(v). If the certificate is furnished to transmit withholding certificates and other documentation, it must contain the information, certifications, and statements described in paragraphs (e)(3)(v)(A) through (C) of this section and in paragraphs (e)(3)(iii) and (iv) (alternative procedures) of this section, applying the term U.S. branch instead of the term nonqualified intermediary. If the certificate is furnished pursuant to an agreement to treat the U.S. branch or territory financial institution as a U.S. person (which agreement must be for purposes of chapter 4 in addition to this section in the case of a payment that is a withholdable payment), the information and certifications required on the withholding certificate are limited to the following—

(A) The name of the territory financial institution or person of which the U.S. branch is a part, the address of the territory financial institution or U.S. branch;

(B) A certification that the payments associated with the certificate are not effectively connected with the conduct of its trade or business in the United States;

(C) The EIN of the U.S. branch or territory financial institution;

(D) When required for chapter 4 purposes, the chapter 4 status and GIIN (if applicable) of the entity of which the U.S. branch is a part; and

(E) Any other information, certifications, or statements as may be required by the form or accompanying instructions in addition to, or in lieu of, the information and certification described in this paragraph (e)(3)(v).

* * * * *

(4) *Applicable rules.* The provisions in this paragraph (e)(4) describe procedures applicable to withholding certificates on Form W–8 or Form 8233 (or a substitute form) or documentary evidence furnished to establish foreign status. These provisions do not apply to Forms W–9 (or their substitutes). For corresponding provisions regarding Form W–9 (or a substitute form), see section 3406 and the regulations under that section.

(i) *Who may sign the certificate*—(A) *In general.* A withholding certificate (including an acceptable substitute) may be signed by any person authorized to sign a declaration under penalties of perjury on behalf of the person whose name is on the certificate as provided in section 6061 and the regulations under that section (relating to who may sign generally for an individual, estate, or trust, which includes certain agents who may sign returns and other documents), section 6062 and the regulations under that section (relating to who may sign corporate returns), and section 6063 and the regulations under that section (relating to who may sign partnership returns). A person authorized to sign a withholding certificate includes an officer or director of a corporation, a partner of a partnership, a trustee of a trust, an executor of an estate, any foreign equivalent of the former titles, and any other person that has been provided written authorization by the individual or entity named on the certificate to sign documentation on such person's behalf.

(B) [Reserved]. For further guidance, see § 1.1441–1T(e)(4)(i)(B).

(ii) *Period of validity*—(A) *General rule*—(*1*) *Withholding certificates and documentary evidence.* Except as provided otherwise in paragraphs (e)(4)(ii)(B) and (C) of this section and this paragraph (e)(4)(ii)(A), a withholding certificate described in paragraph (e)(2)(i) of this section, or a certificate described in § 1.871–14(c)(2)(v) (furnished to qualify interest as portfolio interest for purposes of sections 871(h) and 881(c)), will remain valid until the earlier of the last day of the third calendar year following the year in which the withholding certificate is signed or the day that a change in circumstances occurs that makes any information on the certificate incorrect. For example, a withholding certificate signed on September 30, 2015, remains valid through December 31, 2018, unless circumstances change that make the information on the form no longer correct. Documentary evidence described in § 1.6049–5(c)(1) provided to establish a payee's foreign status shall remain valid until the last day of the third calendar year following the year in which the documentary evidence is provided to the withholding agent except as provided in paragraph (e)(4)(ii)(B) of this section; however, if such documentary evidence contains an expiration date, it may be treated as valid until that expiration date if doing so would provide a longer period of validity than the three-year period. Additionally, a withholding certificate or documentary evidence with a period of validity that is valid on December 31, 2013, will not be treated as invalid based solely on the period described in this paragraph (e)(4)(ii) before January 1, 2015. Notwithstanding the validity periods prescribed by this paragraph (e)(4)(ii)(A) and paragraphs (e)(4)(ii)(B) and (C) of this section, a withholding certificate and documentary evidence will cease to be valid if a change in circumstances makes the information on the documentation incorrect.

(*2*) [Reserved]. For further guidance, see § 1.1441–1T(e)(4)(ii)(A)(*2*).

(B) *Indefinite validity period.* Notwithstanding paragraph (e)(4)(ii)(A) of this section, the certificates (or parts of certificates) and documentary evidence described in paragraphs (e)(4)(ii)(B)(*1*) through (*11*) of this section shall remain valid until a change in circumstances makes the information on the documentation incorrect under paragraph (e)(4)(ii)(D)(*3*). See, however, § 1.1471–3(c)(6)(ii) for when a withholding certificate or documentary evidence remains valid (or is subject to renewal) when also provided with respect to a withholdable payment made to an entity (including an intermediary) for purposes of whether a withholding agent may continue to rely on the entity's claim of chapter 4 status. Additionally, the provisions of paragraphs (e)(4)(ii)(B)(*1*), (*2*), and (*11*) of this section do not apply to documentary evidence or a withholding certificate furnished prior to July 1, 2014. (For documentary evidence or a withholding certificate furnished after December 31, 2000, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.)

(*1*) A beneficial owner withholding certificate (other than the portion of the certificate making a claim for treaty benefits) and documentary evidence supporting a claim of foreign status when both are provided together by an individual claiming foreign status, if the withholding agent does not have a current U.S. residence address or U.S. mailing address for the payee, does not have one or more current U.S. telephone numbers that are the only telephone numbers the withholding agent has for the payee, and, for a payment described in § 1.6049–5(c)(1), the withholding agent has not been provided standing instructions to make a payment to an account in the United States for the obligation. For purposes of the preceding sentence, a beneficial owner withholding certificate and documentary evidence supporting the individual's claim of foreign status will be treated as provided together if they are provided within 30 days of each other, regardless of which the withholding agent receives first.

(*2*) A beneficial owner withholding certificate (other than the portion of the certificate making a claim for treaty benefits) and documentary evidence provided by an entity supporting the entity's claim of foreign status, if both are received by the withholding agent before the validity period of either the withholding certificate or the documentary evidence would otherwise expire under paragraph (e)(4)(ii)(A) of this section. See, however, § 1.1471–3(c)(6)(ii) for rules regarding indefinite validity for chapter 4 purposes.

(*3*) A beneficial owner withholding certificate provided by an entity claiming status as a tax-exempt entity under section 501(c) that is not a foreign private foundation under section 509, provided that the withholding agent reports at least one payment annually to the entity under § 1.1461–1(c).

(*4*) A certificate described in paragraph (e)(3)(ii) of this section (a qualified intermediary withholding certificate) but not including the withholding certificates, documentary evidence, statements, or other information associated with the certificate.

(*5*) A certificate described in paragraph (e)(3)(iii) of this section (a nonqualified intermediary certificate), but not including the withholding certificates, documentary evidence, statements, or other information associated with the certificate.

(*6*) A certificate described in paragraph (e)(3)(v) of this section (a U.S. branch (including a territory financial institution) withholding certificate that is not provided by the beneficial owner),

but not including the withholding certificates, documentary evidence, statements, or other information associated with the certificate.

* * * * *

(*8*) A withholding certificate provided by a withholding foreign trust described in § 1.1441–5(e)(5)(v).

(*9*) A certificate described in § 1.1441–5(c)(2)(iv) (dealing with a certificate from a person representing to be a withholding foreign partnership).

(*10*) A certificate described in § 1.1441–5(c)(3)(iii) (a withholding certificate from a nonwithholding foreign partnership) or in § 1.1441–5(e)(5)(iii) (a withholding certificate of a foreign simple or foreign grantor trust) but not including the withholding certificates, documentary evidence, statements, or other information required to be associated with the certificate; and

(*11*) Documentary evidence that is not generally renewed or amended (such as a certificate of incorporation).

(C) *Withholding certificate for effectively connected income.* Notwithstanding paragraph (e)(4)(ii)(B) of this section, the period of validity of a withholding certificate furnished to a withholding agent to claim a reduced rate of withholding for income that is effectively connected with the conduct of a trade or business within the United States shall be limited to the three-year period described in paragraph (e)(4)(ii)(A) of this section.

(D) *Change in circumstances*—(*1*) *Defined.* A certificate or documentation becomes invalid from the date of a change in circumstances affecting the correctness of the certificate or documentation to the extent provided in this paragraph (e)(4)(ii)(D). For purposes of this section, a person is considered to have a change in circumstances only if such change affects the person's claim of chapter 3 status. Thus, for example, a change of address is not a change in circumstances with respect to a claim of only foreign status under this paragraph (e)(4)(ii)(D) if the change is to another address outside the United States, but is a change in circumstances if the change is to an address in the United States.

(*2*) *Obligation to notify a withholding agent of a change in circumstances.* If a change in circumstances makes any information on a certificate or other documentary evidence incorrect, then the person whose name is on the certificate or other documentation must inform the withholding agent within 30 days of the change and furnish a new certificate or new documentary evidence. If an intermediary (including a U.S. branch or territory financial institution described in paragraph (b)(2)(iv)(A) of this section) or a flow-through entity becomes aware that a certificate or other appropriate documentation it has furnished to the person from whom it collects a payment is no longer valid because of a change in the circumstances of the person who issued the certificate or furnished the other appropriate documentation, then the intermediary or flow-through entity must notify the person from whom it collects the payment of the change of circumstances within 30 days of the date that it knows or has reason to know of the change in circumstances. It must also obtain a new withholding certificate or new appropriate documentation to replace the existing certificate or documentation the validity of which has expired due to the change in circumstances to continue to treat the person who provided the certificate or documentary evidence under its claimed chapter 3 status.

(*3*) *Withholding agent's obligation with respect to a change in circumstances.* A withholding agent may rely on a certificate without having to inquire into possible changes of circumstances that may affect the validity of the statement, unless it knows or has reason to know that circumstances have changed, as permitted under paragraph (e)(4)(viii) of this section. A withholding agent is required to notify any person providing documentary evidence (in lieu of a withholding certificate) of the person's obligation to notify the withholding agent of a change in circumstances. However, a withholding agent may choose to apply the provisions of paragraph (b)(3)(iv) of this section regarding the 90-day grace period as of that date while awaiting a new certificate or documentation or while seeking information regarding changes, or suspected changes, in the person's circumstances. A withholding agent may also require a new certificate at any time prior to a payment, even though the withholding agent has no actual knowledge or reason to know that any information stated on the certificate has changed.

(iii) *Retention of documentation.* A withholding agent must retain each withholding certificate and other documentation for purposes of this section for as long as it may be relevant to the determination of the withholding agent's tax liability under section 1461 and § 1.1461–1. A withholding agent may retain a withholding certificate or documentary evidence that is an original, certified copy, or a scanned document (as described in paragraph (e)(4)(iv)(D) of this section). A withholding agent may also retain a withholding certificate by other means (such as microfiche) that allows a reproduction of the document provided that the withholding agent has recorded its receipt of a form described in the preceding sentence and is able to produce a hard copy of the form. See § 1.6049–5(c)(1) for the requirements for maintaining documentary evidence that also apply for purposes of determining a payee's U.S. or foreign status for purposes of chapter 3.

(iv) *Electronic transmission of information*—(A) *In general.* A withholding agent may establish a system for a beneficial owner or payee to electronically furnish a Form W–8, an acceptable substitute Form W–8, or such other form as the IRS may prescribe. The system must meet the requirements described in paragraph (e)(4)(iv)(B) of this section. See paragraph (e)(4)(iv)(D) of this section for other cases in which a Form W–8 (or other documentation) may be furnished electronically.

* * * * *

(C) [Reserved]. For further guidance, see § 1.1441–1T(e)(4)(iv)(C).

(D) *Forms and documentary evidence received by facsimile or email.* A withholding agent may rely upon an otherwise valid Form W–8 (or documentary evidence) received by facsimile or a form or document scanned and received electronically, such as, for example, an image embedded in an email or as a Portable Document Format (.pdf) attached to an email. A withholding agent may not rely on a form or document received by such means, however, if the withholding agent knows that the form or document was transmitted to the withholding agent by a person not authorized to do so by the person required to execute the form. A withholding agent may establish other procedures to authenticate and verify a form or document sent by such means and may reject any form or document that fails to satisfy the requirements of such procedures. A taxpayer may apply this paragraph (e)(4)(iv)(D) to all of its open tax years, including tax years that are currently under examination by the IRS.

(E) [Reserved]. For further guidance, see § 1.1441–1T(e)(4)(iv)(E).

(v) *Additional procedures for certificates provided electronically.* The IRS may prescribe procedures in a revenue procedure (see § 601.601(d)(2) of this chapter) or may issue other appropriate guidance (including a written directive for revenue agents) to further prescribe the conditions by which the IRS will determine that a system developed by a withholding

agent to permit beneficial owners and payees to provide Forms W–8 electronically satisfies the requirements of paragraph (e)(4)(iv)(B) of this section.

(vi) *Acceptable substitute form.* A withholding agent may substitute its own form instead of an official Form W–8 or 8233 (or such other official form as the IRS may prescribe). Such a substitute for an official form will be acceptable if it contains provisions that are substantially similar to those of the official form, it contains the same certifications relevant to the transactions as are contained on the official form and these certifications are clearly set forth, and the substitute form includes a signature-under-penalties-of-perjury statement identical to the one stated on the official form. The substitute form is acceptable even if it does not contain all of the provisions contained on the official form, so long as it contains those provisions that are relevant to the transaction for which it is furnished (including those required for purposes of chapter 4). For example, a withholding agent that pays no income for which treaty benefits are claimed may develop a substitute form that is identical to the official form, except that it does not include information regarding claims of benefits under an income tax treaty. Similarly, a withholding agent that is not required to determine the chapter 4 status of a payee providing a form may develop a substitute form that does not contain chapter 4 statuses. A withholding agent who uses a substitute form must furnish instructions relevant to the substitute form only to the extent and in the manner specified in the instructions to the official form. A withholding agent may use a substitute form that is written in a language other than English and may accept a form that is filled out in a language other than English, but the withholding agent must make available an English translation of the form and its contents to the IRS upon request. A withholding agent may refuse to accept a certificate from a payee or beneficial owner (including the official Form W–8 or 8233) if the certificate provided is not an acceptable substitute form provided by the withholding agent, but only if the withholding agent furnishes the payee or beneficial owner with an acceptable substitute form within 5 business days of receipt of an unacceptable form from the payee or beneficial owner. In that case, the substitute form is acceptable only if it contains a notice that the withholding agent has refused to accept the form submitted by the payee or beneficial owner and that the payee or beneficial owner must submit the acceptable form provided by the withholding agent in order for the payee or beneficial owner to be treated as having furnished the required withholding certificate.

(vii) *Requirement of taxpayer identifying number.* A TIN must be stated on a withholding certificate when required by this paragraph (e)(4)(vii) for the withholding certificate to be valid for purposes of this section. A TIN is required to be stated on—

(A) A withholding certificate on which a beneficial owner is claiming the benefit of a reduced rate under an income tax treaty (other than for amounts described in § 1.1441–6(c)(2) or amounts for which a foreign tax identifying number has been provided, as described in § 1.1441–6(c)(2));

* * * * *

(F) A withholding certificate from a person representing to be a withholding foreign partnership or a withholding foreign trust;

* * * * *

(H) A withholding certificate from a person representing to be a U.S. branch or territory financial institution described in paragraph (b)(2)(iv) of this section; and

(I) A withholding certificate provided by an entity acting as a qualified securities lender, as defined for purposes of chapter 3, with respect to a substitute dividend paid in a securities lending or similar transaction.

(viii) *Reliance rules.* A withholding agent may rely on the information and certifications stated on withholding certificates or other documentation without having to inquire into the veracity of this information or certification, unless it has actual knowledge or reason to know that the information or certification is incorrect. In the case of amounts described in § 1.1441–6(c)(2), a withholding agent described in § 1.1441–7(b)(3) has reason to know that the information or certifications on a certificate are incorrect only to the extent provided in § 1.1441–7(b)(4) through (6). See § 1.1441–6(b)(1) for reliance on representations regarding eligibility for a reduced rate under an income tax treaty. Paragraphs (e)(4)(viii)(A) and (B) of this section provide examples of such reliance.

* * * * *

(B) *Status of payee as an intermediary or as a person acting for its own account.* A withholding agent may rely on the type of certificate furnished as indicative of the payee's status as an intermediary or as an owner, unless the withholding agent has actual knowledge or reason to know otherwise. For example, a withholding agent that receives a beneficial owner withholding certificate from a foreign financial institution may treat the institution as the beneficial owner, unless it has information in its records that would indicate otherwise or the certificate contains information that is not consistent with beneficial owner status (*e.g.,* sub-account numbers that do not correspond to accounts maintained by the withholding agent for such person or names of one or more persons other than the person submitting the withholding certificate). If the financial institution also acts as an intermediary, the withholding agent may request that the institution furnish two certificates, *i.e.,* a beneficial owner certificate described in paragraph (e)(2)(i) of this section for the amounts that it receives as a beneficial owner, and an intermediary withholding certificate described in paragraph (e)(3)(i) of this section for the amounts that it receives as an intermediary. In the absence of reliable representation or information regarding the status of the payee as an owner or as an intermediary, see paragraph (b)(3)(v)(A) for applicable presumptions.

(C) *Reliance on a prior version of a withholding certificate.* Upon the issuance by the IRS of an updated version of a withholding certificate, a withholding agent may continue to accept the prior version of the withholding certificate until the later of six full months after the revision date shown on the updated withholding certificate or the end of the calendar year the updated withholding certificate is issued, unless the IRS has issued guidance that indicates that the period for accepting a prior version is shortened or extended (including in the instructions to the form), such as when there is a new payee status required to be established using the form. A withholding agent may continue to rely upon a previously signed prior version of the withholding certificate until its period of validity expires.

(ix) *Certificates to be furnished to withholding agent for each obligation unless exception applies.* Unless otherwise provided in paragraphs (e)(4)(ix)(A) through (D) of this section, a withholding agent that is a financial institution with which a customer may open an account shall obtain a withholding certificate or documentary evidence on an obligation-by-obligation basis and may not rely upon such documentation collected by another person or another branch of the withholding agent.

(A) *Exception for certain branch or account systems or system maintained*

by agent. A withholding agent may rely on a withholding certificate or documentary evidence furnished by a customer as part of a single branch system, universal account system, or shared account system described in § 1.1471–3(c)(8) (substituting the term chapter 3 status for chapter 4 status each place it appears in that paragraph). Furthermore, a withholding agent may rely on a shared documentation system maintained by an agent as described in § 1.1471–3(c)(9)(i) (also substituting the term chapter 3 status for chapter 4 status each place it appears in that paragraph).

(B) *Reliance on certification provided by introducing brokers*—(*1*) *In general.* A withholding agent may rely on the certification of a broker indicating the broker's determination of a payee's chapter 3 status and that the broker holds a valid beneficial owner withholding certificate described in paragraph (e)(2)(i) of this section or other appropriate documentation for that beneficial owner with respect to any readily tradable instrument, as defined in § 31.3406(h)–1(d) of this chapter, if the broker is a United States person (including a U.S. branch treated as a U.S. person under paragraph (b)(2)(iv) of this section) that is acting as the agent of a beneficial owner. A withholding agent may also rely on a certification described in the preceding sentence that is provided by a qualified intermediary that makes payments to beneficial owners that it receives from the withholding agent. The certification must be in writing or in electronic form and contain all of the information required of a nonqualified intermediary under paragraphs (e)(3)(iv)(B) and (C) of this section. If a broker chooses to use this paragraph (e)(4)(ix)(B), that broker will be solely responsible for applying the rules of § 1.1441–7(b) to the withholding certificates or other appropriate documentation and shall be liable for any underwithholding as a result of the broker's failure to apply such rules. See § 1.1471–3(c)(9)(iii) for a similar allowance that applies to a broker's determination of a payee's chapter 4 status for purposes of chapter 4. For purposes of this paragraph (e)(4)(ix)(B), the term *broker* means a person treated as a broker under § 1.6045–1(a).

(*2*) *Example.* The following example illustrates the rules of this paragraph (e)(4)(x)(B) with respect to a U.S. broker:

Example. SCO is a U.S. securities clearing organization that provides clearing services for correspondent broker, CB, a U.S. corporation. Pursuant to a fully disclosed clearing agreement, CB fully discloses the identity of each of its customers to SCO. Part of SCO's clearing duties include the crediting of income and gross proceeds of readily tradable instruments (as defined in § 31.3406(h)-1(d)) to each customer's account. For each disclosed customer that is a foreign beneficial owner, CB provides SCO with information required under paragraphs (e)(3)(iv)(B) and (C) of this section that is necessary to apply the correct rate of withholding and to file Forms 1042–S. SCO may use the representations and beneficial owner information provided by CB to determine the proper amount of withholding and to file Forms 1042–S. CB is responsible for determining the validity of the withholding certificates or other appropriate documentation under § 1.1441–1(b).

(C) *Reliance on documentation and certifications provided between principals and agents*—(*1*) *Withholding agent as agent.* A withholding agent that acts on behalf of a principal may rely upon documentation (or copies of documentation) obtained from the principal, and, with respect to a principal that is a U.S. withholding agent, a qualified intermediary (when acting as such for determining a payee's status), or a withholding foreign partnership or withholding foreign trust with respect to a partner, owner, or beneficiary in the partnership or trust, the withholding agent may rely upon certification provided by the principal for purposes of determining a payee's chapter 3 status. Thus an agent (such as a paying agent or transfer agent) may not rely upon a certification provided by a principal that is a participating FFI but is not also a qualified intermediary, withholding foreign partnership, or withholding foreign trust for purposes of this section, even though it may rely on the certification when provided solely for purposes of chapter 4 under § 1.1471–3(c)(9)(iv).

(*2*) *Withholding agent as principal.* A withholding agent may also rely on documentation collected by an agent of the withholding agent in order to fulfill its chapter 3 obligations because such agent's actions are imputed to the principal (the withholding agent). For example, a withholding agent may contract an agent to collect Forms W–8 from account holders on its behalf, but the withholding agent remains liable for any tax liability resulting from a failure of the agent to comply with the requirements of chapter 3.

(D) *Reliance upon documentation for accounts acquired in merger or bulk acquisition for value.* A withholding agent that acquires an account from a predecessor or transferor in a merger or bulk acquisition of accounts for value is permitted to rely upon valid documentation (or copies of valid documentation) collected by the predecessor or transferor for determining the chapter 3 status of an account holder of such an account. In addition, a withholding agent that acquires an account in a merger or bulk acquisition of accounts for value, other than a related party transaction, from a U.S. withholding agent (or a qualified intermediary when the withholding agent is also a qualified intermediary) may also rely upon the predecessor's or transferor's determination of the account holder's chapter 3 status for a transition period of the lesser of six months from the date of the merger or until the acquirer knows that the claim of entity classification and status is inaccurate or a change in circumstances occurs with respect to the account. At the end of the transition period, the acquirer will be permitted to rely upon the predecessor's determination as to the chapter 3 status of the account holder only if the documentation that the acquirer has for the account holder, including documentation obtained from the predecessor or transferor, supports the status claimed. An acquirer that discovers at the end of the transition period that the chapter 3 status assigned by the predecessor or transferor to the account holder was incorrect and has not withheld as it would have been required to but for its reliance upon the predecessor's determination, will be required to withhold on future payments, if any, made to the account holder the amount of tax that should have been withheld during the transition period but for the erroneous classification as to the account holder's status. For purposes of this paragraph (e)(4)(ix)(D), a related party transaction is a merger or sale of accounts in which the acquirer is in the same expanded affiliated group, within the meaning of § 1.1471–5(i)(2), as the predecessor or transferor either prior to or after the merger or acquisition or the predecessor or transferor (or shareholders of the predecessor or transferor) obtain a controlling interest in the acquirer or in a newly formed entity created for purposes of the merger or acquisition. See § 1.1471–3(c)(v) for a similar reliance rule that applies for purposes of chapter 4.

(5) * * *

(ii) *Definition of qualified intermediary.* With respect to a payment to a foreign person, the term qualified intermediary means a person that is a party to a withholding agreement with the IRS where such person is—

(A) A foreign financial institution that is a participating FFI (including a reporting Model 2 FFI), a registered deemed-compliant FFI (including a reporting Model 1 FFI), an FFI treated as a deemed-compliant FFI under an applicable IGA that is subject to due

diligence and reporting requirements with respect to its U.S. accounts similar to those applicable to a registered deemed-compliant FFI under § 1.1471–5(f)(1), excluding a U.S. branch of any of the foregoing entities, or any other category of FFI identified in a qualified intermediary withholding agreement as eligible to act as a qualified intermediary;

(B) A foreign branch or office of a U.S. financial institution or a foreign branch or office of a U.S. clearing organization that is either a reporting Model 1 FFI or agrees to the reporting requirements applicable to a participating FFI with respect to its U.S. accounts;

(C) [Reserved].

(D) Any other person acceptable to the IRS.

(iii) *Withholding agreement*—(A) *In general.* The IRS may, upon request, enter into a withholding agreement with a foreign person described in paragraph (e)(5)(ii) of this section pursuant to such procedures as the IRS may prescribe in published guidance (see § 601.601(d)(2) of this chapter). Under the withholding agreement, a qualified intermediary shall generally be subject to the applicable withholding and reporting provisions applicable to withholding agents and payors under chapters 3, 4, and 61 of the Code, section 3406, the regulations under those provisions, and other withholding provisions of the Code, except to the extent provided under the agreement.

(B) *Terms of the withholding agreement.* The withholding agreement shall specify the obligations of the qualified intermediary under chapters 3 and 4 including, for a qualified intermediary that is an FFI, the documentation, withholding, and reporting obligations required of a participating FFI or registered deemed-compliant FFI (including a reporting Model 1 FFI as defined in § 1.1471–1(b)(114)) with respect to each branch of the qualified intermediary other than a U.S. branch that is treated as a U.S. person under paragraph (b)(2)(iv)(A) of this section. The withholding agreement will specify the type of certifications and documentation upon which the qualified intermediary may rely to ascertain the classification (*e.g.,* corporation or partnership), status (*i.e.,* U.S. or foreign and chapter 4 status) of beneficial owners and payees who receive reportable amounts, reportable payments, and withholdable payments collected by the qualified intermediary for purposes of chapters 3, 4, and 61, section 3406, and, if necessary, entitlement to the benefits of a reduced rate under an income tax treaty. The withholding agreement shall specify if, and to what extent, the qualified intermediary may assume primary withholding responsibility in accordance with paragraph (e)(5)(iv) of this section. It shall also specify the extent to which applicable return filing and information reporting requirements are modified so that, in appropriate cases, the qualified intermediary may report payments to the IRS on an aggregated basis, without having to disclose the identity of beneficial owners and payees. However, the qualified intermediary may be required to provide to the IRS the name and address of those foreign customers who benefit from a reduced rate under an income tax treaty pursuant to the withholding agreement for purposes of verifying entitlement to such benefits, particularly under an applicable limitation on benefits provision. Under the withholding agreement, a qualified intermediary may agree to act as an acceptance agent to perform the duties described in § 301.6109–1(d)(3)(iv)(A) of this chapter. The withholding agreement may specify the manner in which applicable procedures for adjustments for underwithholding and overwithholding, including refund procedures, apply to qualified intermediaries and the extent to which applicable procedures may be modified. In particular, a withholding agreement may allow a qualified intermediary to claim refunds of overwithheld amounts. In addition, the withholding agreement shall specify the manner in which the IRS will verify compliance with the agreement, including the time and manner for which a qualified intermediary will be required to certify to the IRS regarding its compliance with the withholding agreement (including its performance of a periodic review) and the types of information required to be disclosed as part of the certification. In appropriate cases, the IRS may require review procedures be performed by an approved reviewer (in addition to those performed as part of the periodic review) and may conduct a review of the reviewer's findings. The withholding agreement may include provisions for the assessment and collection of tax in the event that failure to comply with the terms of the withholding agreement results in the failure by the withholding agent or the qualified intermediary to withhold and deposit the required amount of tax. Further, the withholding agreement may specify the procedures by which amounts withheld are to be deposited, if different from the deposit procedures under the Code and applicable regulations. To determine whether to enter a withholding agreement and the terms of any particular withholding agreement, the IRS will consider the type of local know-your-customer laws and practices to which the entity is subject (if the entity is an FFI), as well as the extent and nature of supervisory and regulatory control exercised under the laws of the foreign country over the foreign entity.

(iv) *Assignment of primary withholding responsibility.* Any person (whether a U.S. person or a foreign person) who meets the definition of a withholding agent under § 1.1441–7(a) (for payments subject to chapter 3 withholding) and § 1.1473–1(d) (for withholdable payments) is required to withhold and deposit any amount withheld under §§ 1.1461–1(a) and 1.1474–1(b) and to make the returns prescribed by §§ 1.1461–1(b) and (c), and by 1.1474–1(c), and (d). Under its qualified intermediary withholding agreement, a qualified intermediary may, however, inform a withholding agent from which it receives a payment that it will assume the primary obligation to withhold, deposit, and report amounts under chapters 3 and 4 of the Code and/or under chapter 61 and section 3406 of the Code. For assuming withholding obligations as described in the previous sentence, a qualified intermediary that assumes primary withholding responsibility for payments made to an account under chapter 3 is also required to assume primary withholding responsibility under chapter 4 for payments made to the account that are withholdable payments. Additionally, a qualified intermediary may represent that it assumes chapter 61 reporting and section 3406 obligations for a payment when the qualified intermediary meets the requirements of § 1.6049–4(c)(4)(i) or (ii) for the payment. If a withholding agent makes a payment of an amount subject to withholding under chapter 3, a reportable payment (as defined in section 3406(b)), or a withholdable payment to a qualified intermediary that represents to the withholding agent that it has assumed primary withholding responsibility for the payment, the withholding agent is not required to withhold on the payment. The withholding agent is not required to determine that the qualified intermediary actually performs its primary withholding responsibilities. A qualified intermediary that assumes primary withholding responsibility under chapters 3 and 4 or primary reporting and backup withholding responsibility under chapter 61 and section 3406 is not required to assume

primary withholding responsibility for all accounts it has with a withholding agent but must assume primary withholding responsibility for all payments made to any one account that it has with the withholding agent.

(v) *Withholding statement*—(A) *In general.* A qualified intermediary must provide each withholding agent from which it receives reportable amounts as a qualified intermediary with a written statement (the withholding statement) containing the information specified in paragraph (e)(5)(v)(B) of this section. A withholding statement is not required, however, if all of the information a withholding agent needs to fulfill its withholding and reporting requirements is contained in the withholding certificate. The qualified intermediary withholding agreement will require the qualified intermediary to include information in its withholding statement relating to withholdable payments for purposes of withholding under chapter 4 as described in paragraph (e)(5)(v)(C)(*2*) of this section. The withholding statement forms an integral part of the qualified intermediary's qualified intermediary withholding certificate, and the penalties of perjury statement provided on the withholding certificate shall apply to the withholding statement as well. The withholding statement may be provided in any manner, and in any form, to which qualified intermediary and the withholding agent mutually agree, including electronically. If the withholding statement is provided electronically, the statement must satisfy the requirements described in paragraph (e)(3)(iv) of this section (applicable to a withholding statement provided by a nonqualified intermediary). The withholding statement shall be updated as often as necessary for the withholding agent to meet its reporting and withholding obligations under chapters 3, 4, and 61 and section 3406. For purposes of this section, a withholding agent will be liable for tax, interest, and penalties in accordance with paragraph (b)(7) of this section to the extent it does not follow the presumption rules of paragraph (b)(3) of this section, §§ 1.1441–5(d) and (e)(6), and 1.6049–5(d) for a payment, or portion thereof, for which it does not have a valid withholding statement prior to making a payment.

(B) *Content of withholding statement.* The withholding statement must contain sufficient information for a withholding agent to apply the correct rate of withholding on payments from the accounts identified on the statement and to properly report such payments on Forms 1042–S and Forms 1099, as applicable. The withholding statement must—

(*1*) Designate those accounts for which the qualified intermediary acts as a qualified intermediary;

(*2*) Designate those accounts for which qualified intermediary assumes primary withholding responsibility under chapter 3 and chapter 4 of the Code and/or primary reporting and backup withholding responsibility under chapter 61 and section 3406;

(*3*) If applicable, designate those accounts for which the qualified intermediary is acting as a qualified securities lender with respect to a substitute dividend paid in a securities lending or similar transaction;

(*4*) [Reserved].

(*5*) Provide information regarding withholding rate pools, as described in paragraph (e)(5)(v)(C) of this section.

(C) *Withholding rate pools*—(*1*) *In general.* Except to the extent it has assumed both primary withholding responsibility under chapters 3 and 4 of the Code and primary Form 1099 reporting and backup withholding responsibility under chapter 61 and section 3406 with respect to a payment, a qualified intermediary shall provide as part of its withholding statement the chapter 3 withholding rate pool information that is required for the withholding agent to meet its withholding and reporting obligations under chapters 3 and 61 of the Code and section 3406. See, however, paragraph (e)(5)(v)(C)(*2*) of this section for when a qualified intermediary may provide a chapter 4 withholding rate pool (as described in paragraph (c)(48) of this section) with respect to a payment that is a withholdable payment. A chapter 3 withholding rate pool is a payment of a single type of income, determined in accordance with the categories of income reported on Form 1042–S, that is subject to a single rate of withholding paid to a payee that is a foreign person and for which withholding under chapter 4 does not apply. A chapter 3 withholding rate pool may be established by any reasonable method on which the qualified intermediary and a withholding agent agree (*e.g.,* by establishing a separate account for a single chapter 3 withholding rate pool, or by dividing a payment made to a single account into portions allocable to each chapter 3 withholding rate pool). A qualified intermediary may include a separate pool for account holders that are U.S. exempt recipients or may include such accounts in a chapter 3 withholding rate pool to which withholding does not apply. The withholding statement must identify the chapter 4 exemption code (as provided in the instructions to Form 1042–S) applicable to the chapter 3 withholding rate pools contained on the withholding statement. To the extent a qualified intermediary does not assume primary Form 1099 reporting and backup withholding responsibility under chapter 61 and section 3406, a qualified intermediary's withholding statement must establish a separate withholding rate pool for each U.S. non-exempt recipient account holder that the qualified intermediary has disclosed to the withholding agent unless the qualified intermediary uses the alternative procedures in paragraph (e)(5)(v)(C)(*3*) of this section or the account holder is a payee that the qualified intermediary is permitted to include in a chapter 4 withholding rate pool of U.S. payees. A qualified intermediary that is a participating FFI or registered deemed-compliant FFI may include a chapter 4 withholding rate pool of U.S. payees on a withholding statement by applying the rules under paragraph (e)(3)(iv)(A) of this section (by substituting ''qualified intermediary'' for ''nonqualified intermediary'') with respect to an account that it maintains (as described in § 1.1471–5(b)(5)) for the payee of the payment. A qualified intermediary shall determine withholding rate pools based on valid documentation that it obtains under its withholding agreement with the IRS, or if a payment cannot be reliably associated with valid documentation, under the applicable presumption rules. If a qualified intermediary has an account holder that is another intermediary (whether a qualified intermediary or a nonqualified intermediary) or a flow-through entity, the qualified intermediary may combine the account holder information provided by the other intermediary or flow-through entity with the qualified intermediary's direct account holder information to determine the qualified intermediary's chapter 3 withholding rate pools and each of the qualified intermediary's chapter 4 withholding rate pools to the extent provided in its withholding agreement with the IRS.

(*2*) *Withholding rate pool requirements for a withholdable payment.* This paragraph (e)(5)(v)(C)(*2*) modifies the requirements of a withholding statement described in paragraph (e)(5)(v)(C)(*1*) provided by a qualified intermediary with respect to a withholdable payment (including a reportable amount that is a withholdable payment). For such a payment, the regulations applicable to a withholding statement described in

paragraph (e)(5)(v)(C)(*1*) of this section shall apply, except that—

(*i*) If the qualified intermediary provides a withholding statement described in § 1.1471–3(c)(3)(iii)(B)(*2*) (describing an FFI withholding statement), the withholding statement may include a chapter 4 withholding rate pool with respect to the portion of the payment allocated to a single pool of recalcitrant account holders (without the need to subdivide into the pools described in § 1.1471–4(d)(6)), including both account holders of the qualified intermediary and of any participating FFI, registered deemed-compliant FFI, or other qualified intermediary for whom the first-mentioned qualified intermediary receives the payment, and nonparticipating FFIs (to the extent permitted) in lieu of reporting chapter 3 withholding rate pools with respect to such persons as described in paragraph (e)(5)(v)(C)(*1*) of this section); or

(*ii*) If the qualified intermediary provides a withholding statement described in § 1.1471–3(c)(3)(iii)(B)(*3*) (describing a chapter 4 withholding statement), the withholding statement may include a chapter 4 withholding rate pool with respect to the portion of the payment allocated to nonparticipating FFIs.

(*3*) *Alternative procedure for U.S. non-exempt recipients.* If permitted under its withholding agreement with the IRS, a qualified intermediary may, by mutual agreement with a withholding agent, establish a single zero withholding rate pool that includes U.S. non-exempt recipient account holders for whom the qualified intermediary has provided Forms W–9 prior to the withholding agent paying any reportable payments, as defined in the qualified intermediary withholding agreement, and foreign persons for which no withholding is required under chapters 3 and 4, and may include payments allocated to a chapter 4 withholding rate pool of U.S. payees. In such a case, the qualified intermediary may also establish a separate withholding rate pool (subject to 28-percent withholding, or other applicable statutory back-up withholding tax rate) that includes only U.S. non-exempt recipient account holders for whom a qualified intermediary has not provided Forms W–9 prior to the withholding agent paying any reportable payments. If a qualified intermediary chooses the alternative procedure of this paragraph (e)(5)(v)(C)(*3*), the qualified intermediary must provide the information required by its withholding agreement to the withholding agent no later than January 15 of the year following the year in which the payments are paid. Failure to provide such information will result in the application of penalties to the qualified intermediary under sections 6721 and 6722, as well as any other applicable penalties, and may result in the termination of the qualified intermediary's withholding agreement with the IRS. A withholding agent shall not be liable for tax, interest, or penalties for failure to backup withhold or report information under chapter 61 of the Code due solely to the errors or omissions of the qualified intermediary. If a qualified intermediary fails to provide the allocation information required by this paragraph (e)(5)(v)(C)(*3*), with respect to U.S. non-exempt recipients, the withholding agent shall report the unallocated amount paid from the withholding rate pool to an unknown recipient, or otherwise in accordance with the appropriate Form 1099 and the instructions accompanying the form.

(D)

Example. The following example illustrates the application of paragraph (e)(5)(v)(C) of this section for a qualified intermediary providing chapter 4 withholding rate pools on an FFI withholding statement provided to a withholding agent. WA makes a payment of U.S. source interest that is a withholdable payment to QI, a qualified intermediary that is an FFI and a non-U.S. payor (as defined in § 1.6049–5(c)(5)), and A and B are account holders of QI (as defined under § 1.1471–5(a)) and are both U.S. non-exempt recipients (as defined paragraph (c)(21) of this section). Ten percent of the payment is attributable to both A and B. A has provided WA with a Form W–9, but B has not provided WA with a Form W–9. QI assumes primary withholding responsibility under chapters 3 and 4 with respect to the payment, 80 percent of which is allocable to foreign payees who are account holders other than A and B. As a participating FFI, QI is required to report with respect to its U.S. accounts under § 1.1471–4(d) (as incorporated into its qualified intermediary agreement). Provided that QI reports A's account as a U.S. account under the requirements referenced in the preceding sentence, QI is not required to provide WA with a Form W–9 from A and may instead include A in a chapter 4 withholding rate pool of U.S. payees, allocating 10% of the payment to this pool. See § 1.6049–4(c)(4)(iii) concerning when reporting under section 6049 for a payment of interest is not required when an FFI that is a non-U.S. payor reports an account holder receiving the payment under its chapter 4 requirements. With respect to B, the interest payment is subject to backup withholding under section 3406. Because B is a recalcitrant account holder of QI for withholdable payments and because QI assumes primary chapter 4 withholding responsibility, however, QI may include the portion of the payment allocated to B with the remaining 80% of the payment for which QI assumes primary withholding responsibility. WA can reliably associate the full amount of the payment based on the withholding statement and does so regardless of whether WA knows B is a U.S. non-exempt recipient that is receiving a portion of the payment. See § 31.3406(g)–1(e) (providing exemption to backup withholding when withholding was applied under chapter 4).

* * * * *

(f) *Effective/applicability date*—(1) *In general.* Except as otherwise provided in paragraphs (e)(4)(ix)(D), (f)(2), and (f)(3) of this section, this section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014 (except for payments to which paragraph (e)(4)(ix)(D) applies, in which case, substitute March 5, 2014, for June 30, 2014), and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments made after December 31, 2000, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.)

(2) *Lack of documentation for past years.* A taxpayer may elect to apply the provisions of paragraphs (b)(7)(i)(B), (ii), and (iii) of this section, dealing with liability for failure to obtain documentation timely, to all of its open tax years, including tax years that are currently under examination by the IRS. The election is made by simply taking action under those provisions in the same manner as the taxpayer would take action for payments made after December 31, 2000.

(3) *Section 871(m) transactions.* Paragraphs (b)(4)(xxi) through (b)(4)(xxiii), (e)(3)(ii)(E), and (e)(6) of this section apply to payments made on or after September 18, 2015.

(4) [Reserved]. For further guidance, see § 1.1441–1T(f)(4).

■ **Par. 6.** Section 1.1441–1T is added as follows:

§ 1.1441–1T Requirement for the deduction and withholding of tax on payments to foreign persons (temporary).

(a) through (b)(7)(ii)(A) [Reserved]. For further guidance, see § 1.1441–1(a) through (b)(7)(ii)(A).

(B) *Special rules for establishing that income is effectively connected with the conduct of a U.S. trade or business.* A withholding certificate received after the date of payment to claim under § 1.1441–4(a)(1) that income is effectively connected with the conduct of a U.S. trade or business will be considered effective as of the date of the payment if the certificate contains a signed affidavit (either at the bottom of the form or on an attached page) that

states that the information and representations contained on the certificate were accurate as of the time of the payment. The signed affidavit must also state that the beneficial owner has included the income on its U.S. income tax return for the taxable year in which it is required to report the income or, alternatively, that the beneficial owner intends to include the income on a U.S. income tax return for the taxable year in which it is required to report the income and the due date for filing such return (including any applicable extensions) is after the date on which the affidavit is signed. A certificate received within 30 days after the date of the payment will not be considered to be unreliable solely because it does not contain the affidavit described in the preceding sentences.

(b)(7)(iii) through (c)(2)(i) [Reserved]. For further guidance, see § 1.1441–1(b)(7)(iii) through (c)(2)(i).

(ii) *Dual Residents.* Individuals will not be treated as U.S. persons for purposes of this section for a taxable year or any portion of a taxable year for which they are a dual resident taxpayer (within the meaning of § 301.7701(b)–7(a)(1) of this chapter) who is treated as a nonresident alien pursuant to § 301.7701(b)–7(a)(1) of this chapter for purposes of computing their U.S. tax liability.

(c)(3) through (c)(3)(i) [Reserved]. For further guidance, see § 1.1441–1(c)(3) through (c)(3)(i).

(ii) *Nonresident alien individual.* The term nonresident alien individual means persons described in section 7701(b)(1)(B), alien individuals who are treated as nonresident aliens pursuant to § 301.7701(b)(7) of this chapter for purposes of computing their U.S. tax liability, or an alien individual who is a resident of Puerto Rico, Guam, the Commonwealth of Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa as determined under § 301.7701(b)–1(d) of this chapter. An alien individual who has made an election under section 6013(g) or (h) to be treated as a resident of the United States is nevertheless treated as a nonresident alien individual for purposes of withholding under chapter 3 of the Code and the regulations thereunder.

(c)(4) through (c)(38)(i) [Reserved]. For further guidance, see § 1.1441–1(c)(4) through (c)(38)(i).

(ii) *Hold mail instruction.* Notwithstanding the provisions of paragraph (i) of this section, an address that is subject to a hold mail instruction can be used as a permanent residence address if the person has also provided the withholding agent with documentary evidence establishing residence in the country in which the person claims to be a resident for tax purposes. If, after a withholding certificate is provided, a person's permanent residence address is subsequently subject to a hold mail instruction, this is a change in circumstances requiring the person to provide the documentary evidence described in this paragraph (c)(38)(ii) in order to use the address as a permanent residence address.

(c)(39) through (e)(2)(ii)(A) [Reserved]. For further guidance, see § 1.1441–1(c)(39) through (e)(2)(ii)(A).

(B) *Requirement to collect foreign TIN and date of birth beginning January 1, 2017.* Beginning January 1, 2017, a beneficial owner withholding certificate provided to document an account that is maintained at a U.S. branch or office of a financial institution is required to contain the account holder's foreign TIN and, in the case of an individual account holder, the account holder's date of birth in order for the withholding agent to treat such withholding certificate as valid under paragraph (e)(2) of this section. For withholding certificates associated with payments made on or after January 1, 2018, if an account holder does not have a foreign TIN, the account holder is required to provide a reasonable explanation for its absence (*e.g.,* the country of residence does not provide TINs) in order for the withholding certificate not to be considered invalid as a result of the application of this paragraph (e)(2)(ii)(B). A withholding certificate that does not contain the account holder's date of birth will not be considered invalid as a result of the application of this paragraph (e)(2)(ii)(B) if the withholding agent has the account holder's date of birth information in its files.

(e)(3) through (e)(3)(iv)(C)(*2*) [Reserved]. For further guidance, see § 1.1441–1(e)(3) through (e)(3)(iv)(C)(*2*).

(*3*) *Alternative withholding statement.* In lieu of a withholding statement containing all of the information described in paragraph (e)(3)(iv)(C)(*1*) of this section, a withholding agent may accept from a nonqualified intermediary a withholding statement that meets all of the requirements of this paragraph (e)(3)(iv)(C)(*3*) with respect to a payment. This alternative withholding statement may only be provided by a nonqualified intermediary that provides the withholding agent with the withholding certificates from the beneficial owners (*i.e.,* not documentary evidence) before the payment is made.

(*i*) The withholding statement is not required to contain information that is also included on a withholding certificate (*e.g.,* name, address, TIN (if any), chapter 4 status, GIIN (if any)). The withholding statement is also not required to specify the rate of withholding to which each foreign payee is subject, provided that all of the information necessary to make such determination is provided on the withholding certificate. A withholding agent that uses an alternative withholding statement may not apply a different rate from that which the withholding agent may reasonably conclude from the information on the withholding certificate.

(*ii*) The withholding statement must allocate the payment to every payee required to be reported as described in paragraph (e)(3)(iv)(C)(*1*)(*ii*) of this section.

(*iii*) The withholding statement must also contain any other information the withholding agent reasonably requests in order to fulfill its obligations under chapters 3, 4, and 61 of the Code, and section 3406.

(*iv*) The withholding statement must contain a representation from the nonqualified intermediary that the information on the withholding certificates is not inconsistent with any other account information the nonqualified intermediary has for the beneficial owners for determining the rate of withholding with respect to each payee.

(e)(3)(iv)(C)(*4*) through (e)(4)(i)(A) [Reserved]. For further guidance, see § 1.1441–1(e)(3)(iv)(C)(*4*) through (e)(4)(i)(A).

(B) *Electronic Signatures.* A withholding agent, regardless of whether the withholding agent has established an electronic system pursuant to paragraph (e)(4)(iv)(A) or (e)(4)(iv)(C) of this section, may accept a withholding certificate with an electronic signature, provided the electronic signature meets the requirements of paragraph (e)(4)(iv)(B)(3)(ii). In addition, the withholding certificate must reasonably demonstrate to the withholding agent that the form has been electronically signed by the recipient identified on the form (or a person authorized to sign for the person identified on the form). For example, a withholding agent may treat as validly signed a withholding certificate that has, in the signature block, the name of the person authorized to sign, a time and date stamp, and a statement that the certificate has been electronically signed. However, a withholding agent may not treat a withholding certificate with a typed name in the signature line

and no other information as validly signed.

(e)(4)(ii) through (e)(4)(ii)(A)(*1*) [Reserved]. For further guidance, see § 1.1441–1(e)(4)(ii) through (e)(4)(ii)(A)(*1*).

(*2*) *Documentary evidence for treaty claims and treaty statements.* Documentary evidence described in § 1.1441–6(c)(3) or (4) and a statement regarding entitlement to treaty benefits described in § 1.1441–6(c)(5)(i) (treaty statement) shall remain valid until the last day of the third calendar year following the year in which the documentary evidence is provided to the withholding agent except as provided in paragraph (e)(4)(ii)(B) of this section. Notwithstanding the validity period prescribed in this paragraph (e)(4)(ii)(A)(*2*), a treaty statement will cease to be valid if a change in circumstances makes the information on the statement unreliable or incorrect. For accounts opened and treaty statements obtained prior to January 6, 2017, the treaty statement will expire January 1, 2019.

(e)(4)(ii)(B) through (e)(4)(iv)(B)(*4*) [Reserved]. For further guidance, see § 1.1441–1(e)(4)(ii)(B) through (e)(4)(iv)(B)(*4*).

(C) *Form 8233.* A withholding agent may establish a system for a beneficial owner or payee to provide Form 8233 electronically, provided the system meets the requirements of paragraph (e)(4)(iv)(B)(*1*) through (*4*) of this section (replacing ''Form W–8'' with ''Form 8233'' each place it appears).

(e)(4)(iv)(D) [Reserved]. For further guidance, see § 1.1441–1(e)(4)(iv)(D).

(E) *Third party repositories.* A withholding certificate will be considered furnished for purposes of this section (including paragraph (e)(1)(ii)(A)(*1*) of this section) by the person providing the certificate, and a withholding agent may rely on an otherwise valid withholding certificate received electronically from a third party repository, if the withholding certificate was uploaded or provided to a third party repository and there are processes in place to ensure that the withholding certificate can be reliably associated with a specific request from the withholding agent and a specific authorization from the person providing the certificate (or an agent of the person providing the certificate) for the withholding agent making the request to receive the withholding certificate. Each request and authorization must be associated with a specific payment, and, as applicable, a specific obligation maintained by a withholding agent. A third party repository may also be used for withholding statements, and a withholding agent may also rely on an otherwise valid withholding statement, if the intermediary providing the withholding certificates and withholding statement through the repository provides an updated withholding statement in the event of any change in the information previously provided (*e.g.,* a change in the composition of a partnership or a change in the allocation of payments to the partners) and ensures there are processes in place to update withholding agents when there is a new withholding statement (and withholding certificates, as necessary) in the event of any change that would affect the validity of the prior withholding certificates or withholding statement. A third party repository, for purposes of this paragraph, is an entity that maintains withholding certificates (including certificates accompanied by withholding statements) but is not an agent of the applicable withholding agent or the person providing the certificate. The following examples illustrate the provisions of this paragraph (e)(4)(iv)(E):

Example 1. A, a foreign corporation, completes a Form W–8BEN–E and a Form W–8ECI and uploads the forms to X, a third party repository (X is an entity that maintains withholding certificates on an electronic data aggregation site). WA, a withholding agent, enters into a contract with A under which it will make payments to A of U.S. source FDAP that are not effectively connected with A's conduct of a trade or business in the United States. X is not an agent of WA or A. Prior to receiving a payment, A sends WA an email with a link that authorizes WA to access A's Form W–8BEN–E on X's system. The link does not authorize WA to access A's Form W–8ECI. X's system meets the requirements of a third party repository, and WA can treat the Form W–8BEN–E as furnished by A.

Example 2. The facts are the same as *Example 1* of this paragraph (e)(4)(iv)(E), and WA and A enter into a second contract under which WA will make payments to A that are effectively connected with A's conduct of a trade or business in the United States. A sends WA an email with a link that gives WA access to A's Form W–8ECI on X's system. The link in this second email does not give WA access to A's Form W–8BEN–E. A's email also clearly indicates that the link is associated with payments received under the second contract. X's system meets the requirements of a third party repository, and WA can treat the Form W–8ECI as furnished by A.

Example 3. FP is a foreign partnership that is acting on behalf of its partners, A and B, who are both foreign individuals. FP completes a Form W–8IMY and uploads it to X, a third party repository. FP also uploads Forms W–8BEN from both A and B and a valid withholding statement allocating 50% of the payment to A and 50% to B. WA is a withholding agent that makes payments to FP as an intermediary for A and B. FP sends WA an email with a link to its Form W–8IMY on X's system. The link also provides WA access to FP's withholding statement and A's and B's Forms W–8BEN. FP also has processes in place that ensure it will provide a new withholding statement or withholding certificate to X's repository in the event of a change in the information previously provided that affects the validity of the withholding statement and that ensure it will update WA if there is a new withholding statement. X's system meets the requirements of a third party repository, and WA can treat the Form W–8IMY (and withholding statement) as furnished by FP. In addition, because FP is acting as an agent of A and B, the beneficial owners, WA can treat the Forms W–8BEN for A and B as furnished by A and B.

(e)(4)(v) through (f)(3) [Reserved]. For further guidance, see § 1.1441–1(e)(4)(v) through (f)(3).

(4) *Effective/applicability date.* This section applies to payments made on or after January 6, 2017.

(g) *Expiration date.* The applicability of this section expires on December 30, 2019.

■ **Par. 7.** Section 1.1441–2 is amended by removing paragraph (e)(7), redesignating paragraph (e)(8) as paragraph (e)(7), adding new paragraph (a)(8), and revising paragraph (f).

The revisions and additions read as follows:

§ 1.1441–2 Amounts subject to withholding.

(a) * * *

(8) [Reserved]. For further guidance, see § 1.1441–2T(a)(8).

* * * * *

(f) *Effective/applicability date*—(1) This section applies to payments made after December 31, 2000. Paragraphs (b)(5) and (d)(4) of this section apply to payments made after August 1, 2006. Paragraph (b)(6) of this section applies to payments made on or after January 23, 2012. Paragraph (e)(8) of this section applies to payments made on or after September 18, 2015.

(2) [Reserved]. For further guidance, see § 1.1441–2T(f)(2).

■ **Par. 8.** Section 1.1441–2T is added to read as follows:

§ 1.1441–2T Amounts subject to withholding (temporary).

(a) through (a)(7) [Reserved]. For further guidance, see § 1.1441–2(a) through (a)(7).

(8) Amounts of United States source gross transportation income, as defined in section 887(b)(1), that is taxable under section 887(a).

(b) through (f)(1) [Reserved]. For further guidance, see § 1.1441–2(b) through (f)(1).

(2) *Effective/applicability date.* This section applies on January 6, 2017.

(g) *Expiration date.* The applicability of this section expires on December 30, 2019.

■ **Par. 9.** Section 1.1441–3 is amended by:

■ 1. Revising paragraphs (a), (c)(4)(i), (d), and (i).

■ 2. Removing paragraph (j).

The revisions read as follows:

§ 1.1441–3 Determination of amounts to be withheld.

(a) *General rule*—(1) *Withholding on gross amount.* Except as otherwise provided in regulations under section 1441, the amount subject to withholding under § 1.1441–1 is the gross amount of income subject to withholding that is paid to a foreign person. The gross amount of income subject to withholding may not be reduced by any deductions, except to the extent that one or more personal exemptions are allowed as provided under § 1.1441–4(b)(6).

(2) *Coordination with chapter 4.* A withholding agent making a payment that is both a withholdable payment and an amount subject to withholding under § 1.1441–2(a) and that has withheld tax as required under chapter 4 from such payment is not required to withhold under this section notwithstanding paragraph (a)(1) of this section. See § 1.1474–6(b)(1) for the allowance for a withholding agent to credit withholding applied under chapter 4 against its liability for tax due under sections 1441, 1442, or 1443, and see § 1.1474–6(b)(1) for the rule allowing a withholding agent to credit withholding applied under chapter 4 against its liability for tax due under sections 1441, 1442, or 1443, and § 1.1474–6(b)(2) for when such withholding is considered applied by a withholding agent. If the withholdable payment is not required to be withheld upon under chapter 4, then the withholding agent must apply the provisions of § 1.1441–1 to determine whether withholding is required under sections 1441, 1442, or 1443.

* * * * *

(c) * * *

(4) *Coordination with withholding under section 1445*—(i) *In general.* A distribution from a U.S. Real Property Holding Corporation (USRPHC) (or from a corporation that was a USRPHC at any time during the five-year period ending on the date of distribution) with respect to stock that is a U.S. real property interest under section 897(c) or from a Real Estate Investment Trust (REIT) or other entity that is a qualified investment entity (QIE) under section 897(h)(4) with respect to its stock is subject to the withholding provisions under section 1441 (or section 1442 or 1443) and section 1445. A USRPHC making a distribution shall be treated as satisfying its withholding obligations under both sections if it withholds in accordance with one of the procedures described in either paragraph (c)(4)(i)(A) or (B) of this section. A USRPHC must apply the same withholding procedure to all the distributions made during the taxable year. However, the USRPHC may change the applicable withholding procedure from year to year. For rules regarding distributions by REITs and other entities that are QIEs, see paragraph (c)(4)(i)(C) of this section. To the extent withholding under sections 1441, 1442, or 1443 applies under this paragraph (c)(4)(i) to any portion of a distribution that is a withholdable payment, see paragraph (a)(2) for rules coordinating withholding under chapter 4.

(A) *Withholding under section 1441.* The USRPHC may choose to withhold on a distribution only under section 1441 (or 1442 or 1443) and not under section 1445. In such a case, the USRPHC must withhold under section 1441 (or 1442 or 1443) on the full amount of the distribution, whether or not any portion of the distribution represents a return of basis or capital gain. If a reduced tax rate under an income tax treaty applies to the distribution by the USRPHC, then the applicable rate of withholding on the distribution shall be no less than 15 percent for distributions after February 16, 2016, and no less than 10 percent for distributions on or before February 16, 2016, unless the applicable treaty specifies an applicable lower rate for distributions from a USRPHC, in which case the lower rate may apply.

(B) *Withholding under both sections 1441 and 1445.* As an alternative to the procedure described in paragraph (c)(4)(i)(A) of this section, a USRPHC may choose to withhold under both sections 1441 (or 1442 or 1443) and 1445 under the procedures set forth in this paragraph (c)(4)(i)(B). The USRPHC must make a reasonable estimate of the portion of the distribution that is a dividend under paragraph (c)(2)(ii)(A) of this section, and must—

(*1*) Withhold under section 1441 (or 1442 or 1443) on the portion of the distribution that is estimated to be a dividend under paragraph (c)(2)(ii)(A) of this section; and

(*2*) Withhold under section 1445(e)(3) and § 1.1445–5(e) on the remainder of the distribution or on such smaller portion based on a withholding certificate obtained in accordance with § 1.1445–5(e)(3)(iv).

(C) *Coordination with REIT/QIE withholding.* Withholding is required under section 1441 (or 1442 or 1443) on the portion of a distribution from a REIT or other entity that is a QIE that is not designated (for REITs) or reported (for regulated investment companies that are QIEs) as a capital gain dividend, a return of basis, or a distribution in excess of a shareholder's adjusted basis in the stock of the REIT or QIE that is treated as a capital gain under section 301(c)(3). A distribution in excess of a shareholder's adjusted basis in the stock of the REIT or QIE is, however, subject to withholding under section 1445, unless the interest in the REIT or QIE is not a U.S. real property interest (*e.g.,* an interest in a domestically controlled REIT or QIE under section 897(h)(2)). In addition, withholding is required under section 1445 on the portion of the distribution designated (for REITs) or reported (for regulated investment companies that are QIEs) as a capital gain dividend to the extent that it is attributable to the sale or exchange of a U.S. real property interest. See § 1.1445–8.

* * * * *

(d) *Withholding on payments that include an undetermined amount of income*—(1) *In general.* Where the withholding agent makes a payment and does not know at the time of payment the amount that is subject to withholding because the determination of the source of the income or the calculation of the amount of income subject to tax depends upon facts that are not known at the time of payment, then the withholding agent must withhold an amount under § 1.1441–1 based on the entire amount paid that is necessary to ensure that the tax withheld is not less than 30 percent (or other applicable percentage) of the amount that could be from sources within the United States or income subject to tax. See § 1.1471–2(a)(5) for similar rules under chapter 4 that apply to payments made to payees that are entities. The amount so withheld shall not exceed 30 percent of the amount paid. With respect to a payment described in paragraph (d)(1) or (2) of this section, the withholding agent may elect to retain 30 percent of the payment to hold in escrow until the earlier of the date that the amount of income from sources within the United States or the taxable amount can be determined or one year from the date the amount is placed is in escrow, at which time the withholding becomes due under § 1.1441–1, or, to the extent that withholding is not required, the escrowed amount must be paid to the payee.

(2) *Withholding on certain gains.* Absent actual knowledge or reason to know otherwise, a withholding agent may rely on a claim regarding the amount of gain described in § 1.1441–2(c) if the beneficial owner withholding certificate, or other appropriate withholding certificate, states the beneficial owner's basis in the property giving rise to the gain. In the absence of a reliable representation on a withholding certificate, the withholding agent must withhold an amount under § 1.1441–1 that is necessary to assure that the tax withheld is not less than 30 percent (or other applicable percentage) of the recognized gain. For this purpose, the recognized gain is determined without regard to any deduction allowed by the Code from the gains. The amount so withheld shall not exceed 30 percent of the amount payable by reason of the transaction giving rise to the recognized gain. See § 1.1441–1(b)(8) regarding adjustments in the case of overwithholding.

* * * * *

(i) *Effective/applicability date.* Except as otherwise provided in paragraphs (g)(2) and (h)(3) of this section, this section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, revised April 1, 2016. For payments made after December 31, 2000, see this section as in effect and contained in 26 CFR part 1 as revised April 1, 2013.)

§ 1.1441–3T [Removed]

■ **Par. 10.** Section 1.1441–3T is removed.

■ **Par. 11.** Section 1.1441–4 is amended by revising paragraphs (a)(2)(ii), (b)(2)(i), (b)(2)(iii), (b)(2)(v), (b)(3), and (g) to read as follows:

§ 1.1441–4 Exemptions from withholding for certain effectively connected income and other amounts.

(a) * * *

(2) * * *

(ii) *Special rules for U.S. branches of foreign persons*—(A) *U.S. branches of certain foreign banks or foreign insurance companies.* A payment to a U.S. branch described in § 1.1441–1(b)(2)(iv)(B)(3) is presumed to be effectively connected with the conduct of a trade or business in the United States without the need to furnish a certificate if the withholding agent obtains an EIN for the entity, unless the U.S. branch provides a U.S. branch withholding certificate described in § 1.1441–1(e)(3)(v) that represents otherwise. If no certificate is furnished but the income is not, in fact, effectively connected income, then the branch must withhold whether the payment is collected on behalf of other persons or on behalf of another branch of the same entity. See § 1.1441–1(b)(2)(iv) and (b)(6) for general rules applicable to payments to U.S. branches of foreign persons.

(B) *Other U.S. branches.* See § 1.1441–1(b)(2)(iv)(E) for similar procedures for other U.S. branches to the extent provided in a determination letter from the IRS.

* * * * *

(b) * * *

(2) *Manner of obtaining withholding exemption under tax treaty*—(i) *In general.* In order to obtain the exemption from withholding by reason of a tax treaty provided by paragraph (b)(1)(iv) of this section, a nonresident alien individual must submit a withholding certificate (described in paragraph (b)(2)(ii) of this section) to each withholding agent from whom amounts are to be received. A separate withholding certificate must be filed for each taxable year of the alien individual. If the withholding agent is satisfied that an exemption from withholding is warranted (see paragraph (b)(2)(iii) of this section), the withholding certificate shall be accepted in the manner set forth in paragraph (b)(2)(iv) of this section. The exemption from withholding becomes effective for payments made at least ten days after a copy of the accepted withholding certificate is forwarded to the IRS. The withholding agent may rely on an accepted withholding certificate only if the IRS has not objected to the certificate. For purposes of this paragraph (b)(2)(i), the IRS will be considered to have not objected to the certificate if it has not notified the withholding agent within a 10-day period beginning from the date that the withholding certificate is forwarded to the IRS pursuant to paragraph (b)(2)(v) of this section. After expiration of the 10-day period, the withholding agent may rely on the withholding certificate retroactive to the date of the first payment covered by the certificate. The fact that the IRS does not object to the withholding certificate within the 10-day period provided in this paragraph (b)(2)(i) shall not preclude the IRS from examining the withholding agent at a later date with respect to facts that the withholding agent knew or had reason to know regarding the payment and eligibility for a reduced rate and that were not disclosed to the IRS as part of the 10-day review process.

* * * * *

(iii) *Review by withholding agent.* The exemption from withholding provided by paragraph (b)(1)(iv) of this section shall not apply unless the withholding agent accepts (in the manner provided in paragraph (b)(2)(iv) of this section) the statement on Form 8233, ''Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual,'' (or successor form) supplied by the nonresident alien individual. Before accepting the statement, the withholding agent must examine the statement. If the withholding agent knows or has reason to know that any of the facts or assertions on Form 8233 may be false or that the eligibility of the individual's compensation for the exemption cannot be readily determined, the withholding agent may not accept the statement on Form 8233 and is required to withhold under this section. If the withholding agent accepts the statement and subsequently finds that any of the facts or assertions contained on Form 8233 may be false or that the eligibility of the individual's compensation for the exemption can no longer be readily determined, then the withholding agent shall promptly so notify the IRS by letter, and the withholding agent is not relieved of liability to withhold on any amounts still to be paid. If the withholding agent is notified by the IRS that the eligibility of the individual's compensation for the exemption is in doubt or that such compensation is not eligible for the exemption, the withholding agent is required to withhold under this section. The rules of this paragraph (b)(2) are illustrated by the following examples.

Example 1. C, a nonresident alien individual, submits Form 8233 to W, a withholding agent. The statement on Form 8233 does not include all the information required by paragraph (b)(2)(ii) of this section. Therefore, W has reason to know that he or she cannot readily determine whether C's compensation for personal services is eligible for an exemption from withholding and, therefore, W must withhold.

Example 2. D, a nonresident alien individual, is performing services for W, a withholding agent. W has accepted a statement on Form 8233 submitted by D, according to the provisions of this section. W receives notice from the IRS that the eligibility of D's compensation for a withholding exemption is in doubt. Therefore, W has reason to know that the eligibility of the compensation for a withholding exemption cannot be readily determined, as of the date W receives the notification, and W must withhold tax under section 1441 on amounts paid after receipt of the notification.

Example 3. E, a nonresident alien individual, submits Form 8233 to W, a

withholding agent for whom E is to perform personal services. The statement contains all the information requested on Form 8233. E claims an exemption from withholding based on a personal exemption amount computed on the number of days E will perform personal services for W in the United States. If W does not know or have reason to know that any statement on the Form 8233 is false or that the eligibility of E's compensation for the withholding exemption cannot be readily determined, W can accept the statement on Form 8233 and exempt from withholding the appropriate amount of E's income.

* * * * *

(v) *Copies of Form 8233.* The withholding agent shall forward one copy of each Form 8233 that is accepted under paragraph (b)(2)(iv) of this section to the IRS within five days of such acceptance. The withholding agent shall retain a copy of Form 8233.

(3) *Withholding agreements.* Compensation for personal services of a nonresident alien individual who is engaged during the taxable year in the conduct of a trade or business within the United States may be wholly or partially exempted from the withholding required by § 1.1441–1 if an agreement is reached between the IRS and the alien individual with respect to the amount of withholding required. Such agreement shall be available in the circumstances and in the manner set forth by the Internal Revenue Service, and shall be effective for payments covered by the agreement that are made after the agreement is executed by all parties. The alien individual must agree to timely file an income tax return for the current taxable year.

* * * * *

(g) *Effective/applicability date.* This section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, revised April 1, 2016. For payments made after December 31, 2000, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2013.)

* * * * *

§ 1.1441–4T [Removed]

■ **Par. 12.** Section 1.1441–4T is removed.

■ **Par. 13.** Section 1.1441–5 is amended by:

■ 1. Revising paragraphs (b)(2)(iii), (b)(2)(vi), (c)(1)(i) introductory text, (c)(1)(i)(C), (c)(1)(iv) and (v), (c)(2)(i) through (iii), (c)(2)(iv)(A) and (B), (c)(3)(i) and (ii), (c)(3)(iii)(A), (c)(3)(iv) and (v), (d)(2) through (4), (e)(3)(iii), (e)(5)(i) and (ii), (e)(5)(iii)(A), (e)(5)(iv) and (v), (e)(6)(ii), (f), and (g) to read as follows:

§ 1.1441–5 Withholding on payments to partnerships, trusts, and estates.

* * * * *

(b) * * *

(2) * * *

(iii) *U.S. complex trusts and U.S. estates.* A U.S. trust that is not a trust described in section 651(a) (see paragraph (b)(2)(ii) of this section) or sections 671 through 679 (see paragraph (b)(2)(iv) of this section) (a U.S. complex trust) is required to withhold under chapter 3 of the Internal Revenue Code (Code) as a withholding agent on the distributable net income includible in the gross income of a foreign beneficiary to the extent the distributable net income consists of an amount subject to withholding (as defined in § 1.1441–2(a)) that is, or is required to be, distributed currently. The U.S. complex trust shall withhold when a distribution is made to a foreign beneficiary. The trust may use the same procedures regarding an estimate of the amount subject to withholding as a U.S. simple trust under paragraph (b)(2)(ii) of this section. To the extent an amount subject to withholding is required to be, but is not actually, distributed, the U.S. complex trust must withhold on the foreign beneficiary's allocable share at the time the income is required to be reported on Form 1042–S under § 1.1461–1(c), without extension. A U.S. estate is required to withhold under chapter 3 of the Code on the distributable net income includible in the gross income of a foreign beneficiary to the extent the distributable net income consists of an amount subject to withholding (as defined in § 1.1441–2(a)) that is actually distributed. A U.S. estate may also use the reasonable estimate procedures of paragraph (b)(2)(ii) of this section. However, those procedures apply to an estate that has a taxable year other than a calendar year only if the estate files an amended return on Form 1042 for the calendar year in which the distribution was made and pays the underwithheld tax and interest within 60 days after the close of the taxable year in which the distribution was made.

* * * * *

(vi) *Coordination with chapter 4 requirements for U.S. partnerships, trusts, and estates.* To the extent that a U.S. partnership is required to withhold on an amount under chapter 4 with respect to a partner, beneficiary, or owner, the partnership, trust, or estate must apply the rules described in § 1.1473–1(a)(5) to determine when it must withhold on the amount under chapter 4. In a case in which withholding applies under chapter 4 to such an amount, see § 1.1441–3(a)(2) to coordinate with withholding that otherwise applies to such an amount under this paragraph (b).

(c) *Foreign partnerships*—(1) *Determination of payee*—(i) *Payments treated as made to partners.* Except as otherwise provided in paragraph (c)(1)(ii) or (iv) of this section, the payees of a payment to a person that the withholding agent may treat as a nonwithholding foreign partnership under paragraph (c)(3)(i) or (d)(2) of this section are the partners (looking through partners that are foreign intermediaries or flow-through entities) as follows—

* * * * *

(C) If the withholding agent can reliably associate a partner's distributive share of the payment with a qualified intermediary withholding certificate under § 1.1441–1(e)(3)(ii), a nonqualified intermediary withholding certificate under § 1.1441–1(e)(3)(iii), or a U.S. branch certificate under § 1.1441–1(e)(3)(v) (including one provided by a territory financial institution), then the rules of § 1.1441–1(b)(2)(v) shall apply to determine who the payee is in the same manner as if the partner's distributive share of the payment had been paid directly to such intermediary or U.S. branch or territory financial institution;

* * * * *

(iv) *Coordination with chapter 4 for payments made to foreign partnerships.* A withholding agent that makes a payment of U.S. source FDAP income to a foreign partnership that is a withholdable payment to which withholding under chapter 4 applies must apply the rules described in § 1.1473–1(a)(5)(vi) to determine when the payment is treated as made to a partner in the partnership for purposes of chapter 4. In a case in which withholding applies under chapter 4 to a withholdable payment made to a foreign partnership, see § 1.1441–3(a)(2) to coordinate with withholding otherwise required under this paragraph (c) with respect to the amount of the payment included in the gross income of a partner. For when a withholding agent may reliably associate a withholdable payment with a chapter 4 withholding rate pool in lieu of obtaining documentation for each payee include in the pool, see § 1.1441–1(e)(3)(iv)(C)(*2*) (substituting the term *nonwithholding foreign partnership* for the term *nonqualified intermediary*).

(v) *Examples.* The rules of paragraphs (c)(1)(i) and (ii) of this section are illustrated by the following examples. Each example assumes that all payments are not withholdable

payments and thus no withholding applies under chapter 4.

Example 1. FP is a nonwithholding foreign partnership organized in Country X. FP has two partners, FC, a foreign corporation, and USP, a U.S. partnership. USWH, a U.S. withholding agent, makes a payment of U.S. source interest to FP that is not a withholdable payment. FP has provided USWH with a valid nonwithholding foreign partnership certificate, as described in paragraph (c)(3)(iii) of this section, with which it associates a beneficial owner withholding certificate from FC and a Form W–9, ''Request for Taxpayer Identification Number and Certification,'' from USP together with the withholding statement required by paragraph (c)(3)(iv) of this section. USWH can reliably associate the payment of interest with the withholding certificates from FC and USP. Under paragraph (c)(1)(i) of this section, the payees of the interest payment are FC and USP.

Example 2. The facts are the same as in *Example 1,* except that FP1, a nonwithholding foreign partnership, is a partner in FP rather than USP. FP1 has two partners, A and B, both foreign persons. FP provides USWH with a valid nonwithholding foreign partnership certificate, as described in paragraph (c)(3)(iii) of this section, with which it associates a beneficial owner withholding certificate from FC and a nonwithholding foreign partnership certificate from FP1. In addition, foreign beneficial owner withholding certificates from A and B are associated with the nonwithholding foreign partnership withholding certificate from FP1. FP also provides the withholding statement required by paragraph (c)(3)(iv) of this section. USWH can reliably associate the interest payment with the withholding certificates provided by FC, A, and B. Therefore, under paragraph (c)(1)(i) of this section, the payees of the interest payment are FC, A, and B.

Example 3. USWH makes a payment of U.S. source dividends to WFP, a withholding foreign partnership, that is not a withholdable payment. WFP has two partners, FC1 and FC2, both foreign corporations. USWH can reliably associate the payment with a valid withholding foreign partnership withholding certificate from WFP. Therefore, under paragraph (c)(1)(ii)(A) of this section, WFP is the payee of the interest.

Example 4. USWH makes a payment of U.S. source royalties that is not a withholdable payment to FP, a foreign partnership. USWH can reliably associate the royalties with a valid withholding certificate from FP on which FP certifies that the income is effectively connected with the conduct of a trade or business in the United States. Therefore, under paragraph (c)(1)(ii)(B) of this section, FP is the payee of the royalties.

(2) *Withholding foreign partnerships*—(i) *Reliance on claim of withholding foreign partnership status.* A withholding foreign partnership is a foreign partnership that has entered into an agreement with the IRS, as described in paragraph (c)(2)(ii) of this section, with respect to distributions and guaranteed payments it makes to its partners. A withholding agent that can reliably associate a payment with a certificate described in paragraph (c)(2)(iv) of this section may treat the person to whom it makes the payment as a withholding foreign partnership for purposes of withholding under chapters 3 and 4 of the Code, information reporting under chapter 61 of the Code, backup withholding under section 3406, and withholding under other provisions of the Code. Furnishing such a certificate is in lieu of transmitting to a withholding agent withholding certificates or other appropriate documentation for its partners. Although the withholding foreign partnership generally will be required to obtain withholding certificates or other appropriate documentation from its partners pursuant to its agreement with the IRS, it generally will not be required to attach such documentation to its withholding foreign partnership withholding certificate to the extent it is permitted to act as a withholding foreign partnership with respect to the payment under its agreement. In addition, the IRS may permit a foreign partnership to act as a qualified intermediary under § 1.1441–1(e)(5)(ii)(D) with respect to its partners in appropriate circumstances.

(ii) *Withholding agreement.* The IRS may, upon request, enter into a withholding agreement with a foreign partnership pursuant to such procedures as the IRS may prescribe in published guidance (see § 601.601(d)(2) of this chapter). Under the withholding agreement, a foreign partnership shall generally be subject to the applicable withholding and reporting provisions applicable to withholding agents and payors as defined in § 1.6049–4(a) under chapters 3, 4, and 61 of the Code, section 3406, the regulations under those provisions, and other withholding provisions of the Code, except to the extent provided under the withholding agreement. Under the withholding agreement, a foreign partnership may agree to act as an acceptance agent to perform the duties described in § 301.6109–1(d)(3)(iv)(A) of this chapter. For a foreign partnership that is an FFI, the withholding agreement will require the partnership to assume the requirements of a participating FFI, a registered deemed-compliant FFI, or an FFI treated as a deemed-compliant FFI under an applicable IGA that is subject to due diligence and reporting requirements with respect to its U.S. accounts similar to those applicable to a registered deemed-compliant FFI under § 1.1471–5(f)(1). The withholding agreement may specify the manner in which applicable procedures for adjustments for underwithholding and overwithholding, including refund procedures, apply to the withholding foreign partnership and its partners and the extent to which applicable procedures may be modified. In particular, the withholding agreement may allow a withholding foreign partnership to claim refunds of overwithheld amounts on behalf of its customers. In addition, the withholding agreement must specify the manner in which the IRS will verify the partnership's compliance with its agreement, including the requirements for a periodic review of the partnership's compliance with the withholding agreement and the procedures for the partnership to certify to its compliance with the withholding agreement. A withholding foreign partnership must file a return on Form 1042, ''Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,'' and information returns on Form 1042–S, ''Foreign Person's U.S. Source Income Subject to Withholding.'' The withholding agreement may also require a withholding foreign partnership to file a partnership return under section 6031(a) and partner statements under 6031(b), including for each U.S. partner to the extent required in the agreement. Additionally, a partnership that is an FFI will be required to file Form 8966, ''FATCA Report'' to the extent provided in the withholding agreement.

(iii) *Withholding responsibility.* A withholding foreign partnership must assume primary withholding responsibility under both chapters 3 and 4 of the Code to the extent required in the withholding agreement. It is not required to provide information to the withholding agent regarding each partner's distributive share of the payment (including a withholdable payment). The withholding foreign partnership will be responsible for reporting the payments under §§ 1.1461–1(c), 1.1474–1(d), and chapter 61 of the Code and filing Form 1042 (to the extent required in the withholding agreement). A withholding agent making a payment to a withholding foreign partnership is not required to withhold any amount under chapters 3 and 4 of the Code on the payment unless it has actual knowledge or reason to know that the foreign partnership is not acting as a withholding foreign partnership with respect to the payment or has not withheld to the extent

required. The withholding foreign partnership shall withhold the payments under the same procedures and at the same time as prescribed for withholding by a U.S. partnership under paragraph (b)(2) of this section, except that, for purposes of determining the partner's status, the provisions of paragraph (d)(4) of this section shall apply.

* * * * *

(A) The name, permanent residence address (as described in § 1.1441–1(e)(2)(ii)), the employer identification number of the partnership, the country under the laws of which the partnership is created or governed, the chapter 4 status of the partnership if required for purposes of chapter 4 or if the partnership provides (or will provide) a withholding statement associated with the Form W–8 allocating a payment to a chapter 4 withholding rate pool of U.S. payees under § 1.6049–4(c)(4) with respect to its partners, and the GIIN of the partnership (if applicable). If the partnership provides (or will provide) a chapter 4 withholding rate pool of U.S. payees as described in the preceding sentence, the partnership must certify to its chapter 4 status as a participating FFI (including a reporting Model 2 FFI) or registered deemed-compliant FFI (including a reporting Model 1 FFI);

(B) A certification that the partnership is a withholding foreign partnership within the meaning of paragraph (c)(2)(i) of this section, and, for a partnership that is an FFI receiving a withholdable payment, a certification that the partnership is acting as a participating FFI, a registered deemed-compliant FFI, or a nonreporting IGA FFI (as defined in § 1.1471–1(b)(83)); and

* * * * *

(3) *Nonwithholding foreign partnerships*—(i) *Reliance on claim of foreign partnership status.* A withholding agent may treat a person as a nonwithholding foreign partnership if it receives from that person a nonwithholding foreign partnership withholding certificate as described in paragraph (c)(3)(iii) of this section. A withholding agent that does not receive a nonwithholding foreign partnership withholding certificate or does not receive a valid withholding certificate from an entity it knows, or has reason to know, is a foreign partnership must apply the presumption rules of §§ 1.1441–1(b)(3) and 1.6049–5(d) and paragraphs (d) and (e)(6) of this section. In addition, to the extent a withholding agent cannot, prior to a payment, reliably associate the payment with valid documentation from a payee that is associated with the nonwithholding foreign partnership withholding certificate or has insufficient information to report the payment on Form 1042–S or Form 1099, to the extent reporting is required, the withholding agent must apply the presumption rules. See § 1.1441–1(b)(2)(vii)(A) and (B) for rules regarding reliable association. See, however, § 1.1441–1(e)(3)(iv)(C)(*2*) for when a withholding agent may reliably associate a withholdable payment with a chapter 4 withholding rate pool in lieu of obtaining documentation for each payee included in the pool (substituting the term nonwithholding foreign partnership for the term nonqualified intermediary). See also § 1.1441–1(e)(3)(iv)(A) for when a withholding agent may reliably associate a payment with a chapter 4 withholding rate pool of U.S. payees. See paragraph (c)(3)(iv) of this section and § 1.1441–1(e)(3)(iv) for alternative procedures permitting allocation information to be received after a payment is made.

(ii) *Reliance on claim of reduced withholding by a partnership for its partners.* This paragraph (c)(3)(ii) describes the manner in which a withholding agent may rely on a claim of reduced withholding when making a payment to a nonwithholding foreign partnership. To the extent that a withholding agent treats a payment to a nonwithholding foreign partnership as a payment to the nonwithholding foreign partnership's partners (whether direct or indirect) in accordance with paragraph (c)(1)(i) of this section, it may rely on a claim for reduced withholding by the partner if, prior to the payment, the withholding agent can reliably associate the payment (within the meaning of § 1.1441–1(b)(2)(vii)) with a valid withholding certificate or other appropriate documentation from the partner that establishes entitlement to a reduced rate of withholding. A withholding certificate or other appropriate documentation that establishes entitlement to a reduced rate of withholding is a beneficial owner withholding certificate described in § 1.1441–1(e)(2)(i), documentary evidence described in § 1.1441–6(c)(3) or (4) or § 1.6049–5(c)(1) (for a partner claiming to be a foreign person and a beneficial owner, determined under the provisions of § 1.1441–1(c)(6)), a Form W–9 described in § 1.1441–1(d) (for a partner claiming to be a U.S. payee), a withholding foreign partnership withholding certificate described in paragraph (c)(2)(iv) of this section, or a withholding statement allocating the payment to a chapter 4 withholding rate pool of U.S. payees. For when the withholding agent can reliably associate the payment with a chapter 4 withholding rate pool, see paragraph (c)(3)(i) of this section. See also § 1.1441–3(a)(2) (coordinating withholding under chapter 3 when withholding under chapter 4 is applied to a payment). Unless a nonwithholding foreign partnership withholding certificate is provided for income claimed to be effectively connected with the conduct of a trade or business in the United States, a claim must be presented for each portion of the payment that represents an item of income includible in the distributive share of a partner as required under paragraph (c)(3)(iii)(C) of this section. When making a claim for several partners, the partnership may present a single nonwithholding foreign partnership withholding certificate to which the partners' certificates or other appropriate documentation are associated. Where the nonwithholding foreign partnership withholding certificate is provided for income claimed to be effectively connected with the conduct of a trade or business in the United States under paragraph (c)(3)(iii)(D) of this section, the claim may be presented without having to identify any partner's distributive share of the payment.

* * * * *

(A) The name, permanent residence address (as described in § 1.1441–1(e)(2)(ii)), the employer identification number of the partnership, if any, the country under the laws of which the partnership is created or governed, and the chapter 4 status of the partnership (for a nonwithholding foreign partnership receiving a withholdable payment or providing a withholding statement associated with the Form W–8 allocating a payment to a chapter 4 withholding rate pool of U.S. payees), and the GIIN of the partnership (if applicable);

* * * * *

(iv) *Withholding statement provided by nonwithholding foreign partnership and coordination with chapter 4.* The provisions of § 1.1441–1(e)(3)(iv) (regarding a withholding statement) shall apply to a nonwithholding foreign partnership by substituting the term nonwithholding foreign partnership for the term nonqualified intermediary, including when a nonwithholding foreign partnership may provide to a withholding agent a withholding statement that includes a chapter 4 withholding rate pool in lieu of information with respect to each partner that is a payee of a payment.

(v) *Withholding and reporting by a foreign partnership.* A nonwithholding foreign partnership described in this paragraph (c)(3) that receives an amount subject to withholding (as defined in § 1.1441–2(a)) shall be required to withhold and report such payment under chapter 3 of the Code and the regulations thereunder except as otherwise provided in this paragraph (c)(3)(v). A nonwithholding foreign partnership shall not be required to withhold and report if it has provided a valid nonwithholding foreign partnership withholding certificate, it has provided all of the information required by paragraph (c)(3)(iv) of this section (withholding statement), and it does not know, and has no reason to know, that another withholding agent failed to withhold the correct amount or failed to report the payment correctly under § 1.1461–1(c). A nonwithholding foreign partnership is also not required to withhold and report under this paragraph (c)(3) to the extent that withholding under chapter 4 was applied to a payment that is includible in the gross income of a partner in the partnership. See also § 1.1441–3(a)(2) for coordination rules when withholding under chapter 4 has been applied to a withholdable payment. A withholding foreign partnership's obligations to withhold and report shall be determined in accordance with its withholding foreign partnership agreement.

(d) * * *

(2) *Determination of partnership status as U.S. or foreign in the absence of documentation.* In the absence of a valid representation of U.S. partnership status in accordance with paragraph (b)(1) of this section or of foreign partnership status in accordance with paragraph (c)(2)(i) or (c)(3)(i) of this section, the withholding agent shall determine the classification of the payee under the presumptions set forth in § 1.1441–1(b)(3)(ii). If the withholding agent treats the payee as a partnership under § 1.1441–1(b)(3)(ii), the withholding agent shall apply the presumptions set forth in § 1.1441–1(b)(3)(iii)(A)(*1*) (applied by substituting the term *partnership* for the term *exempt recipient*) to determine whether to treat the partnership as a U.S. person or foreign person. For rules regarding reliable association with a withholding certificate from a domestic or a foreign partnership, see § 1.1441–1(b)(2)(vii).

(3) *Determination of partners' status in the absence of certain documentation.* If a nonwithholding foreign partnership has provided a nonwithholding foreign partnership withholding certificate under paragraph (c)(3)(iii) of this section that would be valid except that the withholding agent cannot reliably associate all or a portion of the payment with valid documentation from a partner of the partnership, then the withholding agent may apply the presumption rule of this paragraph (d)(3) with respect to all or a portion of the payment for which documentation has not been received. See § 1.1441–1(b)(2)(vii)(A) and (B) for rules regarding reliable association. The presumption rule of this paragraph (d)(3) also applies to a person that is presumed to be a foreign partnership under the rule of paragraph (d)(2) of this section. Any portion of a payment that the withholding agent cannot treat as reliably associated with valid documentation from a partner may be presumed made to a foreign payee. As a result, any payment of an amount subject to withholding is subject to withholding at a rate of 30 percent. Any payment that is presumed to be made to an undocumented foreign payee must be reported on Form 1042–S. See § 1.1461–1(c). For a payment described in this paragraph (d)(3) that is a withholdable payment, see § 1.1471–3(f)(5) for the presumption rule for determining the payee's chapter 4 status to determine whether withholding under chapter 4 applies to the payment.

(4) *Determination by a withholding foreign partnership of the status of its partners.* Except as otherwise provided in the agreement described in paragraph (c)(2) of this section, a withholding foreign partnership shall determine whether the partners or some other persons are the payees of the partners' distributive shares of any payment made by a withholding foreign partnership by applying the rules of § 1.1441–1(b)(2), paragraph (c)(1) of this section (in the case of a partner that is a foreign partnership), and paragraph (e)(3) of this section (in the case of a partner that is a foreign estate or a foreign trust). Further, the provisions of paragraph (d)(3) of this section shall apply to determine the status of partners and the applicable withholding rates to the extent that, at the time the foreign partnership is required to withhold on a payment, it cannot reliably associate the amount with documentation for any one or more of its partners.

(e) * * *

(3) * * *

(iii) *Coordination with chapter 4 for payments made to foreign simple trusts and foreign grantor trusts.* A withholding agent that makes a payment of U.S. source FDAP income to a foreign simple trust or foreign grantor trust that is a withholdable payment to which withholding under chapter 4 applies must apply the rules described in § 1.1473–1(a)(5)(vi) to determine when the payment is treated as made to a beneficiary or owner of the trust for purposes of chapter 4. In a case in which withholding applies under chapter 4 to a withholdable payment made to a foreign simple trust or foreign grantor trust, see § 1.1441–3(a)(2) to coordinate withholding otherwise required under this paragraph (e) with respect to the amount of the payment included in the gross income of the payee of the payment. For when a withholding agent may reliably associate a withholdable payment with a chapter 4 withholding rate pool in lieu of obtaining documentation for each payee included in the pool, see § 1.1441–1(e)(3)(iv)(C)(*2*) (substituting the term *nonwithholding foreign trust* for the term *nonqualified intermediary*).

* * * * *

(5) *Foreign simple trust and foreign grantor trust*—(i) *Reliance on claim of foreign simple trust or foreign grantor trust status.* A withholding agent may treat a person as a foreign simple trust or foreign grantor trust if it receives from that person a foreign simple trust or foreign grantor trust withholding certificate as described in paragraph (e)(5)(iii) of this section. A withholding agent must apply the presumption rules of §§ 1.1441–1(b)(3) and 1.6049–5(d) and paragraphs (d) and (e)(6) of this section to the extent it cannot, prior to the payment, reliably associate a payment (within the meaning of § 1.1441–1(b)(2)(vii)) with a valid foreign simple trust or foreign grantor trust withholding certificate, it cannot reliably determine how much of the payment relates to valid documentation provided by a payee (*e.g.,* a person that is not itself a nonqualified intermediary, flow-through entity, or U.S. branch) associated with the foreign simple trust or foreign grantor trust withholding certificate, or it does not have sufficient information to report the payment on Form 1042–S or Form 1099, if reporting is required. See § 1.1441–1(b)(2)(vii)(A) and (B). See, however, § 1.1441–1(e)(3)(iv)(C)(*2*) for when a withholding agent may reliably associate a withholdable payment with a chapter 4 withholding rate pool in lieu of obtaining documentation for each payee included in a pool (substituting the term *nonwithholding foreign trust* for the term *nonqualified intermediary*). See also § 1.1441–1(e)(3)(iv)(A) for when a withholding agent may reliably associate a payment with a chapter 4 withholding rate pool of U.S. payees.

(ii) *Reliance on claim of reduced withholding by a foreign simple trust or*

foreign grantor trust for its beneficiaries or owners. This paragraph (e)(5)(ii) describes the manner in which a withholding agent may rely on a claim of reduced withholding when making a payment to a foreign simple trust or foreign grantor trust. To the extent that a withholding agent treats a payment to a foreign simple trust or foreign grantor trust as a payment to payees other than the trust in accordance with paragraph (e)(3)(i) of this section, it may rely on a claim for reduced withholding by a beneficiary or owner if, prior to the payment, the withholding agent can reliably associate the payment (within the meaning of § 1.1441–1(b)(2)(vii)) with a valid withholding certificate or other appropriate documentation from a payee or beneficial owner that establishes entitlement to a reduced rate of withholding. A withholding certificate or other appropriate documentation that establishes entitlement to a reduced rate of withholding is a beneficial owner withholding certificate described in § 1.1441–1(e)(2)(i) or documentary evidence described in § 1.1441–6(c)(3) or (4) or in § 1.6049–5(c)(1) (for a beneficiary or owner claiming to be a foreign person and a beneficial owner, determined under the provisions of § 1.1441–1(c)(6)), a Form W–9 described in § 1.1441–1(d) (for a beneficiary or owner claiming to be a U.S. payee), a withholding foreign partnership withholding certificate described in paragraph (c)(2)(iv) of this section, or a withholding statement allocating the payment to a chapter 4 withholding rate pool of U.S. payees. For when the withholding agent can reliably associate the payment with a chapter 4 withholding rate pool, see paragraph (c)(3)(i) of this section. See also § 1.1441–3(a)(2) (coordinating withholding under chapter 3 when withholding under chapter 4 is applied to a withholdable payment). Unless a foreign simple trust or foreign grantor trust withholding certificate is provided for income treated as income effectively connected with the conduct of a trade or business in the United States, a claim must be presented for each payee's portion of the payment. When making a claim for several payees, the trust may present a single foreign simple trust or foreign grantor trust withholding certificate with which the payees' certificates or other appropriate documentation are associated. Where the foreign simple trust or foreign grantor trust withholding certificate is provided for income that is treated as effectively connected with the conduct of a trade or business in the United States under paragraph (e)(5)(iii)(D) of this section, the claim may be presented without having to identify any beneficiary's or grantor's distributive share of the payment.

(iii) * * *

(A) The name, permanent residence address (as described in § 1.1441–1(e)(2)(ii)), the employer identification number, if required, of the trust, the country under the laws of which the trust is created, the chapter 4 status of the trust if required for purposes of chapter 4 or if the trust provides (or will provide) a withholding statement associated with the Form W–8 allocating a payment to a chapter 4 withholding rate pool of U.S. payees under § 1.6049–4(c)(4) with respect to the nonwithholding foreign trust's owners and beneficiaries, and the GIIN of the trust (if applicable). If a nonwithholding foreign trust provides (or will provide) a chapter 4 withholding rate pool of U.S. payees as described in the preceding sentence, the trust must certify to its chapter 4 status as a participating FFI (including a reporting Model 2 FFI) or registered deemed-compliant FFI (including a reporting Model 1 FFI);

* * * * *

(iv) *Withholding statement provided by a foreign simple trust or foreign grantor trust and coordination with chapter 4.* The provisions of § 1.1441–1(e)(3)(iv) (regarding a withholding statement) shall apply to a foreign simple trust or foreign grantor trust by substituting the term *foreign simple trust* or *foreign grantor trust* for the term *nonqualified intermediary,* including when a withholding statement provided by a foreign simple trust or foreign grantor trust may include a chapter 4 withholding rate pool in lieu of information with respect to each owner or beneficiary that is a payee of a payment.

(v) *Withholding foreign trusts.* The IRS may enter into a withholding agreement with a foreign trust to treat the trust or estate as a withholding foreign trust. Such a withholding agreement shall generally follow the same principles as a withholding agreement with a withholding foreign partnership under paragraph (c)(2)(ii) of this section. A withholding agent may treat a payment to a withholding foreign trust in the same manner the withholding agent would treat a payment (including a withholdable payment) to a withholding foreign partnership. See § 1.1441–1(e)(5)(ii)(D). For a withholding foreign trust that is an FFI, the withholding agreement will require the withholding foreign trust to assume the requirements of either a participating FFI, registered deemed-compliant FFI, or an FFI treated as a deemed-compliant FFI under an applicable IGA that is subject to due diligence and reporting requirements with respect to its U.S. accounts similar to those applicable to a registered deemed-compliant FFI under § 1.1471–5(f)(1).

(6) * * *

(ii) *Determination of status as U.S. or foreign trust or estate in the absence of documentation.* In the absence of valid documentation that establishes the U.S. status of a trust or estate under paragraph (b)(1) of this section and of documentation that establishes the foreign status of a trust or estate under paragraph (e)(4) or (e)(5)(iii) of this section, the withholding agent shall determine the classification of the payee based upon the presumptions set forth in § 1.1441–1(b)(3)(ii). If, based upon those presumptions, the withholding agent classifies the payee as a trust or estate, the withholding agent shall apply the presumptions set forth in § 1.1441–1(b)(3)(iii)(A)(*1*) (applied by substituting the term *trust* for the term *exempt recipient*) to determine whether the trust or estate is a U.S. person or foreign person. An undocumented payee presumed to be a foreign trust shall be presumed to be a foreign complex trust. If a withholding agent has documentary evidence that establishes that an entity is a foreign trust, but the withholding agent cannot determine whether the foreign trust is a complex trust, a simple trust, or foreign grantor trust, the withholding agent shall presume that the trust is a foreign complex trust. Notwithstanding the preceding sentence, in the case of a foreign trust with a settlor that is a U.S. person for which a withholding agent has both a U.S. address and TIN, the withholding agent shall presume that the trust is a grantor trust when it cannot determine the status of the trust as a simple trust, complex trust, or grantor trust. See § 1.1471–3(f)(4) and (5) to determine the status of the payee for purposes of chapter 4.

* * * * *

(f) *Failure to receive withholding certificate timely or to act in accordance with applicable presumptions.* See applicable procedures described in § 1.1441–1(b)(7) in the event the withholding agent does not hold an appropriate withholding certificate or other appropriate documentation at the time of payment or fails to rely on the presumptions set forth in § 1.1441–1(b)(3) or in paragraph (d) or (e) of this section. For a payment that is a

withholdable payment, see § 1.1471–3(f) for the presumption rule for determining the payee's chapter 4 status.

(g) *Effective/applicability date.* This section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments made after December 31, 2000, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.)

§ 1.1441–5T [Removed]

■ **Par. 14.** Section 1.1441–5T is removed.

■ **Par. 15.** Section 1.1441–6 is amended by revising paragraphs (a), (b)(1), (b)(2)(i) and (iv), (c)(1), (c)(5)(i), and (i) to read as follows:

§ 1.1441–6 Claim of reduced withholding under an income tax treaty.

(a) *In general.* The rate of withholding on a payment of income subject to withholding may be reduced to the extent provided under an income tax treaty in effect between the United States and a foreign country. Most benefits under income tax treaties are to foreign persons who reside in the treaty country. In some cases, benefits are available under an income tax treaty to U.S. citizens or U.S. residents or to residents of a third country. See paragraph (b)(5) of this section for claims of benefits by U.S. persons. If the requirements of this section are met, the amount withheld from the payment may be reduced at source to account for the treaty benefit. See, however, § 1.1471–2(a) and § 1.1472–1(b) for when withholding at source on a withholdable payment may not be reduced to account for a treaty benefit such that the beneficial owner of the payment may need to file a claim for refund to obtain a refund for the overwithheld amount of tax. See also § 1.1441–4(b)(2) for rules regarding claims of a reduced rate of withholding under an income tax treaty in the case of compensation from personal services and § 1.1441–4(c)(1) for rules regarding claims of a reduced rate of withholding under an income tax treaty in the case of scholarship and fellowship income.

(b) *Reliance on claim of reduced withholding under an income tax treaty*—(1) *In general.* The withholding imposed under section 1441, 1442, or 1443 on any payment to a foreign person is eligible for reduction under the terms of an income tax treaty only to the extent that such payment is treated as derived by a resident of an applicable treaty jurisdiction, such resident is a beneficial owner, and all other requirements for benefits under the treaty are satisfied. See section 894 and the regulations under section 894 to determine whether a resident of a treaty country derives the income. Absent actual knowledge or reason to know otherwise, a withholding agent may rely on a claim that a beneficial owner is entitled to a reduced rate of withholding based upon an income tax treaty if, prior to the payment, the withholding agent can reliably associate the payment with a beneficial owner withholding certificate, as described in § 1.1441–1(e)(2), that contains the information necessary to support the claim, or, in the case of a payment of income described in paragraph (c)(2) of this section made outside the United States with respect to an offshore obligation, documentary evidence described in paragraphs (c)(3), (c)(4), and (c)(5) of this section. See § 1.6049–5(e) for the definition of payments made outside the United States and § 1.6049–5(c)(1) for the definition of an offshore obligation. For purposes of this paragraph (b)(1), a beneficial owner withholding certificate described in § 1.1441–1(e)(2)(i) contains information necessary to support the claim for a treaty benefit only if it includes the beneficial owner's taxpayer identifying number (except as otherwise provided in paragraph (c)(1) and (g) of this section, or the beneficial owner provides its foreign tax identifying number issued by its country of residence and such country has with the United States an income tax treaty or information exchange agreement in effect), includes the representations that the beneficial owner derives the income under section 894 and the regulations under section 894, if required, and with regard to a beneficial owner that is an entity, includes a statement that the entity meets the limitation on benefits provisions of the treaty, if any. For claims for treaty benefits for scholarship and fellowship income, the beneficial owner withholding certificate must contain the beneficial owner's U.S. taxpayer identifying number (not a foreign taxpayer identifying number). The withholding certificate must also contain any other representations required by this section and any other information, certifications, or statements as may be required by the form or accompanying instructions in addition to, or in place of, the information and certifications described in this section. Absent actual knowledge or reason to know that the claims are unreliable or incorrect (applying the standards of knowledge in § 1.1441–7(b)), a withholding agent may rely on the claims made on a withholding certificate or on documentary evidence. A withholding agent may also rely on the information contained in a withholding statement provided under §§ 1.1441–1(e)(3)(iv) and 1.1441–5(c)(3)(iv) and (e)(5)(iv) to determine whether the appropriate statements regarding section 894 and limitation on benefits have been provided in connection with documentary evidence. The Internal Revenue Service (IRS) may apply the provisions of § 1.1441–1(e)(1)(ii)(B) to notify the withholding agent that the certificate cannot be relied upon to grant benefits under an income tax treaty. See § 1.1441–1(e)(4)(viii) regarding reliance on a withholding certificate by a withholding agent. The provisions of § 1.1441–1(b)(3)(iv) dealing with a 90-day grace period shall apply for purposes of this section.

(i) [Reserved]. For further guidance, § 1.1441–6T(b)(1)(i).

(ii) [Reserved]. For further guidance, § 1.1441–6T(b)(1)(ii).

(2) *Payment to fiscally transparent entity*—(i) *In general.* If the person claiming a reduced rate of withholding under an income tax treaty is an interest holder of an entity that is considered to be fiscally transparent (as defined in the regulations under section 894) by the interest holder's jurisdiction with respect to an item of income, then, with respect to such income derived by that person through the entity, the entity shall be treated as a flow-through entity and may provide a flow-through withholding certificate with which the withholding certificate or other documentary evidence of the interest holder that supports the claim for treaty benefits is associated. In the case of a payment that is a withholdable payment, see, however, § 1.1471–3(c) for determining the payee of the payment and §§ 1.1471–2(a) and 1472–1(b) for when withholding at source may apply to the payment based on the status of the payee notwithstanding a claim for treaty benefits made under this paragraph (b)(2) by an interest holder in the payee. In such a case, the interest holder may file a claim for refund of the overwithheld amount of tax. For purposes of this paragraph (b)(2)(i), interest holders do not include any direct or indirect interest holders that are themselves treated as fiscally transparent entities with respect to that income by the interest holder's jurisdiction. See § 1.1441–1(c)(23) and (e)(3)(i) for the definition of flow-through entity and flow-through withholding certificate. The entity may provide a beneficial owner withholding

certificate, or beneficial owner documentation, with respect to any remaining portion of the income to the extent the entity is receiving income and is not treated as fiscally transparent by its own jurisdiction. Further, the entity may claim a reduced rate of withholding with respect to the portion of a payment for which it is not treated as fiscally transparent if it meets all the requirements to make such a claim and, in the case of treaty benefits, it provides the documentation required by paragraph (b)(1) of this section. If dual claims, as described in paragraph (b)(2)(iii) of this section, are made, multiple withholding certificates may have to be furnished. Multiple withholding certificates may also have to be furnished if the entity receives income for which a reduction of withholding is claimed under a provision of the Internal Revenue Code (*e.g.,* portfolio interest) and income for which a reduction of withholding is claimed under an income tax treaty.

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(iv) *Examples.* The following examples illustrate the rules of paragraph (b)(2) of this section. Each of the following examples describes a payment of U.S. source royalties, which are not withholdable payments under chapter 4. See § 1.1473–1(a)(4)(iii) (describing nonfinancial payments that are not treated as withholdable payments). Thus, withholding under chapter 4 shall not apply with respect to the U.S. source royalties in any of the following examples:

Example 1. (i) *Facts.* Entity E is a business organization formed under the laws of country Y. Country Y has an income tax treaty with the United States. The treaty contains a limitation on benefits provision. E receives U.S. source royalties from withholding agent W and claims a reduced rate of withholding under the U.S.-Y tax treaty on its own behalf (rather than on behalf of its interest holders). E furnishes a beneficial owner withholding certificate described in paragraph (b)(1) of this section that represents that E is a resident of country Y (within the meaning of the U.S.-Y tax treaty), is the beneficial owner of the income, derives the income under section 894 and the regulations under section 894, and is not precluded from claiming benefits by the treaty's limitation on benefits provision.

(ii) *Analysis.* Absent actual knowledge or reason to know otherwise, as described in paragraph (b)(1) of this section, W may rely on the representations made by E to apply a reduced rate of withholding.

Example 2. (i) *Facts.* The facts are the same as under *Example 1,* except that one of E's interest holders, H, is an entity organized in country Z. The U.S.-Z tax treaty reduces the rate on royalties to zero whereas the rate on royalties under the U.S.-Y tax treaty applicable to E is 5%. H is not fiscally transparent under country Z's tax law with respect to such income. H furnishes a beneficial owner withholding certificate to E that represents that H derives, within the meaning of section 894 and the regulations under section 894, its share of the royalty income paid to E as a resident of country Z, is the beneficial owner of the royalty income, and is not precluded from claiming treaty benefits by virtue of the limitation on benefits provision in the U.S.-Z treaty. E furnishes to W a flow-through withholding certificate described in § 1.1441–1(e)(3)(i) to which it attaches H's beneficial owner withholding certificate and a withholding statement for the portion of the payment that H claims as its distributive share of the royalty income. E also furnishes to W a beneficial owner withholding certificate for itself for the portion of the payment that H does not claim as its distributive share.

(ii) *Analysis.* Absent actual knowledge or reason to know otherwise, as described in paragraph (b)(1) of this section, W may rely on the documentation furnished by E to treat the royalty payment to a single foreign entity (E) as derived by different residents of tax treaty countries as a result of the claims presented under different treaties. W may, at its option, grant dual treatment, that is, a reduced rate of zero percent under the U.S.-Z treaty on the portion of the royalty payment that H claims to derive as a resident of country Z and a reduced rate of 5% under the U.S.-Y treaty for the balance. However, under paragraph (b)(2)(iii) of this section, W may, at its option, treat E as the only relevant person deriving the royalty and grant benefits under the U.S.-Y treaty only.

Example 3. (i) *Facts.* E is a business organization formed under the laws of country X. Country X has an income tax treaty with the United States. E has two interest holders, H1, organized in country Y, and H2, organized in country Z. E receives from W, a U.S. withholding agent, a payment of U.S. source royalties and interest, with respect to an obligation issued before July 1, 2014, that is eligible for the portfolio interest exception under sections 871(h) and 881(c), provided W receives the appropriate beneficial owner statement required under section 871(h)(5). E is classified as a corporation under U.S. tax law principles. Country X, E's country of organization, treats E as an entity that is not fiscally transparent with respect to items of income under the regulations under section 894. Under the U.S.-X income tax treaty, royalties are subject to a 5% rate of withholding. Country Y, H1's country of organization, treats E as fiscally transparent with respect to items of income under section 894 and H1 as not fiscally transparent with respect to items of income. Under the country Y–U.S. income tax treaty, royalties are exempt from U.S. tax. Country Z, H2's country of organization, treats E as not fiscally transparent under section 894 with respect to items of income. E provides W with a flow-through beneficial owner withholding certificate with which it associates a beneficial owner withholding certificate from H1. H1's withholding certificate states that H1 is a resident of country Y, derives the royalty income under section 894, meets the applicable limitation on benefits provisions of the U.S.-Y treaty, and is the beneficial owner of the income. The withholding statement attached to E's flow-through withholding certificate allocates one-half of the royalty payment to H1. E also provides W with a beneficial owner withholding certificate for the interest income and the remaining one-half of the royalty income. The withholding certificate states that E is a resident of country X, derives the royalty income under section 894, meets the limitation on benefits provisions of the U.S.-X treaty, and is the beneficial owner of the income.

(ii) *Analysis.* Absent actual knowledge or reason to know that the claims are incorrect, as described in paragraph (b)(1), W may treat one-half of the royalty derived by E as subject to a 5% withholding rate and one-half of the royalty as derived by H1 and subject to no withholding. Further, it may treat all of the interest as being paid to E and as qualifying for the portfolio interest exception. W can, at its option, treat the entire royalty as paid to E and subject it to withholding at a 5% rate of withholding. In that case, H1 would be entitled to claim a refund with respect to its one-half of the royalty.

Example 4. [Reserved]. For further guidance, see § 1.1441–6T(b)(2)(iv) *Example 4.*

(c) *Exemption from requirement to furnish a taxpayer identifying number and special documentary evidence rules for certain income*—(1) *General rule.* In the case of income described in paragraph (c)(2) of this section, a withholding agent may rely on a beneficial owner withholding certificate described in paragraph (b)(1) of this section without regard to the requirement that the withholding certificate include the beneficial owner's taxpayer identifying number. In the case of a payment of income not described in paragraph (c)(2) of this section, a withholding agent may rely on a withholding certificate that includes the beneficial owner's foreign taxpayer identifying number described in paragraph (b)(1) of this section instead of the beneficial owner's taxpayer identifying number. In the case of payments of income described in paragraph (c)(2) of this section made outside the United States (as defined in § 1.6049–5(e)) with respect to an offshore obligation (as defined in § 1.6049–5(c)(1)), a withholding agent may, as an alternative to a withholding certificate described in paragraph (b)(1) of this section, rely on a certificate of residence described in paragraph (c)(3) of this section or documentary evidence described in paragraph (c)(4) of this section, relating to the beneficial owner, that the withholding agent has reviewed and maintains in its records in accordance with § 1.1441–1(e)(4)(iii). In the case of a payment to a person other than an individual, the certificate of

residence or documentary evidence must be accompanied by the statements described in paragraphs (c)(5)(i) and (ii) of this section regarding limitation on benefits and whether the amount paid is derived by such person or by one of its interest holders. The withholding agent maintains the reviewed documents by retaining the original, certified copy, or photocopy (microfiche, electronic scan, or similar means of electronic storage) of such documents. With respect to documentary evidence, the withholding agent must also note in its records the date on which the documents were received and reviewed. This paragraph (c)(1) shall not apply to amounts that are exempt from withholding based on a claim that the income is effectively connected with the conduct of a trade or business in the United States.

* * * * *

(5) * * *

(i) [Reserved]. For further guidance, see § 1.1441–6T(c)(5)(i).

* * * * *

(i) *Effective/applicability dates*—(1) *General rule.* Except as otherwise provided in paragraph (i)(2) of this section, this section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014 (except for payments to which paragraph (c)(1) applies, in which case substitute March 5, 2014, for June 30, 2014), and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, revised April 1, 2016. For payments made after December 31, 2001, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2013.)

(2) *Dividend equivalents.* Paragraph (h) of this section applies to payments made on or after December 5, 2013.

(3) [Reserved]. For further guidance, see § 1.1441–6T(i)(3).

■ **Par. 16.** Section 1.1441–6T is revised to read as follows:

§ 1.1441–6T Claim of reduced withholding under an income tax treaty (temporary).

(a) through (b)(1) introductory text [Reserved]. For further guidance, see § 1.1441–6(a) through (b)(1) introductory text.

(i) *Identification of limitation on benefits provisions.* In conjunction with the representation that the beneficial owner meets the limitation on benefits provision of the applicable treaty, if any, required by paragraph (b)(1) of this section, a beneficial owner withholding certificate must also identify the specific limitation on benefits provision of the article (if any, or a similar provision) of the treaty upon which the beneficial owner relies to claim the treaty benefit. A withholding agent may rely on the beneficial owner's claim regarding its reliance on a specific limitation on benefits provision absent actual knowledge that such claim is unreliable or incorrect.

(ii) *Reason to know based on existence of treaty.* For purposes of this paragraph (b)(1), a withholding agent's reason to know that a beneficial owner's claim to a reduced rate of withholding under an income tax treaty is unreliable or incorrect includes a circumstance where the beneficial owner is claiming benefits under an income tax treaty that does not exist or is not in force. A withholding agent may determine whether a tax treaty is in existence and is in force by checking the list maintained on the IRS Web site at *https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z* (or any replacement page on the IRS Web site) or in the State Department's annual Treaties in Force publication.

(b)(2)(i) through (iv) Example 3 [Reserved]. For further guidance, see § 1.1441–6(b)(2)(i) through (b)(2)(iv) Example 3.

Example 4. (i) *Facts.* Entity E is a business organization formed under the laws of country Y. Country Y has an income tax treaty with the United States that contains a limitation on benefits provision. E receives U.S. source royalties from withholding agent W. E furnishes a beneficial owner withholding certificate to W claiming a reduced rate of withholding under the U.S.-Y tax treaty. However, E's beneficial owner withholding certificate does not specifically identify the limitation on benefits provision that E satisfies.

(ii) *Analysis.* Because E's withholding certificate does not specifically identify the limitation on benefits provision under the U.S.-Y tax treaty that E satisfies as required by paragraph (b)(1)(i) of this section, W cannot rely on E's withholding certificate to apply the reduced rate of withholding claimed by E.

(c) introductory text through (c)(4) [Reserved]. For further guidance, see § 1.1441–6(c) through (c)(4).

(5) *Statements regarding entitlement to treaty benefits*—(i) *Statement regarding conditions under a limitation on benefits provision.* In addition to the documentary evidence described in paragraph (c)(4)(ii) of this section, a taxpayer that is not an individual must provide a statement that it meets one or more of the conditions set forth in the limitation on benefits article (if any, or in a similar provision) contained in the applicable tax treaty and must identify the specific limitation on benefits provision of the article (if any, or a similar provision) of the treaty upon which the taxpayer relies to claim the treaty benefit.

(c)(5)(ii) through (i)(2) [Reserved]. For further guidance, see § 1.1441–6(c)(5)(ii) through (i)(2).

(3) *Effective/applicability date.* This section applies on January 6, 2017.

(j) *Expiration date.* The applicability of this section expires on December 30, 2019.

■ **Par. 17** Section 1.1441–7 is amended by:

■ 1. Revising paragraph (b), (c) and (f)(2)(ii).

■ 2. Removing paragraph (f)(3).

■ 3. Revising paragraph (g).

■ 4. Removing paragraph (h).

The revisions read as follows:

§ 1.1441–7 General provisions relating to withholding agents.

* * * * *

(b) *Standards of knowledge*—(1) *In general.* A withholding agent must withhold at the full 30-percent rate under section 1441, 1442, or 1443(a) or at the full 4-percent rate under section 1443(b) if it has actual knowledge or reason to know that a claim of U.S. status or of a reduced rate of withholding under section 1441, 1442, or 1443 is unreliable or incorrect. A withholding agent shall be liable for tax, interest, and penalties to the extent provided under sections 1461 and 1463 and the regulations under those sections if it fails to withhold the correct amount despite its actual knowledge or reason to know the amount required to be withheld. For purposes of the regulations under sections 1441, 1442, and 1443, a withholding agent may rely on information or certifications contained in, or associated with, a withholding certificate or other documentation furnished by or for a beneficial owner or payee unless the withholding agent has actual knowledge or reason to know that the information or certifications are incorrect or unreliable and, if based on such knowledge or reason to know, it should withhold (under chapter 3 of the Code or another withholding provision of the Code) an amount greater than would be the case if it relied on the information or certifications, or it should report (under chapter 3 of the Code or under another provision of the Code) an amount that would not otherwise be reportable if it relied on the information or certifications. See § 1.1441–1(e)(4)(viii) for applicable reliance rules. A withholding agent that has received notification by the Internal Revenue Service (IRS) that a claim of U.S. status or of a reduced rate is incorrect has actual knowledge beginning on the date that is 30 calendar days after the date the notice is received. A withholding agent that fails to act in accordance with

the presumptions set forth in §§ 1.1441–1(b)(3), 1.1441–4(a), 1.1441–5 (d) and (e), or 1.1441–9(b)(3) may also be liable for tax, interest, and penalties. See § 1.1441–1(b)(3)(ix) and (7). In the case of a withholding agent making a withholdable payment to a payee that the withholding agent is required to treat as a foreign entity, see § 1.1471–3(e) for standards of knowledge and §§ 1.1471–2 and 1.1472–1(b) for withholding that may apply under chapter 4. A withholding agent is allowed to apply the rules under paragraphs (b)(5) and (b)(8) of this section as in effect and contained in 26 CFR part 1 revised April 1, 2013, to accounts opened, and obligations entered into, by an entity on or after July 1, 2014, and before January 1, 2015.

(2) *Reason to know.* A withholding agent shall be considered to have reason to know if its knowledge of relevant facts or of statements contained in the withholding certificates or other documentation is such that a reasonably prudent person in the position of the withholding agent would question the chapter 3 claims made. For an obligation other than a preexisting obligation, a withholding agent will have reason to know that a chapter 3 claim made by the holder of the obligation (account holder) is unreliable or incorrect if any information contained in its account opening files or other files pertaining to the obligation (account information), including documentation collected for purposes of AML due diligence (as defined under § 1.1471–1(b)(4)), conflicts with the account holder's claim. A withholding agent will not, however, be considered to have reason to know that a person's chapter 3 claim is unreliable or incorrect based on documentation collected for AML due diligence until the date that is 30 days after the obligation is executed (or the account is opened for an obligation that is an account with a financial institution).

(3) *Financial institutions—limits on reason to know*—(i) *In general.* For purposes of this paragraph (b)(3) and paragraphs (b)(4) through (10) of this section, the terms withholding certificate, documentary evidence, and documentation are defined in § 1.1441–1(c)(16), (17), and (18). Except as otherwise provided in paragraphs (b)(4) through (9) of this section, a withholding agent that is a financial institution under § 1.1471–5(e), an insurance company (without regard to whether such company is a specified insurance company), or a broker or dealer in securities that maintains or opens an account for a beneficial owner (a direct account holder) has reason to know that documentation provided by the direct account holder is unreliable or incorrect only if one or more of the circumstances described in paragraphs (b)(4) through (9) of this section exist. If a direct account holder has provided documentation that is unreliable or incorrect under the rules of paragraph (b)(4) through (9) of this section, the withholding agent may require new documentation. Alternatively, the withholding agent may rely on the documentation originally provided if the rules of paragraphs (b)(4) through (9) of this section permit such reliance based on additional statements and documentation obtained by the withholding agent from the beneficial owner. Paragraph (b)(10) of this section provides rules regarding reason to know for withholding agents that receive beneficial owner documentation from persons (indirect account holders) that have an account relationship with, or an ownership interest in, a direct account holder of the withholding agent. Paragraph (b)(11) of this section provides limitations on a withholding agent's reason to know for multiple obligations held by the same person. Paragraph (b)(12) of this section defines a reasonable explanation provided by an individual with respect to the individual's claim of foreign status. For rules regarding reliance on Form W–9, see § 31.3406(h)–3(e)(2) of this chapter. For payments that are withholdable payments, see § 1.1471–3(e)(3) and (4) for additional rules regarding a withholding agent's reason to know with respect to a payee's claim of chapter 4 status and § 1.1471–3(f) for presumption rules that apply when the claim of chapter 4 status is unreliable or incorrect.

(ii) *Limits on reason to know for preexisting obligations.* With respect to a preexisting obligation, a withholding agent that has documented the foreign status of the direct account holder for purposes of chapter 3 or chapter 61 before July 1, 2014, may continue to rely on such documentation without regard to a U.S. phone number or U.S. place of birth. If, however, the withholding agent reviews documentation for an individual account holder claiming foreign status that contains a U.S. place of birth (as described in paragraph (b)(5)(ii) of this section) or if the withholding agent is notified of a change in circumstances under the criteria of paragraphs (b)(5) and (8) of this section (as effective on July 1, 2014), the obligation will be treated as having experienced a change in circumstances under § 1.1441–1(e)(4)(ii)(D) as of the date that the withholding agent reviews the documentation or receives the notification, and the withholding agent will then have reason to know that the documentation is unreliable or incorrect. With respect to an obligation held by an entity, a withholding agent is not required to treat the additional U.S. indicia described in this paragraph (b) as a change in circumstances under § 1.1441–1(e)(4)(ii)(D) before January 1, 2015. See § 1.1441–1(b)(3)(iv) for the grace period following a change in circumstances. For purposes of this rule, a direct account holder will be considered documented prior to July 1, 2014, without regard to whether the withholding agent obtains renewal documentation for the account holder on or after July 1, 2014, pursuant to the requirements of § 1.1441–1(e)(4)(ii)(A).

(4) *Rules applicable to withholding certificates*—(i) *In general.* A withholding agent has reason to know that a beneficial owner withholding certificate provided by a direct account holder is unreliable or incorrect if the withholding certificate is incomplete with respect to any item on the certificate that is relevant to the claims made by the direct account holder, the withholding certificate contains any information that is inconsistent with the direct account holder's claim, the withholding agent has account information that is inconsistent with the direct account holder's claim, or the withholding certificate lacks information necessary to establish entitlement to a reduced rate of withholding. For purposes of establishing a direct account holder's status as a foreign person or resident of a treaty country a withholding certificate shall be considered unreliable or inconsistent with an account holder's claims only if it is not reliable under the rules of paragraphs (b)(5) and (6) of this section. A withholding agent that relies on an agent to review and maintain a withholding certificate is considered to know or have reason to know the facts within the knowledge of the agent.

(ii) *Examples.* The rules of paragraph (b)(4) of this section are illustrated by the following examples:

Example 1. F, a foreign person that has a direct account relationship with USB, a bank that is a U.S. person, provides USB with a beneficial owner withholding certificate for the purpose of claiming a reduced rate of withholding on U.S. source dividends (which is a withholdable payment). F resides in a treaty country that has a limitation on benefits provision in its income tax treaty with the United States. The withholding certificate includes a certification of F's status for chapter 4 purposes to except the payment from withholding under chapter 4, but does not contain a statement regarding

limitation on benefits or deriving the income under section 894 as required by § 1.1441–6(b)(1). USB cannot rely on the withholding certificate to grant a reduced rate of withholding for chapter 3 purposes because it is incomplete with respect to the claim made by F.

Example 2. F, a foreign person and entity that has a direct account relationship with USB, a broker that is a U.S. person, provides USB with a withholding certificate for the purpose of claiming the portfolio interest exception under section 881(c) with respect to interest paid on an obligation issued before July 1, 2014. The payment of interest is not a withholdable payment under § 1.1471–2(b) (referring to payments made with respect to grandfathered obligations), and, therefore, withholding does not apply to the payment under chapter 4. See § 1.1441–3(c)(4)(i) for rules coordinating withholding under chapters 3 and 4. F indicates on its withholding certificate, however, that it is a partnership. USB may not treat F as a beneficial owner of the interest for purposes of the portfolio interest exception because F has indicated on its withholding certificate that it is a foreign partnership, and such entity classification is inconsistent with its claim as a beneficial owner.

(5) *Withholding certificate—establishment of foreign status.* A withholding agent has reason to know that a beneficial owner withholding certificate (as defined in § 1.1441–1(e)(2), but excluding a Form W–8ECI) provided by a direct account holder is unreliable or incorrect for purposes of establishing the account holder's status as a foreign person as set forth in paragraphs (b)(5)(i) through (iii) of this section.

(i) *Classification of U.S. status, U.S. address, or U.S. telephone number.* A withholding certificate is unreliable or incorrect if the withholding agent has classified the person as a U.S. person in its account information, the withholding certificate has a current permanent residence address (as defined in § 1.1441–1(e)(2)(ii)) in the United States, the withholding certificate has a current mailing address in the United States, the withholding agent has a current residence or mailing address as part of its account information that is an address in the United States, or the direct account holder notifies the withholding agent of a new residence or mailing address in the United States (whether or not provided on a withholding certificate). A withholding agent also has reason to know that a withholding certificate provided by a person is unreliable or incorrect if the withholding agent has a current telephone number for the account holder in the United States and has no telephone number for the account holder outside of the United States. When any of the foregoing U.S. indicia are present, a withholding agent may nevertheless rely on the beneficial owner withholding certificate to establish the account holder's foreign status if it may do so under the provisions of paragraph (b)(5)(i)(A) or (B) of this section.

(A) A withholding agent may treat a direct account holder as a foreign person if the beneficial owner withholding certificate has been provided by an individual and—

(*1*) The withholding agent has in its possession or obtains documentary evidence establishing foreign status (as described in § 1.1471–3(c)(5)(i)) that does not contain a U.S. address and the individual provides the withholding agent with a reasonable explanation, in writing, supporting the claim of foreign status (as defined in paragraph (b)(12) of this section);

(*2*) For a payment made outside the U.S. with respect to an offshore obligation (as described in § 1.6049–5(c)(1)), the withholding agent has in its possession or obtains documentary evidence establishing foreign status (as described in § 1.1471–3(c)(5)(i)), that does not contain a U.S. address;

(*3*) For a payment made with respect to an offshore obligation (with offshore obligation defined as in § 1.6049–5(c)(1)), the withholding agent classifies the individual as a resident of the country in which the obligation is maintained, the withholding agent is required to report a payment made to the individual annually on a tax information statement that is filed with the tax authority of the country in which the office is located as part of that country's resident reporting requirements, and that country has a tax information exchange agreement or income tax treaty in effect with the United States; or

(*4*) For a case in which the withholding agent classified the account holder as a U.S. person in its account information, the withholding agent has in its possession or obtains documentary evidence described in § 1.1471–3(c)(5)(i)(B) evidencing citizenship in a country other than the United States.

(B) A withholding agent may treat a direct account holder as a foreign person if the beneficial owner withholding certificate has been provided by an entity that the withholding agent does not know, or does not have reason to know, is a flow-through entity and—

(*1*) The withholding agent has in its possession or obtains documentation establishing foreign status that substantiates that the entity is actually organized or created under the laws of a foreign country; or

(*2*) For a payment made with respect to an offshore obligation (with offshore obligation defined as in § 1.6049–5(c)(1)), the withholding agent classifies the entity as a resident of the country in which the account is maintained, the withholding agent is required to report a payment made to the entity annually on a tax information statement that is filed with the tax authority of the country in which the office is located as part of that country's resident reporting requirements, and that country has a tax information exchange agreement or income tax treaty in effect with the United States.

(ii) *U.S. place of birth.* A withholding agent has reason to know that a withholding certificate claiming foreign status provided by a direct account holder that is an individual is unreliable or incorrect if the withholding agent has, either on accompanying documentation or as part of its account information, an unambiguous indication of a place of birth for the individual in the United States. A withholding agent may treat the individual as a foreign person, notwithstanding the U.S. place of birth, if the withholding agent has in its possession or obtains documentary evidence described in § 1.1471–3(c)(5)(i)(B) evidencing citizenship in a country other than the United States and either a copy of the individual's Certificate of Loss of Nationality of the United States or a reasonable written explanation of the account holder's renunciation of U.S. citizenship or the reason the account holder did not obtain U.S. citizenship at birth.

(iii) *Standing instructions with respect to offshore obligations.* A beneficial owner withholding certificate is unreliable or incorrect if it is provided with respect to an offshore obligation (as defined in § 1.6049–5(c)(1)) of a direct account holder that has provided standing instructions to pay amounts to an address or an account maintained in the United States. The withholding agent may treat the account holder as a foreign person, however, if the account holder provides either a reasonable explanation in writing that supports its foreign status or documentary evidence establishing foreign status described in § 1.1471–3(c)(5)(i).

(6) *Withholding certificate—claim of reduced rate of withholding under treaty.* A withholding agent has reason to know that a withholding certificate (other than Form W–9) provided by a direct account holder is unreliable or incorrect for purposes of establishing that the account holder is a resident of a country with which the United States

has an income tax treaty if it is described in paragraphs (b)(6)(i) through (iii) of this section.

(i) *Permanent residence address.* A beneficial owner withholding certificate is unreliable or incorrect if the permanent residence address on the beneficial owner withholding certificate is not in the country whose treaty is invoked, or the direct account holder notifies the withholding agent of a new permanent residence address that is not in the treaty country. A withholding agent may, however, treat a direct account holder as entitled to a reduced rate of withholding under an income tax treaty if the account holder provides a reasonable explanation for the permanent residence address outside the treaty country (*e.g.,* the address is the address of a branch of the beneficial owner located outside the treaty country in which the entity is a resident) or the withholding agent has in its possession or obtains documentary evidence described in § 1.1471–3(c)(5)(i) that establishes residency in a treaty country.

(ii) *Mailing address.* A beneficial owner withholding certificate is unreliable or incorrect if the permanent residence address on the withholding certificate is in the applicable treaty country but the withholding certificate contains a mailing address outside the treaty country or the withholding agent has a current mailing address as part of its account information for the direct account holder that is outside the treaty country. A mailing address that is a P.O. Box, in-care-of address, or address at a financial institution (if the financial institution is not a beneficial owner) shall not preclude a withholding agent from treating the account holder as a resident of a treaty country if such address is in the treaty country. If a withholding agent has a mailing address (whether or not contained on the withholding certificate) outside the applicable treaty country, the withholding agent may nevertheless treat a direct account holder as a resident of an applicable treaty country if—

(A) The withholding agent has in its possession or obtains documentary evidence described in § 1.1471–3(c)(5)(i) supporting the account holder's claim of residence in the applicable treaty country (and the additional documentation does not contain an address outside the treaty country);

(B) The withholding agent has in its possession, or obtains, documentation that establishes that the direct account holder is an entity organized in a treaty country (or an entity managed and controlled in a treaty country, if the applicable treaty so requires);

(C) The withholding agent knows that the address outside the applicable treaty country (other than a P.O. box, or in-care-of address) is a branch of the account holder that is an entity that is a resident of the applicable treaty country; or

(D) The withholding agent obtains a written statement from the direct account holder that reasonably establishes entitlement to treaty benefits.

(iii) *Standing instructions.* A beneficial owner withholding certificate is unreliable or incorrect to establish entitlement to a reduced rate of withholding under an income tax treaty if the direct account holder has standing instructions to pay amounts directing the withholding agent to pay amounts from its account to an address or an account outside the treaty country unless the account holder provides a reasonable explanation, in writing, or the withholding agent has in its possession or obtains documentary evidence described in § 1.1471–3(c)(5)(i) establishing the account holder's residence in the applicable treaty country.

(7) *Documentary evidence.* A withholding agent shall not treat documentary evidence provided by a direct account holder as valid if the documentary evidence does not reasonably establish the identity of the person presenting the documentary evidence. For example, documentary evidence is not valid if it is provided in person by a direct account holder that is a natural person and the photograph or signature on the documentary evidence, if any, does not match the appearance or signature of the person presenting the document. A withholding agent shall not rely on documentary evidence to reduce the rate of withholding that would otherwise apply under the presumption rules of §§ 1.1441–1(b)(3), 1.1441–5(d) and (e)(6), and 1.6049–5(d) if the documentary evidence contains information that is inconsistent with the direct account holder's claim of a reduced rate of withholding, the withholding agent has other account information that is inconsistent with the direct account holder's claim, or the documentary evidence lacks information necessary to establish entitlement to a reduced rate of withholding. For example, if a direct account holder provides documentary evidence to claim treaty benefits and the documentary evidence establishes the direct account holder's status as a foreign person and a resident of a treaty country, but the account holder fails to provide the treaty statements required by § 1.1441–6(c)(5), the documentary evidence does not establish the direct account holder's entitlement to a reduced rate of withholding. For purposes of establishing a direct account holder's status as a foreign person or resident of a country with which the United States has an income tax treaty, documentary evidence shall be considered unreliable or incorrect only if it is not reliable under the rules of paragraph (b)(8) or (9) of this section.

(8) *Documentary evidence—establishment of foreign status.* A withholding agent has reason to know that documentary evidence is unreliable or incorrect for purposes of establishing the direct account holder's status as a foreign person if the documentary evidence is described in paragraphs (b)(8)(i), (ii), (iii), or (iv) of this section.

(i) *Documentary evidence received prior to January 1, 2001.* A withholding agent shall not treat documentary evidence provided by a direct account holder before January 1, 2001, as valid for purposes of establishing the account holder's status as a foreign person if it has actual knowledge that the account holder is a U.S. person or if it has a mailing or residence address for the account holder in the United States. If a withholding agent has an address for the direct account holder in the United States, the withholding agent may nevertheless treat the account holder as a foreign person if it can so treat the account holder under the rules of paragraph (b)(8)(ii) of this section. See, however, paragraph (b)(3)(ii) of this section regarding changes in circumstances with respect to preexisting obligations.

(ii) *Documentary evidence received after December 31, 2000.* A withholding agent shall not treat documentary evidence provided by an account holder after December 31, 2000, as valid for purposes of establishing the direct account holder's foreign status if the withholding agent does not have a permanent residence address for the account holder. Documentary evidence is also unreliable or incorrect to establish a direct account holder's status as a foreign person if the withholding agent has classified the account holder as a U.S. person in its account information, if the withholding agent has a current mailing or permanent residence address (whether or not on the documentation) for the direct account holder in the United States, the direct account holder notifies the withholding agent of a new residence or mailing address in the United States, or if the withholding agent has a current

telephone number for the account holder in the United States and has no telephone number for the account holder outside of the United States. Notwithstanding the foregoing, a withholding agent may rely on documentary evidence as establishing the direct account holder's foreign status if it may do so under the provisions of paragraph (b)(8)(ii)(A) or (B) of this section.

(A) *Treatment of individual's foreign status.* A withholding agent may treat a direct account holder that is an individual as a foreign person even if it has any of the U.S. indicia described in this paragraph for the account holder if—

(*1*) The withholding agent has in its possession or obtains additional documentary evidence supporting the claim of foreign status (described in § 1.1471–3(c)(5)(i)) that does not contain a U.S. address and a reasonable explanation in writing supporting the account holder's foreign status;

(*2*) The withholding agent obtains a valid beneficial owner withholding certificate on Form W–8 and the Form W–8 contains a permanent residence address outside the United States and a mailing address outside the United States (or if a mailing address is inside the United States the account holder provides a reasonable explanation in writing supporting the account holder's foreign status); or

(*3*) For a payment made with respect to an offshore obligation (with offshore obligation defined as in § 1.6049–5(c)(1)), the withholding agent classifies the individual as a resident of the country in which the obligation is maintained, the withholding agent is required to report a payment made to the individual annually on a tax information statement that is filed with the tax authority of the country in which the office is located as part of that country's resident reporting requirements, and that country has a tax information exchange agreement or income tax treaty in effect with the United States.

(B) *Presumption of entity's foreign status.* A withholding agent may treat a direct account holder that is an entity (other than a flow-through entity) as a foreign person even if it has any of the U.S. indicia described in this paragraph for the account holder in the United States if—

(*1*) The withholding agent has in its possession or obtains documentary evidence establishing foreign status that substantiates that the entity is actually organized or created under the laws of a foreign country;

(*2*) The withholding agent obtains a valid beneficial owner withholding certificate on Form W–8 and the Form W–8 contains a permanent residence address outside the United States and a mailing address outside the United States (or if a mailing address is inside the United States the account holder provides additional documentary evidence sufficient to establish the account holder's foreign status); or

(*3*) For a payment made with respect to an offshore obligation (with offshore obligation defined as in § 1.6049–5(c)(1)), the withholding agent classifies the entity as a resident of the country in which the account is maintained, the withholding agent is required to report a payment made to the entity annually on a tax information statement that is filed with the tax authority of the country in which the office is located as part of that country's resident reporting requirements, and that country has a tax information exchange agreement or income tax treaty in effect with the United States.

(iii) *U.S. place of birth.* A withholding agent has reason to know that documentary evidence provided by a direct account holder to support an individual's foreign status is unreliable or incorrect if the withholding agent has, either on the documentary evidence or as part of its account information, an unambiguous indication of a place of birth for the individual in the United States. A withholding agent may treat the individual as a foreign person, notwithstanding the U.S. birth place, if the withholding agent has in its possession or obtains documentary evidence described in § 1.1471–3(c)(5)(i)(B) evidencing citizenship in a country other than the United States and a copy of the individual's Certificate of Loss of Nationality of the United States. Alternatively, a withholding agent may treat the individual as a foreign person if the withholding agent obtains a valid beneficial owner withholding certificate on Form W–8 from the individual that establishes the account holder's foreign status, documentary evidence described in § 1.1471–3(c)(5)(i)(B) evidencing citizenship in a country other than the United States, and a reasonable written explanation of the individual's renunciation of U.S. citizenship or the reason the individual did not obtain U.S. citizenship at birth.

(iv) *Standing instructions with respect to offshore obligations.* Documentary evidence is unreliable or incorrect if it is provided with respect to an offshore obligation (as defined in § 1.6049–5(c)(1)) of a direct account holder that has provided the withholding agent with standing instructions to pay amounts to an address or an account maintained in the United States. The withholding agent may treat the direct account holder as a foreign person, however, if the account holder provides either a reasonable explanation in writing that supports its foreign status or a valid beneficial owner withholding certificate claiming foreign status.

(9) *Documentary evidence—claim of reduced rate of withholding under treaty.* A withholding agent has reason to know that documentary evidence is unreliable or incorrect for purposes of establishing that a direct account holder is a resident of a country with which the United States has an income tax treaty if it is described in paragraph (b)(9)(i) or (ii) of this section.

(i) *Permanent residence address and mailing address.* Documentary evidence is unreliable or incorrect if the withholding agent has a current mailing or current permanent residence address for the direct account holder (whether or not on the documentary evidence) that is outside the applicable treaty country, or the withholding agent has no permanent residence address for the account holder. If a withholding agent has a current mailing or current permanent residence address for the direct account holder outside the applicable treaty country, the withholding agent may nevertheless treat a direct account holder as a resident of an applicable treaty country if the withholding agent—

(A) Has in its possession or obtains additional documentary evidence described in § 1.1471–3(c)(5)(i) supporting the direct account holder's claim of residence in the applicable treaty country (and the documentary evidence does not contain an address outside the applicable treaty country, a P.O. box, an in-care-of address, or the address of a financial institution);

(B) Has in its possession or obtains documentary evidence described in § 1.1471–3(c)(5)(i) that establishes the direct account holder is an entity organized in a treaty country (or an entity managed and controlled in a treaty country, if the applicable treaty so requires); or

(C) Obtains a valid beneficial owner withholding certificate on Form W–8 that contains a permanent residence address and a mailing address in the applicable treaty country.

(ii) *Standing instructions.* Documentary evidence is unreliable or incorrect if the direct account holder has provided the withholding agent with standing instructions to pay amounts to an address or an account maintained outside the treaty country

unless the direct account holder provides a reasonable explanation, in writing, establishing the direct account holder's residence in the applicable treaty country, or a valid beneficial owner withholding certificate that contains a permanent residence address and a mailing address in the applicable treaty country.

(10) *Indirect account holders.* A withholding agent that receives documentation from a payee through a nonqualified intermediary, a flow-through entity, or a U.S. branch (including a territory financial institution) described in § 1.1441–1(b)(2)(iv) (other than a U.S. branch or territory financial institution that is treated as a U.S. person) has reason to know that the documentation is unreliable or incorrect if a reasonably prudent person in the position of a withholding agent would question the claims made. This standard requires, but is not limited to, a withholding agent's compliance with the rules of paragraphs (b)(10)(i) through (iv).

(i) The withholding agent must review the withholding statement described in § 1.1441–1(e)(3)(iv) and may not rely on information in the statement to the extent the information does not support the claims made for any payee. For this purpose, a withholding agent may not treat a payee as a foreign person if an address in the United States is provided for such payee and may not treat a person as a resident of a country with which the United States has an income tax treaty if the address for that person is outside the applicable treaty country. Notwithstanding a U.S. address or an address outside a treaty country, the withholding agent may treat a payee as a foreign person or a foreign person as a resident of a treaty country if the withholding statement is accompanied by a valid withholding certificate and documentary evidence (as described in § 1.1471–3(c)(5)(i)) or a reasonable explanation is provided, in writing, by the nonqualified intermediary, flow-through entity, or U.S. branch supporting the payee's foreign status or the foreign person's residency in a treaty country.

(ii) The withholding agent must review each withholding certificate in accordance with the requirements of paragraphs (b)(5) and (6) of this section and verify that the information on the withholding certificate is consistent with the information on the withholding statement required under § 1.1441–1(e)(3)(iv). If there is a discrepancy between the withholding certificate and the withholding statement, the withholding agent may choose to rely on the withholding certificate, if valid, and instruct the nonqualified intermediary, flow-through entity, or U.S. branch to correct the withholding statement or apply the presumption rules of §§ 1.1441–1(b), 1.1441–5(d) and (e)(6), 1.6049–5(d), and 1.1471–3(f) (for a withholdable payment for chapter 4 purposes) to the payment allocable to the payee who provided the withholding certificate. If the withholding agent chooses to rely upon the withholding certificate, the withholding agent is required to instruct the intermediary or flow-through entity to correct the withholding statement and confirm that the intermediary or flow-through entity does not know or have reason to know that the withholding certificate is unreliable or inaccurate.

(iii) The withholding agent must review the documentary evidence provided by the nonqualified intermediary, flow-through entity, or U.S. branch to determine that there is no obvious indication that the payee is a U.S. non-exempt recipient or that the documentary evidence does not establish the identity of the person who provided the documentation (*e.g.,* the documentary evidence does not appear to be an identification document).

(iv) [Reserved]. For further guidance, see § 1.1441–7T(b)(10)(iv).

(11) *Limits on reason to know for multiple obligations belonging to a single person.* A withholding agent that maintains multiple obligations for a single person will have reason to know that a claim of foreign status for the person is inaccurate based on account information for another obligation held by the person only to the extent that—

(i) The withholding agent's computerized systems link the obligations by reference to a data element such as client number, EIN, or foreign tax identifying number and consolidates the account information and payment information for the obligations; or

(ii) The withholding agent has treated the obligations as consolidated obligations for purposes of sharing documentation pursuant to § 1.1441–1(e)(4)(ix).

(12) *Reasonable explanation supporting claim of foreign status.* A reasonable explanation supporting an individual's claim of foreign status for purposes of paragraphs (b)(5) and (8) of this section means a written statement prepared by the individual or the individual's completion of a checklist provided by the withholding agent, stating that the individual meets the requirements of one of paragraphs (b)(12)(i) through (iv) of this section.

(i) The individual certifies that he or she—

(A) Is a student at a U.S. educational institution and holds the appropriate visa;

(B) Is a teacher, trainee, or intern at a U.S. educational institution or a participant in an educational or cultural exchange visitor program, and holds the appropriate visa;

(C) Is a foreign individual assigned to a diplomatic post or a position in a consulate, embassy, or international organization in the United States; or

(D) Is a spouse or unmarried child under the age of 21 years of one of the persons described in paragraphs (b)(12)(i)(A) through (C) of this section;

(ii) The individual provides information demonstrating that he or she has not met the substantial presence test set forth in § 301.7701(b)–1(c) of this chapter (*e.g.,* a written statement indicating the number of days present in the United States during the three-year period that includes the current year);

(iii) The individual certifies that he or she meets the closer connection exception described in § 301.7701(b)–2, states the country to which the individual has a closer connection, and demonstrates how that closer connection has been established; or

(iv) With respect a payment entitled to a reduced rate of tax under a U.S. income tax treaty, the individual certifies that he or she is treated as a resident of a country other than the United States and is not treated as a U.S. resident or U.S. citizen for purposes of that income tax treaty.

(13) *Additional guidance.* The IRS may prescribe other circumstances for which a withholding certificate or documentary evidence is unreliable or incorrect in addition to the circumstances described in paragraph (b) of this section to establish an account holder's status as a foreign person or a beneficial owner entitled to a reduced rate of withholding in published guidance (see § 601.601(d)(2) of this chapter).

(c) *Agent*—(1) *In general.* A withholding agent may authorize an agent to fulfill its obligations under chapter 3 if the requirements of paragraph (c)(2) of this section are satisfied. The acts of an agent of a withholding agent (including the receipt of withholding certificates, the payment of amounts of income subject to withholding, and the deposit of tax withheld) are imputed to the withholding agent on whose behalf it is acting.

(2) *Authorized agent.* An agent is an authorized agent only if—

(i) There is a written agreement between the withholding agent and the person acting as agent that clearly provides which obligations under chapter 3 that the agent is authorized to fulfill;

(ii) A Form 8655, ''Reporting Agent Authorization,'' is filed with the IRS by a withholding agent if its agent (including any sub-agent) acts as a reporting agent for filing Form 1042 on behalf of the withholding agent and the agent (or sub-agent) identifies itself (instead of the withholding agent) as the filer on the Form 1042;

(iii) Books and records and relevant personnel of the agent (including any sub-agent) are available to the withholding agent (on a continuous basis, including after termination of the relationship) in order to evaluate the withholding agent's compliance with the provisions of chapters 3, 4, and 61 of the Code, section 3406, and the regulations under those provisions; and

(iv) The U.S. withholding agent remains fully liable for the acts of its agent (or for any sub-agent) and does not assert any of the defenses that may otherwise be available, including under common law principles of agency in order to avoid tax liability under the Code.

(3) *Liability of withholding agent acting through an agent.* An authorized agent is subject to the same withholding and reporting obligations that apply to any withholding agent under the provisions of chapter 3 of the Code and the regulations thereunder. See the instructions to Form 1042–S for the manner for filing the form when an authorized agent acts on behalf of a withholding agent. Except as otherwise provided in the QI, WP, and WT agreements, an authorized agent does not benefit from the special procedures or exceptions that may apply to a QI, WP, or WT. A withholding agent acting through an authorized agent is liable for any failure of the agent, such as failure to withhold an amount or make payment of tax, in the same manner and to the same extent as if the agent's failure had been the failure of the withholding agent. For this purpose, the agent's actual knowledge or reason to know shall be imputed to the withholding agent. The withholding agent's liability shall exist irrespective of the fact that the authorized agent is also a withholding agent and is itself separately liable for failure to comply with the provisions of the regulations under section 1441, 1442, or 1443. However, the same tax, interest, or penalties shall not be collected more than once.

* * * * *

(f) * * *

(2) * * *

(ii) *Examples.* The following examples illustrate the operation of paragraph (d)(2) of this section. Each example assumes that withholding under chapter 4 does not apply.

Example 1. (i) DS is a U.S. subsidiary of FP, a corporation organized in Country N, a country that does not have an income tax treaty with the United States. FS is a special purpose subsidiary of FP that is incorporated in Country T, a country that has an income tax treaty with the United States that prohibits the imposition of withholding tax on payments of interest. FS is capitalized with $10,000,000 in debt from BK, a Country N bank, and $1,000,000 in capital from FS.

(ii) On May 1, 1995, C, a U.S. person, purchases an automobile from DS in return for an installment note. On July 1, 1995, DS sells a number of installment notes, including C's, to FS in exchange for $10,000,000. DS continues to service the installment notes for FS, and C is not notified of the sale of its obligation and continues to make payments to DS. But for the withholding tax on payments of interest by DS to BK, DS would have borrowed directly from BK, pledging the installment notes as collateral.

(iii) The C installment note is a financing transaction, whether held by DS or by FS, and the FS note held by BK also is a financing transaction. After FS purchases the installment note, and during the time the installment note is held by FS, the transactions constitute a financing arrangement, within the meaning of § 1.881–3(a)(2)(i). BK is the financing entity, FS is the intermediate entity, and C is the financed entity. Because the participation of FS in the financing arrangement reduces the tax imposed by section 881 and because there was a tax avoidance plan, FS is a conduit entity.

(iv) Because C does not know or have reason to know of the tax avoidance plan (and by extension that the financing arrangement is a conduit financing arrangement), C is not required to withhold tax under section 1441. However, DS, who knows that FS's participation in the financing arrangement is pursuant to a tax avoidance plan and is a withholding agent for purposes of section 1441, is not relieved of its withholding responsibilities.

Example 2. Assume the same facts as in *Example 1* except that C receives a new payment booklet on which DS is described as ''agent.'' Although C may deduce that its installment note has been sold, without more C has no reason to know of the existence of a financing arrangement. Accordingly, C is not liable for failure to withhold, although DS still is not relieved of its withholding responsibilities.

Example 3. (i) DC is a U.S. corporation that is in the process of negotiating a loan of $10,000,000 from BK1, a bank located in Country N, a country that does not have an income tax treaty with the United States. Before the loan agreement is signed, DC's tax lawyers point out that interest on the loan would not be subject to withholding tax if the loan were made by BK2, a subsidiary of BK1 that is incorporated in Country T, a country that has an income tax treaty with the United States that prohibits the imposition of withholding tax on payments of interest. BK1 makes a loan to BK2 to enable BK2 to make the loan to DC. Without the loan from BK1 to BK2, BK2 would not have been able to make the loan to DC.

(ii) The loan from BK1 to BK2 and the loan from BK2 to DC are both financing transactions and together constitute a financing arrangement within the meaning of § 1.881–3(a)(2)(i). BK1 is the financing entity, BK2 is the intermediate entity, and DC is the financed entity. Because the participation of BK2 in the financing arrangement reduces the tax imposed by section 881 and because there is a tax avoidance plan, BK2 is a conduit entity.

(iii) Because DC is a party to the tax avoidance plan (and accordingly knows of its existence), DC must withhold tax under section 1441. If DC does not withhold tax on its payment of interest, BK2, a party to the plan and a withholding agent for purposes of section 1441, must withhold tax as required by section 1441.

Example 4. (i) DC is a U.S. corporation that has a long-standing banking relationship with BK2, a U.S. subsidiary of BK1, a bank incorporated in Country N, a country that does not have an income tax treaty with the United States. DC has borrowed amounts of as much as $75,000,000 from BK2 in the past. On January 1, 1995, DC asks to borrow $50,000,000 from BK2. BK2 does not have the funds available to make a loan of that size. BK2 considers asking BK1 to enter into a loan with DC but rejects this possibility because of the additional withholding tax that would be incurred. Accordingly, BK2 borrows the necessary amount from BK1 with the intention of on-lending to DC. BK1 does not make the loan directly to DC because of the withholding tax that would apply to payments of interest from DC to BK1. DC does not negotiate with BK1 and has no reason to know that BK1 was the source of the loan.

(ii) The loan from BK2 to DC and the loan from BK1 to BK2 are both financing transactions and together constitute a financing arrangement within the meaning of § 1.881–3(a)(2)(i). BK1 is the financing entity, BK2 is the intermediate entity, and DC is the financed entity. The participation of BK2 in the financing arrangement reduces the tax imposed by section 881. Because the participation of BK2 in the financing arrangement reduces the tax imposed by section 881 and because there was a tax avoidance plan, BK2 is a conduit entity.

(iii) Because DC does not know or have reason to know of the tax avoidance plan (and by extension that the financing arrangement is a conduit financing arrangement), DC is not required to withhold tax under section 1441. However, BK2, who is also a withholding agent under section 1441 and who knows that the financing arrangement is a conduit financing

arrangement, is not relieved of its withholding responsibilities.

(g) *Effective/applicability date*—(1) Except as otherwise provided in paragraph (a)(4) of this section, this section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments made after December 31, 2000, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.)

(2) [Reserved]. For further guidance, see § 1.1441–7T(g)(2).

■ **Par. 18.** Section 1.1441–7T is revised to read as follows:

§ 1.1441–7T General provisions relating to withholding agents (temporary).

(a) through (b)(10)(iii) [Reserved]. For further guidance, see § 1.1441–7(a) through (b)(10)(iii).

(iv) If the beneficial owner is claiming a reduced rate of withholding under an income tax treaty, the rules of § 1.1441–6(b)(1)(ii) also apply to determine whether the withholding agent has reason to know that a claim for treaty benefits is unreliable or incorrect.

(b)(11) through (g)(1) [Reserved]. For further guidance, see § 1.1441–7(b)(11) through (g)(1).

(2) *Effective/applicability date.* This section applies on January 6, 2017.

(h) *Expiration date.* The applicability of this section expires on December 30, 2019.

■ **Par. 19.** Section 1.1461–1 is amended by:

■ 1. Revising paragraphs (b)(1), (c)(1)(i) and (ii), (c)(2)(ii)(E), (c)(2)(ii)(H) and (I), (c)(3)(i) and (iii), (c)(4)(i), (c)(4)(ii)(A), (c)(4)(iv) and (v), (c)(5), and (i) to read as follows:

§ 1.1461–1 Payment and returns of tax withheld.

* * * * *

(b) *Income tax return*—(1) *General rule.* A withholding agent shall make an income tax return on Form 1042 (or such other form as the IRS may prescribe) for income paid during the preceding calendar year that the withholding agent is required to report on an information return on Form 1042–S (or such other form as the IRS may prescribe) under paragraph (c)(1) of this section. See section 6011 and § 1.6011–1(c). The withholding agent must file the return on or before March 15 of the calendar year following the year in which the income was paid. The return must show the aggregate amount of income paid and tax withheld required to be reported on all the Forms 1042–S for the preceding calendar year by the withholding agent, in addition to such information as is required by the form and accompanying instructions. See § 1.1474–1(c) for the requirement to show the aggregate chapter 4 reportable amounts and tax withheld on Form 1042. A single Form 1042 may be filed by a withholding agent to report amounts under chapters 3 and 4, including tax withheld. Withholding certificates or other statements or information provided to a withholding agent are not required to be attached to the return. A return must be filed under this paragraph (b)(1) even though no tax was required to be withheld during the preceding calendar year. The withholding agent must retain a copy of Form 1042 for the applicable statute of limitations on assessments and collection with respect to the amounts required to be reported on the Form 1042. See section 6501 and the regulations thereunder for the applicable statute of limitations. Adjustments to the total amount of tax withheld, as described in § 1.1461–2, shall be stated on the return as prescribed by the form and accompanying instructions.

* * * * *

(c) *Information returns*—(1) *Filing requirement*—(i) *In general.* A withholding agent (other than an individual who is not acting in the course of a trade or business with respect to a payment) must make an information return on Form 1042–S, ''Foreign Person's U.S. Source Income Subject to Withholding,'' (or such other form as the IRS may prescribe) to report the amounts subject to reporting, as defined in paragraph (c)(2) of this section, that were paid during the preceding calendar year. Notwithstanding the preceding sentence, any person that withholds or is required to withhold an amount under sections 1441, 1442, 1443, or § 1.1446–4(a) (applicable to publicly traded partnerships required to pay tax under section 1446 on distributions) must file a Form 1042–S for the payment withheld upon whether or not that person is engaged in a trade or business and whether or not the payment is an amount subject to reporting. The reference in the previous sentence to withholding under § 1.1446–4 shall apply to partnership taxable years beginning after May 18, 2005, or such earlier time as the regulations under §§ 1.1446–1 through 1.1446–5 apply by reason of an election under § 1.1446–7. A Form 1042–S shall be prepared for each recipient of an amount subject to reporting and for each single type of income payment. The Form 1042–S shall be prepared in such manner as the form and accompanying instructions prescribe. One copy of the Form 1042–S shall be filed with the IRS on or before March 15th of the calendar year following the year in which the amount subject to reporting was paid. It shall be filed with a transmittal form as provided in the instructions to the Form 1042–S and to the transmittal form. Withholding certificates, documentary evidence, or other statements or documentation provided to a withholding agent are not required to be attached to the form. Another copy of the Form 1042–S must be furnished to the recipient for whom the form is prepared (or any other person, as required under this paragraph (c) or the instructions to the form) on or before March 15 of the calendar year following the year in which the amount subject to reporting was paid. The withholding agent must retain a copy of each Form 1042–S for the statute of limitations on assessment and collection applicable to the Form 1042 to which the Form 1042–S relates. A withholding agent required by this section to furnish a recipient copy of Form 1042–S may furnish such copy electronically by complying with the requirements provided in § 1.6050W–2(a)(2) through (5) applicable to statements required under section 6050W (substituting the phrase ''Form 1042–S'' for the phrases ''statement required under section 6050W'' or ''statements required by section 6050W(f)'' each place they appear). A withholding agent that meets the requirements of that section for providing electronic copies to recipients may apply these rules to payments made in calendar year 2016.

(ii) *Recipient*—(A) *Defined.* For purposes of this section, the term *recipient* means—

(*1*) A beneficial owner as defined in § 1.1441–1(c)(6), including a foreign estate or a foreign complex trust, as defined in § 1.1441–1(c)(25);

(*2*) A qualified intermediary as defined in § 1.1441–1(e)(5)(ii);

(*3*) A withholding foreign partnership as defined in § 1.1441–5(c)(2) or a withholding foreign trust under § 1.1441–5(e)(5)(v);

(*4*) A territory financial institution treated as a U.S. person under § 1.1441–1(b)(2)(iv)(A);

(*5*) A U.S. branch that is treated as a U.S. person under § 1.1441–1(b)(2)(iv)(A);

(*6*) A nonwithholding foreign partnership or a foreign simple trust as defined in § 1.1441–1(c)(24), but only to the extent the income is (or is treated as) effectively connected with the conduct

of a trade or business in the United States by such entity, or if the nonwithholding foreign partnership or foreign simple trust is also described in paragraph (c)(1)(ii)(A)(*9*) or (c)(1)(ii)(A)(*10*) of this section;

(*7*) A payee, as defined in § 1.1441–1(b)(2) that is presumed to be a foreign person under the presumption rules of § 1.1441–1(b)(3); 1.1441–5(d) or (e)(6), or 1.6049–5(d);

(*8*) A partner receiving a distribution from a publicly traded partnership subject to withholding under section 1446 and § 1.1446–4 on distributions of effectively connected income. This paragraph (c)(1)(ii)(A)(*8*) shall apply to partnership taxable years beginning after May 18, 2005, or such earlier time as the regulations under §§ 1.1446–1 through 1.1446–5 apply by reason of an election under § 1.1446–7.

(*9*) A foreign intermediary, nonwithholding foreign partnership, or nonwithholding foreign trust that is a participating FFI or registered deemed-compliant FFI with respect to a chapter 4 reporting pool of U.S. payees;

(*10*) A participating FFI or a registered deemed-compliant FFI that is a recipient of a withholdable payment described in § 1.1474–1(d)(1)(ii)(A)(*1*)(*iii*); and

(*11*) Any other person as required on Form 1042–S or the instructions to the form.

(B) *Persons that are not recipients.* A recipient does not include—

(*1*) A nonqualified intermediary, except with respect to a payment (or portion of a payment) for which a nonqualified intermediary that is an FFI is a recipient reporting as described in § 1.1474–1(d)(1)(ii)(A)(*1*)(*iii*), or if the nonqualified intermediary is also described in paragraph (c)(1)(ii)(A)(*9*) or (c)(1)(ii)(A)(*10*) of this section;

(*2*) A payee included in a chapter 3 or chapter 4 withholding rate pool;

(*3*) A flow-through entity, as defined in § 1.1441–1(c)(23) (to the extent it is receiving amounts subject to reporting other than income effectively connected with the conduct of a trade or business in the United States), that is not a recipient described in paragraphs (c)(1)(ii)(A)(9) or (c)(1)(ii)(A)(10) of this section; and

(*4*) A U.S. branch (including a territory financial institution) described in § 1.1441–1(b)(2)(iv)(A) that is not treated as a U.S. person under that section and is not a recipient described in paragraphs (c)(1)(ii)(A)(*9*) or (*10*) of this section.

(C) *Coordination with chapter 4 reporting.* See § 1.1474–1(d)(1)(ii)(A) for persons that are defined as recipients of a withholdable payment of U.S. source FDAP income for purposes of chapter 4 in addition to the persons that are recipients under this paragraph (c)(1)(ii).

(2) * * *

(ii) * * *

(E) Any item required to be reported on Form 1099, and such other forms as are prescribed pursuant to the information reporting provisions of sections 6041 through 6050W and the regulations under those sections;

* * * * *

(H) Interest (including original issue discount) paid with respect to foreign-targeted registered obligations issued before January 1, 2016, that are described in § 1.871–14(e)(2) to the extent the documentation requirements described in § 1.871–14(e)(3) and (e)(4) are required to be satisfied (taking into account the provisions of § 1.871–14(e)(4)(ii), if applicable;

(I) Interest on a foreign-targeted bearer obligation (see §§ 1.1441–1(b)(4)(i) and 1.1441–2(a)) issued before March 19, 2012;

* * * * *

(3) * * *

(i) The name, address, taxpayer identifying number of the withholding agent, and the withholding agent's status for chapter 3 purposes (based on the status codes applicable for chapter 3 purposes provided on the form);

* * * * *

(iii) For a payment not subject to withholding under chapter 4, the rate of withholding applied or the basis for exempting the payment from withholding under chapter 3, and the exemption applicable to the payment for chapter 4 purposes (based on the exemption codes provided on the form);

* * * * *

(4) *Method of reporting*—(i) *Payments by U.S. withholding agents to recipients.* A withholding agent that is a U.S. person (other than a foreign branch of a U.S. person that is a qualified intermediary as defined in § 1.1441–1(e)(5)(ii) that makes payments of amounts subject to reporting on Form 1042–S must file a separate Form 1042–S for each recipient who receives such amount. For purposes of this paragraph (c)(4), a U.S. person includes a U.S. branch (including a territory financial institution) described in § 1.1441–1(b)(2)(iv)(A) that is treated as a U.S. person. Except as may otherwise be required on Form 1042–S or the instructions to the form, only payments for which the income code, exemption code, withholding rate, and recipient code are the same may be reported on a single Form 1042–S. See paragraph (c)(4)(ii) of this section for reporting of payments made to a person that is not a recipient. See § 1.1474–1(d)(4) for additional requirements that may apply for reporting on Form 1042–S with respect to a withholdable payment that is a chapter 4 reportable amount.

(A) *Payments to beneficial owners.* If a U.S. withholding agent makes a payment directly to a beneficial owner it must complete Form 1042–S treating the beneficial owner as the recipient. Under the grace period rule of § 1.1441–1(b)(3)(iv), a U.S. withholding agent may, under certain circumstances, treat a payee as a foreign person while the withholding agent awaits a valid withholding certificate. A U.S. withholding agent who relies on the grace period rule to treat a payee as a foreign person must file a Form 1042–S to report all payments on Form 1042–S during the period that person was presumed to be foreign even if that person is later determined to be a U.S. person based on appropriate documentation or is presumed to be a U.S. person after the grace period ends. In the case of joint owners, a withholding agent may provide a single Form 1042–S made out to the owner whose status the U.S. withholding agent relied upon to determine the applicable rate of withholding. If, however, any one of the owners requests its own Form 1042–S, the withholding agent must furnish a Form 1042–S to the person who requests it. If more than one Form 1042–S is issued for a single payment, the aggregate amount paid and tax withheld that is reported on all Forms 1042–S cannot exceed the total amounts paid to joint owners and the tax withheld thereon.

(B) *Payments to a qualified intermediary, a withholding foreign partnership, or a withholding foreign trust.* A U.S. withholding agent that makes payments to a qualified intermediary (whether or not the qualified intermediary assumes primary withholding responsibility for purposes of chapter 3 and chapter 4 of the Code), a withholding foreign partnership, or a withholding foreign trust shall complete Forms 1042–S treating the qualified intermediary, withholding foreign partnership, or withholding foreign trust as the recipient. The U.S. withholding agent must complete a separate Form 1042–S for each chapter 3 and chapter 4 withholding rate pool with respect to each qualified intermediary. A qualified intermediary that does not assume primary withholding responsibility on all payments it receives provides information regarding the proportions of income subject to a particular withholding rate (*i.e.,* a chapter 3 withholding rate pool) to the

withholding agent on a withholding statement associated with a qualified intermediary withholding certificate. In such a case, the U.S. withholding agent must complete a separate Form 1042–S for each chapter 3 and chapter 4 withholding rate pool with respect to the qualified intermediary. To the extent a qualified intermediary is required to report a payment under chapter 61, it may provide a U.S. withholding agent with information regarding withholding rate pools for U.S. non-exempt recipients (as defined under § 1.1441–1(c)(21)). Amounts paid with respect to such withholding rate pools must be reported on a Form 1099 completed for each U.S. non-exempt recipient to the extent such U.S. non-exempt recipient is subject to Form 1099 reporting and is not reported on Form 1042–S. See, however, § 1.1441–1(e)(5)(v)(C) for when a qualified intermediary may provide a chapter 4 withholding rate pool of U.S payees (in lieu of reporting such payees on a withholding statement) and for the withholding rate pools (including chapter 4 withholding rate pools) otherwise reportable on a withholding statement provided by a qualified intermediary.

(C) *Amounts paid to U.S. branches treated as U.S. persons.* A U.S. withholding agent making a payment to a U.S. branch of a foreign person (including a territory financial institution) described in § 1.1441–1(b)(2)(iv)(A) shall complete Form 1042–S as follows—

(*1*) If the branch has provided the U.S. withholding agent with a withholding certificate that evidences its agreement with the withholding agent to be treated as a U.S. person, the U.S. withholding agent files Forms 1042–S treating the U.S. branch or territory financial institution as the recipient;

(*2*) If the branch has provided the U.S. withholding agent with a withholding certificate that transmits information regarding beneficial owners, qualified intermediaries, withholding foreign partnerships, or other recipients, the U.S. withholding agent must complete a separate Form 1042–S for each recipient whose documentation is associated with the U.S. branch's or territory financial institution's withholding certificate; or

(*3*) If the U.S. withholding agent cannot reliably associate a payment with a valid withholding certificate from the U.S. branch, it shall treat the U.S. branch as the recipient and report the income as effectively connected with the conduct of a trade or business in the United States except as otherwise provided in § 1.1441–1(b)(2)(iv)(B)(*4*).

(D) *Dual Claims.* A U.S. withholding agent may make a payment to a foreign entity that is simultaneously claiming a reduced rate of tax on its own behalf for a portion of the payment and a reduced rate on behalf of persons in their capacity as interest holders in that entity on the remaining portion. See § 1.1441–6(b)(2)(iii). If the claims are consistent and the withholding agent accepts the multiple claims, the withholding agent must file a separate Form 1042–S for those payments for which the entity is treated as the beneficial owner and Forms 1042–S for each of the interest holders in the entity for which the interest holder is treated as the recipient. For those payments for which the interest holder in an entity is treated as the recipient, the U.S. withholding agent shall prepare the Form 1042–S in the same manner as a payment made to a nonqualified intermediary or flow-through entity as set forth in paragraph (c)(4)(ii) of this section. If the claims are consistent but the withholding agent has not chosen to accept the multiple claims, or if the claims are inconsistent, the withholding agent must file a separate Form 1042–S for the person or persons it has chosen to treat as the recipients.

(ii) *Payments made by U.S. withholding agents to persons that are not recipients*—(A) *Amounts paid to a nonqualified intermediary, a flow-through entity, and certain U.S. branches.* If a U.S. withholding agent makes a payment to a nonqualified intermediary, a flow-through entity, or a U.S. branch (including a territory financial institution) described in § 1.1441–1(b)(2)(iv) (other than a U.S. branch or territory financial institution that is treated as a U.S. person), it must complete a separate Form 1042–S for each recipient to the extent the withholding agent can reliably associate a payment with valid documentation (within the meaning of § 1.1441–1(b)(2)(vii)) from the recipient which is associated with the withholding certificate provided by the nonqualified intermediary, flow-through entity, or U.S. branch or territory financial institution. See § 1.1474–1(d)(4)(i) for when a withholding agent may report a chapter 4 reportable amount made to such an entity in a chapter 4 withholding rate pool. See also § 1.1441–1(e)(3)(iv)(A) for when a withholding statement provided by a nonqualified intermediary may include a chapter 4 withholding rate pool of U.S. payees. If a payment is reported by the withholding agent in a chapter 4 withholding rate pool, the withholding agent must report on Form 1042–S the nonqualified intermediary or flow-through entity as a recipient associated with the applicable chapter 4 withholding rate pool. If a payment is made through tiers of nonqualified intermediaries or flow-through entities, the withholding agent must nevertheless complete Form 1042–S for the recipient to the extent it can reliably associate the payment with documentation from the recipient. A withholding agent that is completing a Form 1042–S for a recipient that receives a payment through a nonqualified intermediary, a flow-through entity, or a U.S. branch or territory financial institution must include on the Form 1042–S the name of the nonqualified intermediary, flow-through entity, U.S. branch or territory financial institution from which the recipient directly receives the payment. If a U.S. withholding agent cannot reliably associate the payment, or any portion of the payment, with valid documentation from a recipient either because no such documentation has been provided or because the nonqualified intermediary, flow-through entity, or U.S. branch or territory financial institution has failed to provide sufficient allocation information so that the withholding agent can associate the payment, or any portion thereof, with valid documentation, then the withholding agent must report the payments as made to an unknown recipient in accordance with the appropriate presumption rules for that payment. Thus, if the payment is not a withholdable payment and under the presumption rules the payment is presumed to be made to a foreign person, the withholding agent must generally withhold 30 percent of the payment and report the payment on Form 1042–S made out to an unknown recipient and shall also include the name of the nonqualified intermediary, flow-through entity, U.S. branch or territory financial institution that received the payment on behalf of the unknown recipient. If, however, the recipient is presumed to be a U.S. non-exempt recipient (as defined in § 1.1441–1(c)(21)), the withholding agent must withhold on the payment as required under section 3406 and report the payment as required under chapter 61 of the Code. See § 1.1474–1(d)(4) for reporting requirements that apply to payments of chapter 4 reportable amounts paid to nonqualified intermediaries and flow-through entities. If, however, the payment is a withholdable payment, the withholding agent must report the payment as made to a chapter 4 withholding rate pool of nonparticipating FFIs in accordance

with the presumption rule under § 1.1471–3(f)(5).

* * * * *

(iv) *Reporting by a nonqualified intermediary, flow-through entity, and certain U.S. branches.* A nonqualified intermediary, flow-through entity, or U.S. branch (including a territory financial institution) described in § 1.1441–1(e)(2)(iv) (other than a U.S. branch or territory financial institution that is treated as a U.S. person) is a withholding agent and must file Forms 1042–S for amounts paid to recipients in the same manner as a U.S. withholding agent. A Form 1042–S will not be required, however, if another withholding agent has reported the same amount for which the nonqualified intermediary, flow-through entity, or U.S. branch would be required to file a return and the entire amount that should be withheld from such payment has been withheld (including withholding and reporting in accordance with the applicable presumption rule for the payment). A nonqualified intermediary, flow-through entity, or U.S. branch must report payments made to recipients to the extent it has failed to provide the appropriate documentation to another withholding agent together with the information required for that withholding agent to reliably associate the payment with the recipient documentation or to the extent it knows, or has reason to know, that less than the required amount has been withheld. A nonqualified intermediary or flow-through entity that is required to report a payment on Form 1042–S must follow the same rules as apply to a U.S. withholding agent under paragraphs (c)(4)(i) and (ii) of this section.

(v) *Pro rata reporting for allocation failures.* If a nonqualified intermediary, flow-through entity, or U.S. branch (including a territory financial institution) described in § 1.1441–1(b)(2)(iv) (other than a U.S. branch or territory financial institution treated as a U.S. person) uses the alternative procedures of § 1.1441–1(e)(3)(iv)(D) and fails to provide information sufficient to allocate the amount subject to reporting paid to a withholding rate pool to the payees identified for that pool, then the withholding agent shall report the payment in accordance with the rule provided in § 1.1441–1(e)(3)(iv)(D)(*6*).

* * * * *

(5) *Magnetic media reporting.* A withholding agent that makes 250 or more Form 1042–S information returns for a taxable year must file Form 1042–S returns on magnetic media. See, however, § 301.1474–1(a) of this chapter for the requirements for a withholding agent that is a financial institution to file Forms 1042–S on magnetic media. See, also, § 301.6011–2 of this chapter for requirements applicable to a withholding agent that files Forms 1042–S with the IRS on magnetic media and publications of the IRS relating to magnetic media filing.

* * * * *

(i) *Effective/applicability date.* Except as otherwise provided in paragraph (c)(2)(iii) of this section, this section shall apply to returns required for payments made on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments made after December 31, 2000, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.)

§ 1.1461–1T [Removed]

■ **Par. 20.** Section 1.1461–1T is removed.

■ **Par. 21.** Section 1.1461–2 is amended by revising paragraphs (a)(2)(i), (a)(4), and (d) to read as follows:

§ 1.1461–2 Adjustments for overwithholding or underwithholding of tax.

(a) * * *

(2) *Reimbursement of tax*—(i) *General rule.* Under the reimbursement procedure, the withholding agent repays the beneficial owner or payee for the amount of tax overwithheld. In such a case, the withholding agent may reimburse itself by reducing, by the amount of tax actually repaid to the beneficial owner or payee, the amount of any deposit of tax made by the withholding agent under § 1.6302–2(a)(1)(iii) for any subsequent payment period occurring before the end of the calendar year following the calendar year of overwithholding. Any such reduction that occurs for a payment period in the calendar year following the calendar year of overwithholding shall be allowed only if—

(A) The repayment to the beneficial owner or payee occurs before the earlier of the due date (not including extensions) for filing Form 1042–S for the calendar year of overwithholding or the date the Form 1042–S is actually filed with the IRS; and

(B) The withholding agent states on a timely filed (not including extensions) Form 1042 for the calendar year of overwithholding, that the filing of the Form 1042 constitutes a claim for credit in accordance with § 1.6414–1.

* * * * *

(4) *Examples.* The principles of this paragraph (a) are illustrated by the following examples:

Example 1. (i) N is a nonresident alien individual who is a resident of the United Kingdom. In December 2001, a domestic corporation C pays a dividend of $100 to N, at which time C withholds $30 and remits the balance of $70 to N. On February 10, 2002, prior to the time that C files its Form 1042 and Form 1042–S with respect to the payment, N furnishes a valid Form W–8 described in § 1.1441–1(e)(2)(i) upon which C may rely to reduce the rate of withholding to 15% under the provisions of the U.S.-U.K. tax treaty. Consequently, N advises C that its tax liability is only $15 and not $30 and requests reimbursement of $15. Although C has already deposited the $30 that was withheld, as required by § 1.6302–2(a)(1)(iv), C repays N in the amount of $15.

(ii) During 2001, C makes no other payments upon which tax is required to be withheld under chapter 3 of the Code; accordingly, its return on Form 1042 for such year, which is filed on March 15, 2002, shows total tax withheld of $30, an adjusted total tax withheld of $15, and $30 previously paid for such year. Pursuant to § 1.6414–1(b), C claims a credit for the overpayment of $15 shown on the Form 1042 for 2001. Accordingly, it is permitted to reduce by $15 any deposit required by § 1.6302–2 to be made of tax withheld during the calendar year 2002. The Form 1042–S required to be filed by C with respect to the dividend of $100 paid to N in 2001 is required to show tax withheld under chapter 3 of $30 and tax repaid to N of $15.

Example 2. The facts are the same as in *Example 1.* In addition, during 2002, C makes payments to N upon which it is required to withhold $200 under chapter 3 of the Code, all of which is withheld in June 2002. Pursuant to § 1.6302–2(a)(1)(iii), C deposits the amount of $185 on July 15, 2002 ($200 less the $15 for which credit is claimed on the Form 1042 for 2001). On March 15, 2003, C Corporation files its return on Form 1042 for calendar year 2002, which shows total tax withheld of $200, $185 previously deposited by C, and $15 allowable credit.

Example 3. The facts are the same as in *Example 1.* Under § 1.6302–2(a)(1)(ii), C is required to deposit on a quarter-monthly basis the tax withheld under chapter 3 of the Code. C withholds tax of $100 between February 8 and February 15, 2002, and deposits $75 [($100 × 90%) less $15] of the withheld tax within 3 banking days after February 15, 2002, and by depositing $10 [($100 − $15) less $75] within 3 banking days after March 15, 2002.

* * * * *

(d) *Effective/applicability date.* This section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments made after December 31, 2000, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.)

§ 1.1461–2T [Removed]

■ **Par. 22.** Section 1.1461–2T is removed.

■ **Par. 23.** Section 1.6041–1 is amended by revising paragraphs (d)(5)(i) and (ii) and (j) to read as follows:

§ 1.6041–1 Return of information as to payments of $600 or more.

* * * * *

(d) * * *

(5) * * *

(i) An amount paid with respect to a notional principal contract is not required to be reported if the amount is paid by a non-U.S. payor or a non-U.S. middleman and is paid and received outside the United States (as defined in § 1.6049–4(f)(16)).

(ii) An amount paid with respect to a notional principal contract is not required to be reported if the amount is paid by a payor that has no actual knowledge that the payee is a U.S. person and is paid and received outside the United States (as defined in § 1.6049–4(f)(16)), and the payor is—

* * * * *

(j) *Effective/applicability date.* This section applies to payments made on or after *January 6, 2017.* (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments made after December 31, 2010, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.)

§ 1.6041–1T [Removed]

■ **Par. 24.** Section 1.6041–1T is removed.

■ **Par. 25.** Section 1.6041–4 is amended by revising paragraphs (a)(1) through (3), (a)(7), (b), and (d) to read as follows:

§ 1.6041–4 Foreign-related items and other exceptions.

(a) * * *

(1) Returns of information are not required for payments that a payor can, prior to payment, reliably associate with documentation upon which it may rely to treat as made to a foreign beneficial owner in accordance with § 1.1441–1(e)(1)(ii) or as made to a foreign payee in accordance with § 1.6049–5(d)(1) or presumed to be made to a foreign payee under § 1.6049–5(d)(2), (3), (4), or (5). Returns of information are also not required for a payment that a payor or middleman can, prior to payment, reliably associate with documentation upon which it may rely to treat as made to a foreign intermediary or flow-through entity in accordance with § 1.1441–1(b) if it obtains from the intermediary or flow-through entity a withholding statement described in § 1.6049–5(b)(14) that allocates the payment to a chapter 4 withholding rate pool (as defined in § 1.6049–4(f)(5)) or specific payees to which withholding applies under chapter 4. Payments excepted from reporting under this paragraph (a)(1) may be reportable, for purposes of chapter 3 of the Internal Revenue Code (Code), under § 1.1461–1(b) and (c) and, for purposes of chapter 4 of the Code, under § 1.1474–1(d)(2). The provisions in § 1.6049–5(c) regarding documentation of foreign status shall apply for purposes of this paragraph (a)(1). The provisions in § 1.6049–5(c)(5) regarding the definitions of U.S. payor and non-U.S. payor shall also apply for purposes of this paragraph (a)(1). See § 1.1441–1(b)(3)(iii)(B) and (C) for special payee rules regarding scholarships, grants, pensions, annuities, etc. The provisions of § 1.1441–1 shall apply by substituting the term ''payor'' for the term ''withholding agent'' and without regard to the fact that the provisions apply only to amounts subject to withholding under chapter 3 of the Code and the regulations under that chapter.

(2) Returns of information are not required for payments of amounts from sources outside the United States (determined under the provisions of part I, subchapter N, chapter 1 of the Code and the regulations under those provisions) paid by a non-U.S. payor or non-U.S. middleman and that are paid and received outside the United States. For a definition of non-U.S. payor and non-U.S. middleman, see § 1.6049–5(c)(5). For circumstances in which an amount is considered to be paid and received outside the United States, see § 1.6049–4(f)(16).

(3) If a foreign intermediary, as described in § 1.1441–1(c)(13), or a U.S. branch that is not treated as a U.S. person receives a payment from a payor, which payment the payor can reliably associate with a valid withholding certificate described in § 1.1441–1(e)(3)(ii) or (iii), or § 1.1441–1(e)(3)(v), respectively, furnished by such intermediary or branch, then the intermediary or branch is not required to report such payment when it, in turn, pays the amount, unless, and to the extent, the intermediary or branch knows that the payment is required to be reported under this section and was not so reported. For example, if a U.S. branch described in § 1.1441–1(b)(2)(iv) fails to provide information regarding U.S. persons that are not exempt from reporting under § 1.6041–3(q) to the person from whom the U.S. branch receives the payment, the U.S. branch must report the payment on an information return. See, however, paragraph (a)(7) of this section for when reporting under section 6041is coordinated with reporting under chapter 4 of the Code or an applicable IGA (as defined in § 1.6049–4(f)(7)). The exception described in this paragraph (a)(3) for amounts paid by a foreign intermediary shall not apply to a qualified intermediary that assumes reporting responsibility under chapter 61 of the Code with respect to amounts reportable under the agreement described in § 1.1441–1(e)(5)(iii).

* * * * *

(7) Returns of information are not required for payments with respect to which a return is not required by applying the rules of § 1.6049–4(c)(4) (by substituting the term ''a payment subject to reporting under section 6041'' for the term ''an interest payment'').

(b) *Joint owners.* Amounts paid to joint owners for which a certificate or documentation is required as a condition for being exempt from reporting under paragraph (a) of this section are presumed made to U.S. payees who are not exempt recipients if, prior to payment, the payor or middleman cannot reliably associate the payment either with a Form W–9 furnished by one of the joint owners in the manner required in §§ 31.3406(d)–1 through 31.3406(d)–5, or with documentation described in paragraph (a)(1) of this section furnished by each joint owner upon which the payor or middleman can rely to treat each joint owner as a foreign payee or foreign beneficial owner. However, in the case of a withholdable payment (as defined in § 1.6049–4(f)(15)) made to joint payees, if any joint payee does not appear to be an individual, the payment is presumed made to a foreign payee that is a nonparticipating FFI (as defined in § 1.1471–1(b)(82)). See § 1.1471–3(f)(7).

* * * * *

(d) *Effective/applicability date.* This section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments made after December 31, 2002, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.)

§ 1.6041–4T [Removed]

■ **Par. 26.** Section 1.6041–4T is removed.

■ **Par. 27.** Section 1.6042–2 is amended by revising paragraphs (a)(1)(i) and (f) to read as follows:

§ 1.6042–2 Returns of information as to dividends paid.

(a) * * *

(1) * * *

(i) Every person who makes a payment of dividends (as defined in § 1.6042–3) to any other person during a calendar year. The information return shall show the aggregate amount of the dividends, the name, address, and taxpayer identifying number of the person to whom paid, the amount of tax deducted and withheld under section 3406 from the dividends, if any, and such other information as required by the forms. An information return is generally not required if the amount of dividends paid to the other person during the calendar year aggregates less than $10 or if the payment is made to a person who is an exempt recipient described in § 1.6049–4(c)(1)(ii) unless the payor backup withholds under section 3406 on such payment (because, for example, the payee has failed to furnish a Form W–9), in which case the payor must make a return under this section, unless the payor refunds the amount withheld pursuant to § 31.6413(a)–3 of this chapter. Further, a return of information is not required under this section for—

(A) Payments with respect to which a return is not required by applying the rules of § 1.6049–4(c)(4) (by substituting the term ''dividend'' for the term ''interest''); or

(B) Payments made by a paying agent on behalf of a corporation described in section 1297(a) with respect to a shareholder of the corporation if—

(*1*) The paying agent obtains from the corporation a written certification signed by a person authorized to sign on behalf of the corporation, that states that the corporation is described in section 1297(a) for each calendar year during which the paying agent relies on the provisions of paragraph (a)(1)(i)(B) of this section, and the paying agent has no reason to know the written certification is unreliable or incorrect;

(*2*) The paying agent identifies, prior to payment, the corporation as a participating FFI (including a reporting Model 2 FFI) (as defined in § 1.6049–4(f)(10) or (14), respectively), or reporting Model 1 FFI (as defined in § 1.6049–4(f)(13)), in accordance with the requirements of § 1.1471–3(d)(4) (substituting the terms ''paying agent'' and ''corporation'' for the terms ''withholding agent'' and ''payee,'' respectively) and validates that status annually;

(*3*) The paying agent obtains a written certification representing that the corporation shall report the payment as part of its reporting obligations under chapter 4 of the Code or an applicable IGA (as defined in § 1.6049–4(f)(7)) with respect to its U.S. accounts and provided the paying agent does not know that the corporation is not reporting the payment as required. The paying agent may rely on the written certification until there is a change in circumstances or the paying agent knows or has reason to know that the statement is unreliable or incorrect. A paying agent that knows that the corporation is not reporting the payment as required under chapter 4 of the Code or an applicable IGA (as defined in § 1.6049–4(f)(7)) must report all payments reportable under this section that it makes during the year in which it obtains such knowledge; and

(*4*) The paying agent is not also acting in its capacity as a custodian, nominee, or other agent of the payee with respect to the payments.

* * * * *

(f) *Effective/applicability date.* This section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments made after December 31, 2000, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.)

§ 1.6042–2T [Removed]

■ **Par. 28.** Section 1.6042–2T is removed.

■ **Par. 29.** Section 1.6042–3 is amended by:

■ 1. Revising paragraphs (b)(1)(iii) and (iv), (b)(1)(vi), and (b)(3).

■ 2. Removing paragraph (b)(5).

■ 3. Adding paragraph (d).

The revisions and addition read as follows:

§ 1.6042–3 Dividends subject to reporting.

* * * * *

(b) * * *

(1) * * *

(iii) Distributions or payments that a payor can, prior to payment, reliably associate with documentation upon which it may rely to treat as made to a foreign beneficial owner in accordance with § 1.1441–1(e)(1)(ii) or as made to a foreign payee in accordance with § 1.6049–5(d)(1) or presumed to be made to a foreign payee under § 1.6049–5(d)(2), (3), (4), or (5). Returns of information are also not required for payments that a payor or middleman can, prior to payment, reliably associate with documentation upon which it may rely to treat as made to a foreign intermediary in accordance with § 1.1441–1(b) if it obtains from the intermediary entity a withholding statement (described in § 1.6049–5(b)(14)) that allocates the payment to a chapter 4 withholding rate pool (as defined in § 1.6049–4(f)(5)) or to specific payees to which withholding under chapter 4 applies. Payments excepted from reporting under this paragraph (b)(1)(iii) may be reportable, for purposes of chapter 3 of the Internal Revenue Code (Code), under § 1.1461–1(b) and (c) or, for chapter 4 purposes, under § 1.1474–1(d)(2). The provisions in § 1.6049–5(c) regarding documentation of foreign status shall apply for purposes of this paragraph (b)(1)(iii). The provisions in § 1.6049–5(c) regarding the definitions of U.S. payor and non-U.S. payor shall also apply for purposes of this paragraph (b)(1)(iii). The provisions of § 1.1441–1 shall apply by substituting the term *payor* for the term *withholding agent* and without regard to the fact that the provisions apply only to amounts subject to withholding under chapter 3 of the Code.

(iv) Distributions or payments from sources outside the United States (as determined under the provisions of part I, subchapter N, chapter 1 of the Code and the regulations under those provisions) that are paid by a non-U.S. payor or non-U.S. middleman and that are paid and received outside the United States. For a definition of non-U.S. payor and non-U.S. middleman, see § 1.6049–5(c)(5). For circumstances in which an amount is considered to be paid and received outside the United States, see § 1.6049–4(f)(16).

* * * * *

(vi) If a foreign intermediary, as described in § 1.1441–1(c)(13), or a U.S. branch that is not treated as a U.S. person receives a payment from a payor, which payment the payor can reliably associate with a valid withholding certificate described in § 1.1441–1(e)(3)(ii) or (iii), or § 1.1441–1(e)(3)(v), respectively, furnished by such intermediary or branch, then the intermediary or branch is not required to report such payment when it, in turn, pays the amount, unless, and to the extent, the intermediary or branch knows that the payment is required to be reported under this section and was not so reported. For example, if a U.S. branch described in § 1.1441–1(b)(2)(iv) fails to provide information regarding U.S. persons that are not exempt from reporting under § 1.6049–4(c)(1)(ii) to the person from whom the U.S. branch receives the payment, the amount paid by the U.S. branch to such person is a dividend. See, however, § 1.6042–2(a)(1)(i)(A) for when reporting under

section 6042 is coordinated with reporting under chapter 4 of the Code or an applicable IGA (as defined in § 1.6049–4(f)(7)). The exception of this paragraph (b)(1)(vi) for amounts paid by a foreign intermediary shall not apply to a qualified intermediary that assumes reporting responsibility under chapter 61 of the Code with respect to amounts reportable under the agreement described in § 1.1441–1(e)(5)(iii).

* * * * *

(3) *Joint owners.* Amounts paid to joint owners for which a certificate or documentation is required as a condition for being exempt from reporting under this paragraph (b) are presumed made to U.S. payees who are not exempt recipients if, prior to payment, the payor or middleman cannot reliably associate the payment either with a Form W–9 furnished by one of the joint owners in the manner required in §§ 31.3406(d)–1 through 31.3406(d)–5 of this chapter, or with documentation described in paragraph (b)(1)(iii) of this section furnished by each joint owner upon which it can rely to treat each joint owner as a foreign payee or foreign beneficial owner. However in the case of a withholdable payment (as defined in § 1.6049–4(f)(15)) made to joint payees, if any such joint payee does not appear to be an individual, the payment is presumed made to a foreign payee that is a nonparticipating FFI (as defined in § 1.1471–1(b)(82)). See § 1.1471–3(f)(7). For purposes of applying this paragraph (b)(3), the grace period described in § 1.6049–5(d)(2)(ii) shall apply only if each payee qualifies for such grace period.

* * * * *

(d) *Effective/applicability date.* This section applies on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments made after December 31, 2000, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013).

§ 1.6042–3T [Removed]

■ **Par. 30.** Section 1.6042–3T is removed.

■ **Par. 31.** Section 1.6045–1 is amended by:

■ 1. Revising paragraphs (c)(3)(ii) and (xiv).

■ 2. Removing paragraph (c)(3)(xv) and (c)(7)(v).

■ 3. Revising paragraphs (g)(1)(i), (g)(3)(iv), and (g)(4),

■ 4. Removing paragraph (g)(5).

■ 5. Revising paragraphs (m)(2)(ii) and (n)(12)(ii).

■ 6. Adding paragraph (q).

The revisions and addition read as follows:

§ 1.6045–1 Returns of information of brokers and barter exchanges.

* * * * *

(c) * * *

(3) * * *

(ii) *Excepted sales.* No return of information is required with respect to a sale effected by a broker for a customer if the sale is an excepted sale. For this purpose, a sale is an excepted sale if it is—

(A) So designated by the Internal Revenue Service in a revenue ruling or revenue procedure (see § 601.601(d)(2) of this chapter); or

(B) A sale with respect to which a return is not required by applying the rules of § 1.6049–4(c)(4) (by substituting the term ''a sale subject to reporting under section 6045'' for the term ''an interest payment'').

* * * * *

(xiv) *Certain redemptions.* No return of information is required under this section for payments made by a stock transfer agent (as described in § 1.6045–1(b)(iv)) with respect to a redemption of stock of a corporation described in section 1297(a) with respect to a shareholder in the corporation if—

(A) The stock transfer agent obtains from the corporation a written certification signed by a person authorized to sign on behalf of the corporation, that states that the corporation is described in section 1297(a) for each calendar year during which the stock transfer agent relies on the provisions of paragraph (c)(3)(xiv) of this section, and the stock transfer agent has no reason to know that the written certification is unreliable or incorrect;

(B) The stock transfer agent identifies, prior to payment, the corporation as a participating FFI (including a reporting Model 2 FFI) (as defined in § 1.6049–4(f)(10) or (f)(14), respectively), or reporting Model 1 FFI (as defined in § 1.6049–4(f)(13)), in accordance with the requirements of § 1.1471–3(d)(4) (substituting the terms ''stock transfer agent'' and ''corporation'' for the terms ''withholding agent'' and ''payee,'' respectively) and validates that status annually;

(C) The stock transfer agent obtains a written certification representing that the corporation shall report the payment as part of its account holder reporting obligations under chapter 4 of the Code or an applicable IGA (as defined in § 1.6049–4(f)(7)) and provided the stock transfer agent does not know that the corporation is not reporting the payment as required. The paying agent may rely on the written certification until there is a change in circumstances or the paying agent knows or has reason to know that the statement is unreliable or incorrect. A stock transfer agent that knows that the corporation is not reporting the payment as required under chapter 4 of the Code or an applicable IGA must report all payments reportable under this section that it makes during the year in which it obtains such knowledge; and

(D) The stock transfer agent is not also acting in its capacity as a custodian, nominee, or other agent of the payee with respect to the payment.

* * * * *

(g) * * *

(1) * * *

(i) With respect to a sale effected at an office of a broker either inside or outside the United States, the broker may treat the customer as an exempt foreign person if the broker can, prior to the payment, reliably associate the payment with documentation upon which it can rely in order to treat the customer as a foreign beneficial owner in accordance with § 1.1441–1(e)(1)(ii), as made to a foreign payee in accordance with § 1.6049–5(d)(1), or presumed to be made to a foreign payee under § 1.6049–5(d)(2) or (3). For purposes of this paragraph (g)(1)(i), the provisions in § 1.6049–5(c) regarding rules applicable to documentation of foreign status shall apply with respect to a sale when the broker completes the acts necessary to effect the sale at an office outside the United States, as described in paragraph (g)(3)(iii)(A) of this section, and no office of the same broker within the United States negotiated the sale with the customer or received instructions with respect to the sale from the customer. The provisions in § 1.6049–5(c) regarding the definitions of U.S. payor, U.S. middleman, non-U.S. payor, and non-U.S. middleman shall also apply for purposes of this paragraph (g)(1)(i). The provisions of § 1.1441–1 shall apply by substituting the terms ''broker'' and ''customer'' for the terms ''withholding agent'' and ''payee,'' respectively, and without regard for the fact that the provisions apply to amounts subject to withholding under chapter 3 of the Code. The provisions of § 1.6049–5(d) shall apply by substituting the terms ''broker'' and ''customer'' for the terms ''payor'' and ''payee,'' respectively. For purposes of this paragraph (g)(1)(i), a broker that is required to obtain, or chooses to obtain, a beneficial owner withholding certificate described in § 1.1441–1(e)(2)(i) from an individual may rely on the withholding certificate only to the

extent the certificate includes a certification that the beneficial owner has not been, and at the time the certificate is furnished, reasonably expects not to be present in the United States for a period aggregating 183 days or more during each calendar year to which the certificate pertains. The certification is not required if a broker receives documentary evidence under § 1.6049–5(c)(1) or (4).

* * * * *

(3) * * *

(iv) *Special rules where the customer is a foreign intermediary or certain U.S. branches.* A foreign intermediary, as defined in § 1.1441–1(c)(13), is an exempt foreign person, except when the broker has actual knowledge (within the meaning of § 1.6049–5(c)(3)) that the person for whom the intermediary acts is a U.S. person that is not exempt from reporting under paragraph (c)(3) of this section or the broker is required to presume under § 1.6049–5(d)(3) that the payee is a U.S. person that is not an exempt recipient. If a foreign intermediary, as described in § 1.1441–1(c)(13), or a U.S. branch that is not treated as a U.S. person receives a payment from a payor or middleman, which payment the payor or middleman can reliably associate with a valid withholding certificate described in § 1.1441–1(e)(3)(ii) or (iii) or § 1.1441–1(e)(3)(v), respectively, furnished by such intermediary or branch, then the intermediary or branch is not required to report such payment when it, in turn, pays the amount, unless, and to the extent, the intermediary or branch knows that the payment is required to be reported under this section and was not so reported. For example, if a U.S. branch described in § 1.1441–1(b)(2)(iv) fails to provide information regarding U.S. persons that are not exempt from reporting under paragraph (c)(3) of this section to the person from whom the U.S. branch receives the payment, the U.S. branch must report the payment on an information return. See, however, paragraph (c)(3)(ii) of this section for when reporting under section 6045 is coordinated with reporting under chapter 4 of the Code or an applicable IGA (as defined in § 1.6049–4(f)(7)). The exception of this paragraph (g)(3)(iv) for amounts paid by a foreign intermediary shall not apply to a qualified intermediary that assumes reporting responsibility under chapter 61 of the Code except as provided under the agreement described in § 1.1441–1(e)(5)(iii).

(4) *Examples.* The application of the provisions of this paragraph (g) may be illustrated by the following examples:

Example 1. FC is a foreign corporation that is not a U.S. payor or U.S. middleman described in § 1.6049–5(c)(5) that regularly issues and retires its own debt obligations. A is an individual whose residence address is inside the United States, who holds a bond issued by FC that is in registered form (within the meaning of section 163(f) and the regulations under that section). The bond is retired by FP, a foreign corporation that is a broker within the meaning of paragraph (a)(1) of this section and the designated paying agent of FC. FP mails the proceeds to A at A's U.S. address. The sale would be considered to be effected at an office outside the United States under paragraph (g)(3)(iii)(A) of this section except that the proceeds of the sale are mailed to a U.S. address. For that reason, the sale is considered to be effected at an office of the broker inside the United States under paragraph (g)(3)(iii)(B) of this section. Therefore, FC is a broker under paragraph (a)(1) of this section with respect to this transaction because, although it is not a U.S. payor or U.S. middleman, as described in § 1.6049–5(c)(5), it is deemed to effect the sale in the United States. FP is a broker for the same reasons. However, under the multiple broker exception under paragraph (c)(3)(iii) of this section, FP, rather than FC, is required to report the payment because FP is responsible for paying the holder the proceeds from the retired obligations. Under paragraph (g)(1)(i) of this section, FP may not treat A as an exempt foreign person and must make an information return under section 6045 with respect to the retirement of the FC bond, unless FP obtains the certificate or documentation described in paragraph (g)(1)(i) of this section.

Example 2. The facts are the same as in *Example 1* except that FP mails the proceeds to A at an address outside the United States. Under paragraph (g)(3)(iii)(A) of this section, the sale is considered to be effected at an office of the broker outside the United States. Therefore, under paragraph (a)(1) of this section, neither FC nor FP is a broker with respect to the retirement of the FC bond. Accordingly, neither is required to make an information return under section 6045.

Example 3. The facts are the same as in *Example 2* except that FP is also the agent of A. The result is the same as in *Example 2.* Neither FP nor FC are brokers under paragraph (a)(1) of this section with respect to the sale since the sale is effected outside the United States and neither of them are U.S. payors (within the meaning of § 1.6049–5(c)(5)).

Example 4. The facts are the same as in *Example 1* except that the registered bond held by A was issued by DC, a domestic corporation that regularly issues and retires its own debt obligations. Also, FP mails the proceeds to A at an address outside the United States. Interest on the bond is not described in paragraph (g)(1)(ii) of this section. The sale is considered to be effected at an office outside the United States under paragraph (g)(3)(iii)(A) of this section. DC is a broker under paragraph (a)(1)(i)(B) of this section. DC is not required to report the payment under the multiple broker exception under paragraph (c)(3)(iii) of this section. FP is not required to make an information return under section 6045 because FP is not a U.S. payor described in § 1.6049–5(c)(5) and the sale is effected outside the United States. Accordingly, FP is not a broker under paragraph (a)(1) of this section.

Example 5. The facts are the same as in *Example 4* except that FP is also the agent of A. DC is a broker under paragraph (a)(1) of this section. DC is not required to report under the multiple broker exception under paragraph (c)(3)(iii) of this section. FP is not required to make an information return under section 6045 because FP is not a U.S. payor described in § 1.6049–5(c)(5) and the sale is effected outside the United States and therefore FP is not a broker under paragraph (a)(1) of this section.

Example 6. The facts are the same as in *Example 4* except that the bond is retired by DP, a broker within the meaning of paragraph (a)(1) of this section and the designated paying agent of DC. DP is a U.S. payor under § 1.6049–5(c)(5). DC is not required to report under the multiple broker exception under paragraph (c)(3)(iii) of this section. DP is required to make an information return under section 6045 because it is the person responsible for paying the proceeds from the retired obligations unless DP obtains the certificate or documentary evidence described in paragraph (g)(1)(i) of this section.

Example 7. Customer A owns U.S. corporate bonds issued in registered form after July 18, 1984, and carrying a stated rate of interest. The bonds are held through an account with foreign bank, X, and are held in street name. X is a wholly-owned subsidiary of a U.S. company and is not a qualified intermediary within the meaning of § 1.1441–1(e)(5)(ii). X has no documentation regarding A. A instructs X to sell the bonds. In order to effect the sale, X acts through its agent in the United States, Y. Y sells the bonds and remits the sales proceeds to X. X credits A's account in the foreign country. X does not provide documentation to Y and has no actual knowledge that A is a foreign person but it does appear that A is an entity (rather than an individual).

(i) *Y's obligations to withhold and report.* Y treats X as the customer, and not A, because Y cannot treat X as an intermediary because it has received no documentation from X. Y is not required to report the sales proceeds under the multiple broker exception under paragraph (c)(3)(iii) of this section, because X is an exempt recipient. Further, Y is not required to report the amount of accrued interest paid to X on Form 1042–S under § 1.1461–1(c)(2)(ii) because accrued interest is not an amount subject to reporting under chapter 3 unless the withholding agent knows that the obligation is being sold with a primary purpose of avoiding tax.

(ii) *X's obligations to withhold and report.* Although X has effected, within the meaning of paragraph (a)(1) of this section, the sale of a security at an office outside the United States under paragraph (g)(3)(iii) of this section, X is treated as a broker, under paragraph (a)(1) of this section, because as a wholly-owned subsidiary of a U.S. corporation, X is a controlled foreign

corporation and therefore is a U.S. payor. See § 1.6049–5(c)(5). Under the presumptions described in § 1.6049–5(d)(2) (as applied to amounts not subject to withholding under chapter 3), X must apply the presumption rules of § 1.1441–1(b)(3)(i) through (iii), with respect to the sales proceeds, to treat A as a partnership that is a U.S. non-exempt recipient because the presumption of foreign status for offshore obligations under § 1.1441–1(b)(3)(iii)(D) does not apply. See paragraph (g)(1)(i) of this section. Therefore, unless X is an FFI (as defined in § 1.1471–1(b)(47)) that is excepted from reporting the sales proceeds under paragraph (c)(3)(ii) of this section, the payment of proceeds to A by X is reportable on a Form 1099 under paragraph (c)(2) of this section. X has no obligation to backup withhold on the payment based on the exemption under § 31.3406(g)–1(e) of this chapter, unless X has actual knowledge that A is a U.S. person that is not an exempt recipient. X is also required to separately report the accrued interest (see paragraph (d)(3) of this section) on Form 1099 under section 6049 because A is also presumed to be a U.S. person who is not an exempt recipient with respect to the payment because accrued interest is not an amount subject to withholding under chapter 3 and, therefore, the presumption of foreign status for offshore obligations under § 1.1441–1(b)(3)(iii)(D) does not apply. See § 1.6049–5(d)(2)(i).

Example 8. The facts are the same as in *Example 7,* except that X is a foreign corporation that is not a U.S. payor under § 1.6049–5(c).

(i) *Y's obligations to withhold and report.* Y is not required to report the sales proceeds under the multiple broker exception under paragraph (c)(3)(iii) of this section, because X is the person responsible for paying the proceeds from the sale to A.

(ii) *X's obligations to withhold and report.* Although A is presumed to be a U.S. payee under the presumptions of § 1.6049–5(d)(2), X is not considered to be a broker under paragraph (a)(1) of this section because it is a not a U.S. payor under § 1.6049–5(c)(5). Therefore X is not required to report the sale under paragraph (c)(2) of this section.

* * * * *

(m) * * *

(2) * * *

(ii) *Delayed effective date for certain options*—(A) Notwithstanding paragraph (m)(2)(i) of this section, if an option, stock right, or warrant is issued as part of an investment unit described in § 1.1273–2(h), paragraph (m) of this section applies to the option, stock right, or warrant if it is acquired after December 31, 2015.

* * * * *

(n) * * *

(12) * * *

(ii) *Effective/applicability date.* Paragraph (n)(12)(i) of this section applies to a debt instrument described in paragraph (n)(12)(i)(A) or (B) of this section that is acquired after February 17, 2016. However, a broker may rely on paragraph (n)(12)(i) of this section for a debt instrument described in paragraph (n)(12)(i)(A)(or (B) of this section acquired before February 18, 2016.

* * * * *

(q) *Effective/applicability date.* Except as otherwise provided in paragraphs (m)(2)(ii), and (n)(12)(ii) of this section, this section applies on or after January 6, 2017. (For rules that apply after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016.)

§ 1.6045–1T [Removed]

■ **Par. 32.** Section 1.6045–1T is removed.

■ **Par. 33.** Section 1.6049–4 is amended by revising paragraphs (b)(1), (c)(4), (f)(3), (f)(4)(ii), (f)(5) through (16), and (h) to read as follows:

§ 1.6049–4 Return of information as to interest paid and original issue discount includible in gross income after December 31, 1982.

* * * * *

(b) *Information to be reported*—(1) *Interest payments.* Except as provided in paragraphs (b)(3) and (5) of this section, in the case of interest other than original issue discount treated as interest under § 1.6049–5(f), an information return on Form 1099 shall be made for the calendar year showing the aggregate amount of the payments, the name, address, and taxpayer identification number of the person to whom paid, the amount of tax deducted and withheld under section 3406 from the payments, if any, and such other information as required by the forms. An information return is generally not required if the amount of interest paid to a person aggregates less than $10 or if the payment is made to a person who is an exempt recipient described in paragraph (c)(1)(ii) of this section, unless the payor backup withholds under section 3406 on such payment (because, for example, the payee (*i.e.,* exempt recipient) has failed to furnish a Form W–9 on request), in which case the payor must make a return under this section, unless the payor refunds the amount withheld pursuant to § 31.6413(a)-3 (Employment Tax Regulations). For reporting interest paid to certain nonresident alien individuals, see § 1.6049–8.

* * * * *

(c) * * *

(4) *Coordination of reporting with chapter 4 reporting or an applicable IGA*—(i) *U.S. accounts reported by FFIs that are non-U.S. payors.* An information return shall not be required with respect to an interest payment made by a participating FFI (including a reporting Model 2 FFI), or registered deemed-compliant FFI (including a reporting Model 1 FFI), that is a non-U.S. payor (as defined in § 1.6049–5(c)(5)) to an account holder of an account maintained by the FFI, when the payment is not subject to withholding under chapter 4 or to backup withholding under section 3406, and the conditions of paragraphs (c)(4)(i)(A), (B), or (C) of this section, as applicable, are met. See paragraph (c)(4)(iii) of this section for circumstances in which an FFI may allocate a payment described in this paragraph (c)(4)(i) to a chapter 4 withholding rate pool of U.S. payees.

(A) The FFI is a participating FFI (including a reporting Model 2 FFI) reporting the account holder of the U.S. account (as defined in § 1.1471–1(b)(133)) pursuant to either § 1.1471–4(d)(3) or (5) for the year in which the payment is made (including reporting of the account holder's TIN).

(B) The FFI is a registered deemed-compliant FFI (other than a reporting Model 1 FFI) reporting the account holder of the U.S. account pursuant to the conditions of its applicable deemed-compliant status under § 1.1471–5(f)(1) for the year in which the payment is made (including reporting of the account holder's TIN).

(C) The FFI is a reporting Model 1 FFI reporting the account holder of the reportable U.S. account pursuant to an applicable Model 1 IGA for the year in which the payment is made (including reporting of the account holder's TIN).

(ii) *Other accounts reported by FFIs under chapter 4.* An information return shall not be required under this section with respect to a payment that is not subject to withholding under chapter 3 (as defined in § 1.1441–2(a)) or backup withholding under § 31.3406(g)–1(e) and that is made to a recalcitrant account holder of a participating FFI or registered deemed-compliant FFI (or non-consenting U.S. account of a reporting Model 2 FFI), provided that the FFI reports such account holder in accordance with the classes of account holders described in § 1.1471–4(d)(6) for the year in which the payment is made. See paragraph (c)(4)(iii) of this section for circumstances in which an FFI may allocate a payment described in this paragraph (c)(4)(ii) to a chapter 4 withholding rate pool of U.S. payees. In the case of a payment made by an FFI that is a reporting Model 1 FFI, an information return shall not be required with respect to a payment that is not subject to withholding under chapter 3 or backup withholding under § 31.3406(g)–1(e) and that is made to an

account holder of the FFI if the account—

(A) Has U.S. indicia for which appropriate documentation sufficient to treat the account as held by other than a specified U.S. person has not been provided pursuant to the due diligence requirements described in an applicable Model 1 IGA, and

(B) Is therefore treated as a U.S. reportable account that the FFI is required to report pursuant to the applicable Model 1 IGA.

(iii) *Coordination of reporting exceptions with reporting of chapter 4 withholding rate pools.* For purposes of paragraphs (c)(4)(i) and (ii) of this section, a participating FFI (including a reporting Model 2 FFI) or registered deemed-compliant FFI (including a reporting Model 1 FFI) receiving a payment from another payor may provide a withholding statement to the payor allocating the payment to a chapter 4 withholding rate of pool of U.S. payees only if the payment is excepted from reporting under paragraph (c)(4)(i) of this section or if the payment is both excepted from reporting under paragraph (c)(4)(ii) of this section and not subject to withholding under chapter 4. See § 1.6049–5(b)(14) (providing an exception from reporting under section 6049 to a payor that has been furnished a withholding statement from an participating FFI (including a reporting Model 2 FFI) or registered deemed-compliant FFI (including a reporting Model 1 FFI) and that allocates the payment to a chapter 4 withholding rate pool). Thus, for example, a U.S. payor that is a participating FFI may not allocate a payment to a chapter 4 withholding rate pool of U.S. payees on a withholding statement described in § 1.6049–5(b)(14) when the payment is made to a U.S. account maintained by the FFI, regardless of whether the FFI reports the account in accordance with § 1.1471–4(d)(3) because the U.S. payor is not excepted from reporting under this section pursuant to paragraph (c)(4)(i) of this section.

(iv) *Example.* The application of the provisions of paragraphs (c)(4)(ii) and (iii) of this section may be illustrated by the following example:

Example. USP is a payor that makes an interest payment that is not a withholdable payment (as defined in paragraph (f)(15) of this section) to RM2, a U.S. payor and reporting Model 2 FFI. The payment is paid and received outside of the United States and is not an amount subject to withholding under chapter 3. RM2 receives the payment as an intermediary with respect to a preexisting account held by A. RM2 has account information with respect to A which includes U.S. indicia as described in § 1.1441–7(b)(5) or (8). A does not provide consent for RM2 to report A's account. Under the presumption rules described in § 1.6049–5(d)(2)(i), RM2 is required to treat A as a U.S. non-exempt recipient. Despite this presumption rule, and because backup withholding does not apply under § 31.3406(g)–1(e), no information return shall be required with respect to the payment under paragraph (c)(4)(ii) of this section if A is reported by RM2 consistent with § 1.1471–4(d)(6) as a non-consenting account holder. Additionally, RM2 may include A in the chapter 4 withholding rate pool of U.S. payees on the withholding statement provided to USP consistent with the requirements of paragraph (c)(4)(iii) of this section.

* * * * *

(f) * * *

(3) *Obligation.* The term *obligation* includes bonds, debentures, notes, certificates, and other evidences of indebtedness regardless of how denominated. For the definition of the term *offshore obligation,* see paragraph (f)(9) of this section.

(4) * * *

(ii) *Example.* The application of the provisions of paragraph (f)(4) of this section may be illustrated by the following example:

Example. In January 1984, Broker B, a U.S. payor, purchases on behalf of its customer, Individual A, an obligation issued by partnership in a public offering on that date. Broker B holds the obligation for A throughout 1984. Broker B is required to make an information return showing the amount of original issue discount treated as paid to A under § 1.6049–5(f).

(5) *Chapter 4 withholding rate pool.* The term *chapter 4 withholding rate pool* has the meaning set forth in § 1.1471–1(b)(20). However, for determining the U.S. payees included in a chapter 4 withholding rate pool for purposes of section 6049, see paragraph (c)(4)(iii) of this section.

(6) *Foreign financial institution (or FFI).* The term *foreign financial institution* or *FFI* means an entity described in § 1.1471–1(b)(47),

(7) *Intergovernmental agreement (or IGA).* The term *intergovernmental agreement* or *IGA* has the meaning set forth in § 1.1471–1(b)(67) (*i.e.,* either a *Model 1 IGA* described in § 1.1471–1(b)(78) or a *Model 2 IGA* described in § 1.1471–1(b)(79)).

(8) *Non-consenting U.S. accounts.* The term *non-consenting U.S. accounts* has the meaning set forth in an applicable Model 2 IGA.

(9) *Offshore obligation.* The term offshore obligation means an offshore obligation defined in § 1.6049–5(c)(1). For the definition of the term *obligation,* see paragraph (f)(3) of this section.

(10) *Participating FFI.* The term *participating FFI* means an FFI that is described in § 1.1471–1(b)(91).

(11) *Recalcitrant account holder.* The term *recalcitrant account holder* has the same meaning set forth in § 1.1471–1(b)(110).

(12) *Registered deemed-compliant FFI.* The term *registered deemed-compliant FFI* means an FFI that is described in § 1.1471–1(b)(111).

(13) *Reporting Model 1 FFI.* The term *reporting Model 1 FFI* means an FFI that is described in § 1.1471–1(b)(114).

(14) *Reporting Model 2 FFI.* The term *reporting Model 2 FFI* means a participating FFI that is described in § 1.1471–1(b)(91).

(15) *Withholdable payment.* The term *withholdable payment* means a payment described in § 1.1471–1(b)(145).

(16) *Paid and received outside the United States*—(i) *In general.* Except as otherwise provided in paragraphs (f)(16)(ii) and (iii) of this section, the term *paid and received outside the United States* means an amount that is paid by a payor or middleman outside the United States as described in § 1.6049–5(e).

(ii) *Transfers to the United States.* Without regard to the location of the account from which the amount is drawn, an amount that is described in paragraph (f)(16)(ii)(A) or (B) of this section and paid by transfer to an account maintained by the payee in the United States or by mail to a United States address (including an amount paid with respect to a bond or a discount obligation described in § 1.6049–5(e)(4)) is not considered to be paid and received outside the United States.

(A) An amount is described in this paragraph (f)(16)(ii)(A) if it is paid by an issuer or the paying agent of the issuer with respect to an obligation that is—

(*1*) Issued by a U.S. payor, as defined in § 1.6049–5(c)(5);

(*2*) Registered under the Securities Act of 1933 (15 U.S.C. 77a); or

(*3*) Listed on an exchange that is registered as a national securities exchange in the United States or included in an interdealer quotation system in the United States.

(B) An amount is described in this paragraph (f)(16)(ii)(B) if it is paid by a U.S. middleman (as defined in § 1.6049–5(c)(5)) that, as a custodian, nominee, or other agent of a payee, collects the amount for or on behalf of the payee.

(iii) *Deposits or accounts with banks and other financial institutions.* In the case of an amount paid by a bank or other financial institution with respect to a deposit or an account that is considered paid at a branch or office

outside the United States as described in § 1.6049–5(e)(2), the amount is not considered paid and received outside the United States if the institution has knowledge that the customer has transmitted instructions to an agent, branch, or office of the institution from inside the United States by mail, telephone, electronic transmission, or otherwise concerning the deposit or account (unless the transmission from the United States has taken place in isolated and infrequent circumstances).

(iv) *Examples.* The application of the provisions of paragraph (f)(16) of this section may be illustrated by the following examples:

Example 1. FC is a foreign corporation that is not a U.S. payor or U.S. middleman, as defined in § 1.6049–5(c)(5). A holds FC coupon bonds that are not in registered form under section 163(f) and the regulations . FB, a foreign branch of DC, a domestic corporation, is the designated paying agent with respect to the bonds issued by FC. A does not have an account with FB. A presents a coupon to FB at its office outside the United States with instructions to transfer funds to a bank account maintained by A in the United States. FB transfers the funds in accordance with A's instructions. Even though the amount is credited to an account in the United States, the interest on the FC bonds is paid and received outside the United States under paragraph (f)(16)(ii) of this section and § 1.6049–5(e)(3) because the coupon is presented for payment outside the United States; because FC is a foreign person that is not a U.S. payor or U.S. middleman, as defined in § 1.6049–5(d)(1); because FB is not acting as A's agent; and because the obligation is not registered under the Securities Act of 1933 (15 U.S.C. 77a), listed on a securities exchange that is registered as a national securities exchange in the United States, or included in an interdealer quotation system.

Example 2. FC is a foreign corporation that is not a U.S. payor or U.S. middleman, as defined in § 1.6049–5(d)(1). B, a United States citizen, holds a bond issued by FC in registered form under section 163(f) and the regulations thereunder and registered under the Securities Act of 1933 (15 U.S.C. 77a). The bond is not a foreign-targeted registered obligation as defined in § 1.871–14(e)(2). DB, a United States branch of a foreign corporation engaged in the commercial banking business, is the registrar of the bonds issued by FC. DB supplies FC with a list of the holders of the FC bonds. Interest on the FC bonds is paid to B and other bondholders by checks prepared by FC at its principal office outside the United States, and B's check is mailed from there to his designated address in the United States. The bond is described in paragraph (f)(16)(ii)(A)(*2*) of this section. The interest on the FC bonds paid to B by FC is not paid and received outside the United States under paragraph (f)(16) of this section.

Example 3. The facts are the same as in *Example 2* except that the checks are prepared and mailed in the United States by DC, a U.S. corporation engaged in the commercial banking business that is the designated paying agent with respect to the bonds issued by FC, and B's check is mailed to his designated address outside the United States. For purposes of section 6049, the interest on the FC bonds paid by DC is not paid and received outside the United States under paragraph (f)(16)(i) of this section.

* * * * *

(h) *Effective/applicability dates.* Except as otherwise provided in paragraphs (b)(5)(ii) and (d)(3)(ii)(B) of this section, this section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016.)

§ 1.6049–4T [Removed]

■ **Par. 34.** Section 1.6049–4T is removed.

■ **Par. 35.** Section 1.6049–5 is amended by:

■ 1. Revising paragraphs (b)(6) through (8), (b)(10) through (b)(11)(ii)(A), (b)(12), (b)(14) and (15), and (c)(1)(i) through (iii).

■ 2. Adding paragraph (c)(1)(iv).

■ 3. Revising paragraphs (c)(2) and (3) and (c)(4) introductory text and (c)(4)(i).

■ 4. Removing paragraph (c)(4)(ii).

■ 5. Redesignating paragraphs (c)(4)(iii) and (iv) as paragraphs (c)(4)(ii) and (iii).

■ 6. Revising paragraphs (c)(5)(i)(F), (c)(6), (d)(1) and (2), (d)(3)(i) through (d)(3)(iii)(A), (d)(4), (e), and (g).

The addition and revisions read as follows:

§ 1.6049–5 Interest and original issue discount subject to reporting after December 31, 1982.

* * * * *

(b) * * *

(6) Amounts from sources outside the United States (determined under the provisions of part I, subchapter N, chapter 1 of the Internal Revenue Code (Code) and the regulations under those provisions) paid by a non-U.S. payor or a non-U.S. middleman (as defined in paragraph (c)(5) of this section) and paid and received outside the United States. See § 1.6049–4(f)(16) for circumstances in which a payment is considered to be paid and received outside the United States.

(7) Portfolio interest, as defined in § 1.871–14(b)(1), paid with respect to obligations in bearer form described in section 871(h)(2)(A), as in effect prior to the amendment by section 502 of the Hiring Incentives to Restore Employment Act of 2010 (HIRE Act), Public Law 111–147, or section 881(c)(2)(A), as in effect prior to the amendment by section 502 of the HIRE Act, that were issued prior to March 19, 2012, or with respect to a foreign-targeted registered obligation described in § 1.871–14(e)(2) that was issued prior to January 1, 2016, and for which the documentation requirements described in § 1.871–14(e)(3) and (4) have been satisfied (other than by a U.S. middleman (as defined in paragraph (c)(5) of this section) that, as a custodian or nominee of the payee, collects the amount for, or on behalf of, the payee, regardless of whether the middleman is also acting as agent of the payor).

(8) Portfolio interest described in § 1.871–14(c)(1)(ii), paid with respect to obligations in registered form described in section 871(h)(2) or 881(c)(2) that is not described in paragraph (b)(7) of this section.

* * * * *

(10)(i) Amounts paid and received outside the United States under § 1.6049–4(f)(16) (other than by a U.S. middleman (as defined in paragraph (c)(5) of this section) that are paid by a custodian or nominee or other agent of the payee, of amounts that that it receives for, or on behalf of, the payee, regardless of whether the middleman is also acting as agent of the payor) with respect to an obligation that: Has a face amount or principal amount of not less than $500,000 (as determined based on the spot rate on the date of issuance if in foreign currency); has a maturity (at issue) of 183 days or less; satisfies the requirements of sections 163(f)(2)(B)(i) and (ii)(I), as in effect prior to the amendment by section 502 of the HIRE Act, and the regulations thereunder (as if the obligation would otherwise be a registration-required obligation within the meaning of section 163(f)(2)(A)) (however, an original issue discount obligation with a maturity of 183 days or less from the date of issuance is not required to satisfy the certification requirement of § 1.163–5(c)(2)(i)(D)(*3*)) and is issued in accordance with the procedures of § 1.163–5(c)(2)(i)(D); and has on its face the following statement (or a similar statement having the same effect):

By accepting this obligation, the holder represents and warrants that it is not a United States person (other than an exempt recipient described in section 6049(b)(4) of the Internal Revenue Code and regulations thereunder) and that it is not acting for or on behalf of a United States person (other than an exempt recipient described in section 6049(b)(4) of the Internal Revenue Code and the regulations thereunder).

(ii) If the obligation is in registered form, it must be registered in the name of an exempt recipient described in § 1.6049–4(c)(1)(ii). For purposes of this paragraph (b)(10), a middleman may treat an obligation as described in

section 163(f)(2)(B)(i) and (f)(2)(B)(ii)(I), as in effect prior to the amendment by section 502 of the HIRE Act, and the regulations under that section if the obligation, or coupons detached therefrom, whichever is presented for payment, contains the statement described in this paragraph (b)(10). The exemption from reporting described in this paragraph (b)(10) shall not apply if the payor has actual knowledge that the payee is a U.S. person who is not an exempt recipient.

(11) Amounts paid with respect to an account or deposit with a U.S. or foreign branch of a domestic or foreign corporation or partnership that is paid with respect to an obligation described in either paragraph (b)(11)(i) or (ii) of this section, if the branch is engaged in the commercial banking business; and the interest or OID is paid and received outside the United States as defined in § 1.6049–4(f)(16) (other than by a U.S. middleman (as defined in paragraph (c)(5) of this section) that acts as a custodian, nominee, or other agent of the payee, and collects the amount for, or on behalf of, the payee, regardless of whether the middleman is also acting as agent of the payor). The exemption from reporting described in this paragraph (b)(11) shall not apply if the payor has actual knowledge that the payee is a U.S. person who is not an exempt recipient.

(i) An obligation is described in this paragraph (b)(11)(i) if it is not in registered form (within the meaning of section 163(f) and the regulations under that section), is described in section 163(f)(2)(B), as in effect prior to the amendment by section 502 of the HIRE Act, and issued in accordance with the procedures of § 1.163–5(c)(2)(i)(C) or (D), and, in the case of a U.S. branch, is part of a larger single public offering of securities. For purposes of this paragraph (b)(11)(i), a middleman may treat an obligation as described in section 163(f)(2)(B), as in effect prior to the amendment by section 502 of the HIRE Act, if the obligation, and any detachable coupons, contains the statement described in section 163(f)(2)(B)(ii)(II), as in effect prior to the amendment by section 502 of the HIRE Act, and the regulations under that section.

(ii)(A) An obligation is described in this paragraph (b)(11)(ii) if it produces income described in section 871(i)(2)(A); has a face amount or principal amount of not less than $500,000 (as determined based on the spot rate on the date of issuance if in foreign currency); satisfies the requirements of sections 163(f)(2)(B)(i) and (ii)(I), as in effect prior to the amendment by section 502 of the HIRE Act, and the regulations thereunder (as if the obligation would otherwise be a registration-required obligation within the meaning of section 163(f)(2)(A)) and is issued in accordance with the procedures of § 1.163–5(c)(2)(i)(C) or (D) (however, an original issue discount obligation with a maturity of 183 days or less from the date of issuance is not required to satisfy the certification requirement of § 1.163–5(c)(2)(i)(D)(*3*)). For purposes of this paragraph (b)(11)(ii), a middleman may treat an obligation as described in sections 163(f)(2)(B)(i) and (ii), as in effect prior to the amendment by section 502 of the HIRE Act, and the regulations under that section if the obligation, or any detachable coupon, contains the statement described in paragraph (b)(11)(ii)(B) of this section.

* * * * *

(12) Payments that a payor can, prior to payment, reliably associate with documentation upon which it may rely to treat the payment as made to a foreign beneficial owner in accordance with § 1.1441–1(e)(1)(ii) or as made to a foreign payee in accordance with paragraph (d)(1) of this section or presumed to be made to a foreign payee under paragraph (d)(2) or (3) of this section. However, such payments may be reportable under § 1.1461–1(b) and (c) or under § 1.1474–1(d)(2) (for a chapter 4 reportable amount (as described in § 1.1471–1(b)(18)). The provisions of § 1.1441–1 shall apply by substituting the term ''payor'' for the term ''withholding agent'' and without regard to the fact that the provisions apply only to amounts subject to withholding under chapter 3 of the Code. In the event of a conflict between the provisions of § 1.1441–1 and paragraph (d) of this section in determining the foreign status of the payee, the provisions of § 1.1441–1 shall govern for payments of amounts subject to withholding under chapter 3 of the Code and the provisions of paragraph (d) of this section shall govern in other cases. This paragraph (b)(12) does not apply to interest paid on or after January 1, 2013, to a nonresident alien individual to the extent provided in § 1.6049–8.

* * * * *

(14) Payments that a payor or middleman can, prior to payment, reliably associate with documentation upon which it may rely to treat as made to a foreign intermediary or flow-through entity in accordance with § 1.1441–1(b) if it obtains from the foreign intermediary or flow-through entity a withholding statement under § 1.1471–3(c)(3)(iii)(B)(2) (describing an FFI withholding statement), § 1.1471–3(c)(3)(iii)(B)(3) (describing a chapter 4 withholding statement), § 1.1441–1(e)(3)(iv) (describing a withholding statement provided by a non-qualified intermediary), § 1.1441–1(e)(5)(v) (describing a withholding statement provided by a qualified intermediary), or under § 1.1441–5 (describing a withholding statement provided by a foreign partnership, foreign simple trust, or foreign grantor trust), that allocates the payment (or portion of a payment) to a chapter 4 withholding rate pool or specific payees to which withholding applies under chapter 4. The provisions of each of the foregoing sections shall apply by substituting the term ''payor'' for the term ''withholding agent.'' A payor or middleman may rely on a withholding statement provided by a foreign intermediary or flow-through entity that identifies a chapter 4 withholding rate pool of U.S. payees (as described in § 1.6049–4(c)(4)) or, with respect to a withholdable payment, a chapter 4 withholding rate pool of recalcitrant account holders (as described in § 1.1471–4(d)(6)) provided that the payor or middleman identifies the foreign intermediary or flow-through entity that maintains the accounts (as described in § 1.1471–5(b)(5)) included in the chapter 4 withholding rate pool as a participating FFI (including a reporting Model 2 FFI) or registered deemed-compliant FFI (including a reporting Model 1 FFI) by applying the rules in § 1.1471–3(d)(4) or in § 1.1471–3(e)(4)(vi)(B), as applicable, for identifying the payee of a payment (by substituting the term ''payor'' for the term ''withholding agent''). See, however, § 1.1441–1(e)(5)(v)(C)(*2*)(*i*) for when a qualified intermediary may provide a single pool of recalcitrant account holders (without the need to subdivide into the pools described in § 1.1471–4(d)(6)). Additionally, when a foreign intermediary or flow-through entity provides to a payor or middleman a withholding statement that allocates the payment (or portion of a payment) to a chapter 4 withholding rate pool of U.S. payees, the payor or middleman may also rely on the withholding statement if the payor or middleman identifies the intermediary or flow-through entity as a qualified intermediary (as defined in § 1.1441–1(c)(15) by applying the rules described in § 1.1441–1(b)(2)(vii)) that provides the certification described in § 1.1441–1(e)(3)(ii)(D) with respect to U.S. payees that hold accounts with a foreign intermediary or flow-through entity

other than the qualified intermediary providing the certification.

(15) If a foreign intermediary, as described in § 1.1441–1(c)(13), or a U.S. branch that is not treated as a U.S. person receives a payment from a payor, which payment the payor can reliably associate with a valid withholding certificate described in § 1.1441–1(e)(3)(ii) or (iii), or § 1.1441–1(e)(3)(v), respectively, furnished by such intermediary or branch, then the intermediary or branch is not required to report such payment when it, in turn, pays the amount, unless, and to the extent, the intermediary or branch knows that the payment is required to be reported under this section and was not so reported. For example, if a U.S. branch described in § 1.1441–1(b)(2)(iv) fails to provide information regarding U.S. persons that are not exempt from reporting under § 1.6049–4(c)(1)(ii) to the person from whom the U.S. branch receives the payment, the amount paid by the U.S. branch to such person is interest or original issue discount. See, however, § 1.6049–4(c)(4) for when reporting under section 6049 is coordinated with reporting under chapter 4 or an applicable IGA (as defined in § 1.6049–4(f)(7)). The exception for payments described in this paragraph (b)(15) shall not apply to a qualified intermediary that assumes reporting responsibility under chapter 61 of the Code for the payment under the agreement described in § 1.1441–1(e)(5)(iii).

* * * * *

(c) *Applicable rules*—(1) *Documentary evidence for offshore obligations and certain other obligations*—(i) A payor may rely on documentary evidence described in § 1.1471–3(c)(5)(i) instead of a beneficial owner withholding certificate described in § 1.1441–1(e)(2)(i) in the case of an amount paid outside the United States (as described in paragraph (e) of this section) with respect to an offshore obligation, or, in the case of broker proceeds described in § 1.6045–1(c)(2), to the extent provided in § 1.6045–1(g)(1)(i). For purposes of this section, the term *offshore obligation* means—

(A) An account maintained at an office or branch of a bank or other financial institution located outside the United States; or

(B) An obligation as defined in § 1.6049–4(f)(3) (other than an account described in paragraph (c)(1)(i)(A) of this section), contract, or other instrument with respect to which the payor is either engaged in business as a broker or dealer in securities or a financial institution (as defined in § 1.1471–5(e)) that engages in significant activities at an office or branch located outside the United States. For purposes of the preceding sentence, an office or branch of such payor shall be considered to engage in significant activities with respect to an obligation when it participates materially and actively in negotiating the obligation under the principles described in § 1.864–4(c)(5)(iii) (substituting the term ''obligation'' for the term ''stock or security'').

(ii) A payor may rely on documentary evidence if the payor has established procedures to obtain, review, and maintain documentary evidence sufficient to establish the identity of the payee and the status of that person as a foreign person; and the payor obtains, reviews, and maintains such documentary evidence in accordance with those procedures. A payor maintains the documents reviewed for purposes of this paragraph (c)(1) by retaining an original, certified copy, or photocopy (including a microfiche, electronic scan, or similar means of electronic storage) of the documents reviewed for as long as it may be relevant to the determination of the payor's obligation to report under § 1.6049–4 and this section and noting in its records the date on which the document was received and reviewed. Documentary evidence furnished for a payment of an amount subject to withholding under chapter 3 of the Code or that is a chapter 4 reportable amount under § 1.1474–1(d)(2) must contain all of the information that is necessary to complete a Form 1042–S for that payment. See §§ 1.1471–3(c) and 1.1471–4(c) for additional documentation requirements to identify a payee or account holder for chapter 4 purposes that may apply in addition to the requirements under paragraph (c) of this section.

(iii) Even if an account or obligation (as defined in § 1.6049–4(f)(3)) is not maintained outside the United States (maintained in the United States), a payor may rely on documentary evidence associated with a withholding certificate described in § 1.1441–1(e)(3)(iii) with respect to the persons for whom an entity acting as an intermediary collects the payment. A payor may also rely on documentary evidence associated with a flow-through withholding certificate for payments treated as made to foreign partners of a nonwithholding foreign partnership, as defined in § 1.1441–1(c)(28), the foreign beneficiaries of a foreign simple trust, as defined in § 1.1441–1(c)(24), or foreign owners of a foreign grantor trust, as defined in § 1.1441–1(c)(26), even though the partnership or trust account is an obligation maintained in the United States.

(iv) For accounts opened on or after July 1, 2014, and before January 1, 2015, and for obligations entered into on or after July 1, 2014, and before January 1, 2015, a payor may continue to apply the rules of §§ 1.6049–5(c)(1) and (c)(4) as in effect and contained in 26 CFR part 1 revised April 1, 2013, rather than this paragraph (c)(1) and paragraph (c)(4) of this section. A payor that applies the rules of §§ 1.6049–5(c)(1) and (c)(4) as in effect and contained in 26 CFR part 1 revised April 1, 2013, to an account or obligation must also apply § 1.1441–6(c)(2) (to the extent applicable) and § 1.6049–5(e) both as in effect and contained in 26 CFR part 1 revised April, 2013, with respect to the account or obligation.

(2) *Other applicable rules.* The provisions of § 1.1441–1(e)(4)(i) through (xii) (regarding who may sign a certificate, validity period of certificates and documentary evidence, retention of certificates, reliance rules, etc.) shall apply (by substituting the term ''payor'' for the term ''withholding agent'' and disregarding the fact that the provisions under § 1.1441–1(e)(4) only apply to amounts subject to withholding under chapter 3 of the Code) to withholding certificates and documentary evidence furnished for purposes of this section. See § 1.1441–1(b)(2)(vii) for provisions dealing with reliable association of a payment with documentation.

(3) *Standards of knowledge.* A payor may not rely on a withholding certificate or documentary evidence described in paragraph (c)(1) or (4) of this section if it has actual knowledge or reason to know that any information or certification stated in the certificate or documentary evidence is unreliable. A payor has reason to know that information or certifications are unreliable only if the payor would have reason to know under the provisions of § 1.1441–7(b)(2) and (3) that the information and certifications provided on the certificate or in the documentary evidence are unreliable or, in the case of a Form W–9 (or an acceptable substitute), it cannot reasonably rely on the documentation as set forth in § 31.3406(h)–3(e) of this chapter (see the information and certification described in § 31.3406(h)–3(e)(2)(i) through (iv) of this chapter that are required in order for a payor reasonably to rely on a Form W–9). The provisions of § 1.1441–7(b)(2) and (3) shall apply for purposes of this paragraph (c)(3) irrespective of the type of income to which § 1.1441–7(b)(2) is otherwise limited. The exemptions from reporting described in paragraphs

(b)(10) and (11) of this section shall not apply if the payor has actual knowledge that the payee is a U.S. person who is not an exempt recipient.

(4) *Special documentation rules for certain payments.* This paragraph (c)(4) modifies the provisions of paragraph (c)(1) of this section for payments of amounts that are not subject to withholding under chapter 3 of the Code, other than amounts described in paragraph (d)(3)(iii) of this section (dealing with U.S. short-term OID and U.S. source deposit interest described in section 871(i)(2)(A) or 881(d)(3)). Amounts are not subject to withholding under chapter 3 of the Code if they are not included in the definition of amounts subject to withholding under § 1.1441–2(a) (*e.g.,* deposit interest with foreign branches of U.S. banks, foreign source income, or broker proceeds). A payor may rely upon documentation in lieu of documentary evidence (as described in paragraph (c)(1) of this section) or a written statement (as defined in § 1.1471–1(b)(150)) or another statement to the extent permitted in paragraphs (c)(4)(i) through (iii) of this section, until the payor knows or has reason to know of a change in circumstance that makes the documentation unreliable or incorrect (as defined in § 1.1441–1(e)) when the payor does not have customer information for the payee that includes any of the U.S. indicia described in § 1.1471–3(c)(6)(ii)(C)(*1*). Further, a payor may maintain such documentation or documentary evidence as required in paragraph (c)(4)(iv) of this section.

(i) *Statement in lieu of documentary evidence with respect to accounts.* If under the local laws, regulations, or practices of a country in which an account is maintained, it is not customary to obtain documentary evidence described in paragraph (c)(1) of this section with respect to the type of account, the payor may, instead of obtaining a beneficial owner withholding certificate described in § 1.1441–1(e)(2)(i) or documentary evidence described in paragraph (c)(1) of this section, establish a payee's foreign status based on the statement described in this paragraph (c)(4)(i) (or such substitute statement as the Internal Revenue Service may prescribe) made on an account opening form. However, see, also § 1.1471–4(c) or an applicable IGA for additional documentation requirements that may apply to a participating FFI (including a reporting Model 2 FFI) for determining the status of its account holders for chapter 4 purposes. The statement referred to in this paragraph (c)(4)(i) must appear near the signature line and must state, ''By opening this account and signing below, the account owner represents and warrants that he/she/it is not a U.S. person for purposes of U.S. Federal income tax and that he/she/it is not acting for, or on behalf of, a U.S. person. A false statement or misrepresentation of tax status by a U.S. person could lead to penalties under U.S. law. If your tax status changes and you become a U.S. citizen or a resident, you must notify us within 30 days.'' Additionally, a payor may, instead of obtaining a beneficial owner withholding certificate described in § 1.1441–1(e)(2)(i) or § 1.1471–3(c)(3)(ii) or documentary evidence described in paragraph (c)(1) of this section, establish a payee's foreign status based on a written statement described in paragraph § 1.1471–1(b)(150) to the extent a payor uses such written statement to establish a payee's chapter 4 status and is permitted to use the written statement under § 1.1471–3(d) (by substituting the term ''payor'' for the term ''withholding agent'') without any other documentary evidence.

(ii) *Documentation under IGA.* A payor that is a reporting Model 1 FFI or reporting Model 2 FFI may rely upon documentation or information establishing a payee's status that is permitted under an applicable IGA for determining whether the account of the payee is other than a U.S. account and regardless of whether such documentation or certification is described in paragraph (c)(1) of this section or § 1.1441–1(e)(2).

(iii) *Maintenance of documentation and written statement.* A payor maintains documentation if it either maintains the documentary evidence as described in paragraph (c)(1) of this section or retains a record of the documentary evidence reviewed if the payor is not required to retain copies of the documentation pursuant to the payor's AML due diligence (as defined in § 1.1471–1(b)(4)). A payor retains a record of documentary evidence reviewed by noting in its records the type of documentation reviewed, the date the document was reviewed, the document's identification number (if any), and whether such documentation contained any U.S. indicia described in § 1.1441–7(b)(8). Any statement described in paragraph (c)(4)(i) of this section, must be retained in accordance with § 1.1471–3(c)(6)(iii).

(5) * * *

(i) * * *

(F) A U.S. branch or territory financial institution described in § 1.1441–1(b)(2)(iv) that is treated as a U.S. person.

* * * * *

(6) *Examples.* The following examples illustrate the provisions of paragraphs (b) and (c) of this section:

Example 1. FC is a foreign corporation that is not engaged in a trade or business in the United States during the current calendar year. D, an individual who is a resident and citizen of the United States, holds a registered obligation issued by FC in a public offering. Interest is paid on the obligation within the United States by DC, a U.S. corporation that is the designated paying agent of FC. D does not have an account with DC. Although interest paid on the obligation issued by FC is foreign source, the interest paid by DC to D is considered to be interest under paragraph (b)(6) of this section for purposes of information reporting under section 6049 because it is not paid and received outside the United States within the meaning of § 1.6049–4(f)(16).

Example 2. The facts are the same as in *Example 1* except that D is a nonresident alien individual who has furnished DC with a Form W–8 in accordance with the provisions of § 1.1441–1(e)(1)(ii). By reason of paragraph (b)(12) of this section, the payment of interest by DC to D is not considered to be a payment of interest for purposes of information reporting under section 6049. Therefore, DC is not required to make an information return under section 6049.

Example 3. The facts are the same as in *Example 2* except that the obligation of FC is held in a custodial account for D by FB, a foreign branch of a U.S. financial institution. By reason of paragraph (c)(5) of this section, FB is considered to be a U.S. middleman. Therefore, FB is required to make an information return unless FB may treat D as a beneficial owner that is a foreign person in accordance with the provisions of § 1.1441–1(e)(1)(ii).

Example 4. The facts are the same as in *Example 3* except that the FC obligation is held for D by NC, in a custodial account at NC's foreign branch. NC is a foreign corporation that is a non-U.S. middleman described in paragraph (c)(5) of this section. The payment by NC to D is paid and received outside of the United States under § 1.6049–4(f)(16) and therefore is not considered to be a payment of interest for purposes of section 6049 pursuant to paragraph (b)(6) of this section. Therefore, NC is not required to make an information return under section 6049 with respect to the payment.

(d) *Determination of status as U.S. or foreign payee and applicable presumptions in the absence of documentation*—(1) *Identifying the payee.* The provisions of §§ 1.1441–1(b)(2), 1.1441–5(c)(1) and (e)(2) and (3) shall apply (by substituting the term ''payor'' for the term ''withholding agent'') to identify the payee (other than a payee included in a chapter 4 withholding rate pool described in paragraph (b)(14) of this section) for

purposes of this section (and other sections of the regulations under this chapter to which this paragraph (d)(1) applies), except to the extent provided in this paragraph (d)(1) in the case of a payment of an amount that is not subject to withholding under chapter 3 of the Code and that is not a withholdable payment (as defined in § 1.6049–4(f)(15)). Amounts are not subject to withholding under chapter 3 of the Code if they are not included in the definition of amounts subject to withholding under § 1.1441–2(a) (*e.g.,* deposit interest with foreign branches of U.S. banks, foreign source income, or broker proceeds). The exceptions to the application of § 1.1441–1(b)(2) to amounts that are not subject to withholding under chapter 3 of the Code and that are not withholdable payments are as follows:

(i) The provisions of § 1.1441–1(b)(2)(ii), dealing with payments to a U.S. agent or intermediary of a foreign person, shall not apply. Thus, a payment to a U.S. agent or intermediary of a foreign person is treated as a payment to a U.S. payee.

(ii) Payments to U.S. branches or territory financial institution described in § 1.1441–1(b)(2)(iv) shall be treated as payments to a foreign payee, irrespective of the fact that the U.S. branch or territory financial institution is otherwise treated as a U.S. person for payments of amounts subject to withholding under chapter 3 and withholdable payments, and irrespective of the fact that the branch or territory financial institution is treated as a U.S. payor for purposes of paragraph (c)(5) of this section.

(2) *Presumptions of U.S. or foreign status in the absence of documentation*—(i) *In general.* Except as otherwise provided in this paragraph (d)(2)(i), for purposes of this section (and other sections of regulations under this chapter 61 to which this paragraph (d)(2) applies), the provisions of § 1.1441–1(b)(3)(i) through (ix) and § 1.1441–5(d) and (e)(6) shall apply (by substituting the term ''payor'' for the term ''withholding agent'') to determine the classification (*e.g.,* individual, corporation, partnership, trust), status (*i.e.,* a U.S. or a foreign person), and other relevant characteristics (*e.g.,* beneficial owner or intermediary) of a payee if a payment cannot be reliably associated with valid documentation under § 1.1441–1(b)(2)(vii) irrespective of whether the payments are subject to withholding under chapter 3 of the Code or are withholdable payments. The provisions of § 1.1441–1(b)(3)(iii)(D) and (vii)(B) (referencing presumption rules for payments with respect to offshore obligations) shall not apply to a payment of an amount not subject to withholding under chapter 3, unless it is an amount that is a withholdable payment made to a payee that is an entity. Thus, in the case of a withholdable payment made to an entity, the presumption rules of § 1.1441–1(b)(3)(iii)(D) and (vii)(B) shall apply regardless of whether the payment is an amount subject to withholding under chapter 3. Additionally, in the case of an amount paid outside the United States with respect to an offshore obligation described in § 1.1441–1(b)(3)(iii)(D) or (vii)(B) of an amount not subject to withholding under chapter 3 and that is treated as made to a payee that is an individual, the presumption rules of § 1.1441–1(b)(3)(iii) shall not apply, and the payee shall be presumed a U.S. person only when the payee has any of the indicia of U.S. status that are described in § 1.1441–7(b)(5) or (8). In a case in which a withholding agent makes a withholdable payment that cannot reliably be associated with documentation, see § 1.1471–3(f)(4) and (5) for determining the status of the payee for chapter 4 purposes when the payment is treated as made to a foreign entity (by substituting the term ''payor'' for the term ''withholding agent''). The rules of § 1.1441–1(b)(2)(vii) shall apply for purposes of determining when a payment can reliably be associated with documentation, by substituting the term ''payor'' for the term ''withholding agent.'' For this purpose, the information, documentary evidence, statement, or other documentation described in paragraph (c)(4) of this section can be treated as documentation with which a payment can be associated.

(ii) *Grace period in the case of indicia of a foreign payee.* When the conditions of this paragraph (d)(2)(ii) are satisfied, the 30-day grace period provisions under section 3406(e) shall not apply and the provisions of this paragraph (d)(2)(ii) shall apply instead. A payor that, at any time during the grace period described in this paragraph (d)(2)(ii), credits an account with payments described in § 1.1441–6(c)(2) (or credits an account with broker proceeds from securities described in § 1.1441–6(c)(2)), that are reportable under section 6042, 6045, 6049, or 6050N may, instead of treating the account as owned by a U.S. person and applying backup withholding under section 3406, if applicable, choose to treat the account as owned by a foreign person (and apply the grace period described in § 1.1441–1(b)(3)(iv)) if, at the beginning of the grace period, the address that the payor has in its records for the account holder is in a foreign country, the payor has been furnished the information contained in a withholding certificate described in § 1.1441–1(e)(2), or the payor holds a withholding certificate that is no longer reliable other than because the validity period as described in § 1.1441–1(e)(4)(ii)(A) has expired. In the case of a newly opened account, the grace period begins on the date that the payor first credits the account. In the case of an existing account for which the payor holds a Form W–8 or documentary evidence of foreign status, the payor may apply the provisions of the grace period described in § 1.1441–1(b)(3)(iv), beginning on the date that the payor first credits the account after the existing documentation held with regard to the account can no longer be relied upon (other than because the validity period described in § 1.1441–1(e)(4)(ii)(A) has expired). A new account shall be treated as an existing account for purposes of this paragraph (d)(2)(ii) if the account holder already holds an account at the branch location at which the new account is opened, or if the account is treated as a consolidated obligation as defined in § 1.1471–(1)(b)(23) for purpose of chapter 4 to the extent the account does not receive any amounts subject to withholding under chapter 3. A new account shall also be treated as an existing account for purposes of this paragraph (d)(2)(ii) if an account is held at another branch location if the institution maintains an account information system described in § 1.1441–1(e)(4)(ix). The grace period terminates on the earlier of the close of the 90th day from the date on which the grace period begins or the date that valid documentation is provided. The grace period also terminates when the remaining balance in the account (due to withdrawals or otherwise) is equal to or less than 28 percent (or other statutory tax rate that is applicable to backup withholding) of the total amounts credited since the beginning of the grace period that would be subject to backup withholding if the provisions of this paragraph (d)(2)(ii) did not apply. At the end of the grace period, the payor shall treat the amounts credited to the account, or paid with respect to an account, during the grace period as paid to a U.S. or foreign payee depending upon whether documentation has been furnished and the nature of any such documentation furnished upon which the payor may rely to treat the account as owned by a U.S. or foreign payee. If the documentation has not been

received on or before the date of expiration of the grace period, the payor may also apply the presumptions described in this paragraph (d) to amounts credited to the account after the date on which the grace period expires (until such time as the payor can reliably associate the documentation with amounts credited). See § 31.6413(a)–3(a)(1)(iv) of this chapter for treating backup withheld amounts under section 3406 as erroneously withheld when the documentation establishing foreign status is furnished prior to the end of the calendar year in which backup withholding occurs. If the provisions of this paragraph (d)(2)(ii) apply, the provisions of § 31.3406(d)–3 of this chapter shall not apply. For purposes of this paragraph (d)(2)(ii), an account holder's reinvestment of gross proceeds of a sale into other instruments constitutes a withdrawal and a non-qualified electronic transmission of information on a withholding certificate is a transmission that is not in accordance with the provisions of § 1.1441–1(e)(4)(iv). See § 1.1092(d)–1 for a definition of the term actively traded for purposes of this paragraph (d)(2)(ii).

(iii) *Joint owners.* Amounts paid to accounts held jointly for which a certificate or documentation is required as a condition for being exempt from reporting under paragraph (b) of this section are presumed made to U.S. payees who are not exempt recipients if, prior to payment, the payor cannot reliably associate the payment either with a Form W–9 furnished by one of the joint owners in the manner required in §§ 31.3406(d)–1 through 31.3406(d)–5 of this chapter, or with documentation described in paragraph (b)(12) of this section furnished by each joint owner upon which it can rely to treat each joint owner as a foreign payee or foreign beneficial owner. In the case of an amount that is a withholdable payment made to a joint account, however, see § 1.1471–3(f)(7) for when the payment is treated as made to a foreign payee that is a nonparticipating FFI (as defined in § 1.1471–1(b)(82)). For purposes of applying this paragraph (d)(2)(iii), the grace period described in paragraph (d)(2)(ii) of this section shall apply only if each payee qualifies for such grace period.

(3) *Payments to foreign intermediaries or flow-through entities*—(i) *Payments of amounts subject to withholding under chapter 3 of the Code or withholdable payments.* In the case of payments of amounts that the payor may treat as made to a foreign intermediary or flow-through entity in accordance with §§ 1.1441–1(b)(3)(ii)(C) and (b)(3)(v)(A) and 1.1441–5(c) or (e) and that are subject to withholding under § 1.1441–2(a), the provisions of §§ 1.1441–1(b)(2)(v) and 1.1441–5(c)(1), (e)(2), and (3) shall apply (by substituting the term ''payor'' for the term ''withholding agent'') to identify the payee. If a payment of an amount subject to withholding cannot be reliably associated with valid documentation from a payee in accordance with § 1.1441–1(b)(2)(vii), the presumption rules of §§ 1.1441–1(b)(3)(v) and 1.1441–5(d) and (e)(6) shall apply to determine the payee's status for purposes of this section (and other sections of regulations under this chapter to which this paragraph (d)(3) applies). In the case of an amount that is a withholdable payment, see § 1.1471–3(c)(3) for rules to identify the payee and see § 1.1471–3(f)(5) for the presumption rule that shall apply to amounts treated as made to a foreign intermediary or flow-through entity (by substituting the term ''payor'' for the term ''withholding agent''). For example, where a withholdable payment is made to an intermediary under § 1.1471–3 that is treated as a nonparticipating FFI under § 1.1471–3(f)(5), the nonparticipating FFI shall be treated as the payee under § 1.1471–3(c)(3) and for purposes of this paragraph (d)(3)(i), therefore, no information return shall be required under this section.

(ii) *Payments of amounts not subject to withholding under chapter 3 of the Code and that are not withholdable payments.* Except as provided in paragraph (d)(3)(iii) of this section, amounts that are not subject to withholding under chapter 3 of the Code and that are not withholdable payments that the payor may treat as paid to a foreign intermediary or flow-through entity shall be treated as made to an exempt recipient described in § 1.6049–4(c) except to the extent that the payor has actual knowledge that any person for whom the intermediary or flow-through entity is collecting the payment is a U.S. person who is not an exempt recipient. In the case of such actual knowledge, the payor shall treat the payment that it knows is allocable to such U.S. person as a payment to a U.S. payee who is not an exempt recipient and has actual knowledge of the amount allocable to such a person.

(iii) *Special rule for payments of certain short-term original issue discount*—(A) *General rule.* A payment of U.S. source bank deposit interest not subject to chapter 4 withholding or U.S. source interest or original issue discount on the redemption of an obligation with a maturity from the date of issue of 183 days or less (short-term OID) described in section 871(g)(1)(B) or 881(e) that the payor may treat as paid to a foreign intermediary or flow-through entity in accordance with the provisions of § 1.1441–1(b)(3)(ii)(C), (b)(3)(v)(A), § 1.1441–5(d) or (e) (by substituting the term ''payor'' for the term ''withholding agent''), shall be treated as paid to an undocumented U.S. payee that is not an exempt recipient under paragraph § 1.6049–4(c) unless the payor has documentation from the payees of the payment and the payment is allocated to foreign payees, as a group, and to each U.S. non-exempt recipient payee. See § 1.1441–1(e)(3)(iv)(C)(*2*). However, a payor may rely on a withholding statement provided by an intermediary described in § 1.1441–1(e)(3)(iv) (or similar withholding statement for a flow-through entity) that identifies a chapter 4 withholding rate pool of U.S. payees (as described in § 1.6049–4(c)(4)(iii)) only if it identifies the foreign intermediary or flow-through entity as a participating FFI (including a reporting Model 2 FFI) or registered deemed-compliant FFI (including a reporting Model 1 FFI) under § 1.1471–3(d)(4) (by substituting the term ''payor'' for the term ''withholding agent''). See also § 1.6049–4(c)(4)(iii) for when an FFI may provide a chapter 4 withholding rate pool of U.S. payees on a withholding statement.

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(4) *Examples.* The rules of paragraphs (d)(1) through (3) of this section are illustrated by the examples in this paragraph (d)(4). Unless otherwise specified in an example, the following facts apply: all FFIs, such as a nonqualified intermediary that is an FFI, are treated as participating FFIs; all payees have been identified with chapter 4 statuses that do not require withholding under chapter 4; and none of the payments are withholdable payments.

Example 1. (i) *Facts.* USP is a U.S. payor as defined in paragraph (c)(5) of this section. USP pays interest from sources within the United States that is a withholdable payment to an account maintained in the United States by X. The interest is not deposit interest described in sections 871(i)(2)(A) or 881(d). USP does not have a Form W–9, or withholding certificate from X as defined in § 1.1441–1(c)(16). Moreover, USP cannot treat X as an exempt recipient, as defined in § 1.6049–4(c)(1)(ii), without documentation and there is no indication that X is an individual, trust, or estate.

(ii) *Analysis.* The U.S. source interest is an amount subject to withholding as defined in § 1.1441–2(a). Under paragraph (d)(1) of this section, USP must apply the provisions of §§ 1.1441–1(b)(2) and 1.1441–5(c) and (e) to determine the payee of the interest. Under

§ 1.1441–1(b)(2)(i), X, the person to whom the payment is made, is considered to be the payee, unless X is determined to be a flow-through entity, in which case the rules of § 1.1441–5 apply to determine the payee. Under paragraph (d)(2)(i) of this section, the rules of § 1.1441–1(b)(3)(ii) apply to determine the classification of a payee as an individual, trust, estate, corporation, or partnership. Under § 1.1441–1(b)(3)(ii)(B), X is presumed to be a partnership, since X does not appear to be an individual, trust or estate, and X cannot be presumed to be an exempt recipient in the absence of documentation. Paragraph (d)(2)(i) of this section requires USP to apply the provisions of §§ 1.1441–1(b)(3)(iii) and 1.1441–5(d) to determine whether X is presumed to be a U.S. or foreign partnership. Under §§ 1.1441–1(b)(3)(iii) and 1.1441–5(d)(2), X is presumed to be a U.S. partnership in absence of any indicia of foreign partnership status. The presumption of U.S. status applies even though the payment is a withholdable payment (see paragraph (d)(2) of this section and § 1.1471–3(f)(2) cross referencing the presumption rules of § 1.1441–1(b)(3)). The U.S. source interest paid to X is reportable under section 6049 on Form 1099 and the interest is subject to backup withholding under section 3406 because X has not provided its TIN on a valid Form W–9. No withholding or reporting applies to the payment under chapter 3 or 4 of the Code.

Example 2. (i) *Facts.* The facts are the same as in *Example 1,* except that the interest paid by USP is from sources outside the United States.

(ii) *Analysis.* Interest from sources outside the United States is not an amount subject to withholding, as defined in § 1.1441–2(a) or a withholdable payment. Under paragraph (d)(1) of this section, USP must apply the provisions of §§ 1.1441–1(b)(2) and 1.1441–5(c) and (e) to determine the payee. Under § 1.1441–1(b)(2)(i), X, the person to whom the payment is made, is considered to be the payee, unless X is determined to be a flow-through entity, in which case the rules of § 1.1441–5(c) or (e) apply to determine the payee. Under paragraph (d)(2)(i) of this section, the rules of § 1.1441–1(b)(3)(ii) apply to determine the classification of a payee as an individual, trust, estate, corporation, or partnership. These rules apply irrespective of whether the payment is an amount subject to withholding. Under § 1.1441–1(b)(3)(ii)(B), X is presumed to be a partnership, since X does not appear to be an individual, trust or estate, and X cannot be presumed to be an exempt recipient in the absence of documentation. Paragraph (d)(2)(i) of this section requires USP to apply the provisions of §§ 1.1441–1(b)(3)(iii) and 1.1441–5(d) to determine whether, X is presumed to be a U.S. or foreign partnership. Under §§ 1.1441–1(b)(3)(iii) and 1.1441–5(d)(2), X is presumed to be a U.S. partnership in absence of any indicia of foreign partnership status. The foreign source interest is a payment subject to reporting on Form 1099 under § 1.6049–5(a). Further, because X is a non-exempt recipient that has failed to provide its TIN on a valid Form W–9, the foreign source interest is subject to backup withholding under section 3406.

Example 3. (i) *Facts.* USP is a U.S. payor as defined in paragraph (c)(5) of this section. USP makes a payment of U.S. source interest outside the United States to an offshore account of X. See paragraphs (c)(1) for a definition of offshore account and (e) for a payment outside the United States. USP does not have a withholding certificate from X as defined in § 1.1441–1(c)(16) nor does it have documentary evidence as described in § 1.1441–1(e)(1)(ii)(A)(*2*) and § 1.6049–5(c)(1).

(ii) *Analysis.* The interest is an amount subject to withholding as defined in § 1.1441–2(a). Under paragraph (d)(1) of this section, USP must apply the provisions of § 1.1441–1(b)(2) and § 1.1441–5(c) and (e) to determine the payee. Under § 1.1441–1(b)(2)(i), X, the person to whom the payment is made, is considered to be the payee, unless X is determined to be a flow-through entity, in which case the rules of § 1.1441–5(c) or (e) apply to determine the payee. Under paragraph (d)(2)(i) of this section, the rules of § 1.1441–1(b)(3)(ii) apply to determine the classification of a payee as an individual, trust, estate, corporation, or partnership. Under § 1.1441–1(b)(3)(ii)(B), X is presumed to be a partnership, since X does not appear to be an individual, trust or estate, and X cannot be presumed to be an exempt recipient in the absence of documentation. Paragraph (d)(2)(i) of this section requires USP to apply the provisions of §§ 1.1441–1(b)(3)(iii) and 1.1441–5(d) to determine whether, X is presumed to be a U.S. or foreign partnership. Under §§ 1.1441–1(b)(3)(iii)(D) and 1.1441–5(d)(2), X is presumed to be a foreign partnership. Therefore, under paragraph (d)(1) of this section and § 1.1441–5(c)(1)(i)(E), the payees of the interest are presumed to be the partners of X. Under § 1.1441–5(d)(3), the partners are presumed to be undocumented foreign persons. Therefore, USP must withhold 30% of the interest payment under § 1.1441–1(b)(1) and report the payment on Form 1042–S in accordance with § 1.1461–1(c).

Example 4. (i) *Facts.* The facts are the same as in *Example 3,* except that the interest is paid by F, a non-U.S. payor.

(ii) *Analysis.* The analysis and result are the same as in *Example 3.* F is a withholding agent under § 1.1441–7 and its status as a non-U.S. payor under paragraph (c)(5) of this section is irrelevant.

Example 5. (i) *Facts.* USP is a U.S. payor as defined in paragraph (c)(5) of this section that is not an FFI. USP makes a payment outside the United States of interest from sources outside the United States with respect to an offshore obligation held by X. USP does not have a withholding certificate from X as defined in § 1.1441–1(c)(16) nor does it have documentary evidence as described in §§ 1.1471–3(c)(5)(i) and 1.6049–5(c)(1). USP does not have actual knowledge of an employer identification number for X. X does not appear to be an individual, trust, or estate and cannot be treated as an exempt recipient, as defined in § 1.6049–4(c)(1)(ii) in the absence of documentation.

(ii) *Analysis.* The interest is not an amount subject to withholding as defined in § 1.1441–2(a) and is not a withholdable payment. Under paragraph (d)(1) of this section, USP must apply the rules of §§ 1.1441–1(b)(2) and 1.1441–5(c) and (e) to determine the payee of the interest. Under § 1.1441–1(b)(2)(i), X, the person to whom the payment is made, is considered to be the payee, unless X is determined to be a flow-through entity, in which case the rules of § 1.1441–5(c) or (e) apply to determine the payee. Under paragraph (d)(2)(i) of this section, § 1.1441–1(b)(3)(ii) applies to determine X's classification as an individual, trust, estate, corporation or partnership. Under § 1.1441–1(b)(3)(ii)(B), X is treated as a partnership, since it does not appear to be an individual, trust, or estate and cannot be treated as an exempt recipient without documentation. Paragraph (d)(2)(i) of this section requires USP to apply the provisions of §§ 1.1441–1(b)(3)(iii) and 1.1441–5(d) to determine whether, X is presumed to be a U.S. or foreign partnership. Paragraph (d)(2)(i) of this section also states that the presumptions of foreign status for payments made with respect to offshore obligations contained in §§ 1.1441–1(b)(3)(iii)(D) and 1.1441–5(d)(2) do not apply to amounts that are not subject to withholding and that are not withholdable payments described in paragraph (d)(2)(i). Therefore, under §§ 1.1441–1(b)(3)(iii) and 1.1441–5(d)(2), X is presumed to be a U.S. partnership because it does not have actual knowledge that X's employer identification number begins with the digits ''98.'' Therefore, USP must treat X as a U.S. person that is not an exempt recipient and report the payment on Form 1099 under section 6049. Under § 31.3406(g)–1(e) of this chapter, however, USP is not required to backup withhold on the payment unless it has actual knowledge that X is a U.S. person that is not an exempt recipient.

Example 6. (i) *Facts.* The facts are the same as in *Example 5,* except that the interest is paid by F, a non-U.S. payor, as defined under paragraph (c)(5) of this section.

(ii) *Analysis.* The analysis is the same as under *Example 5.* However, F is a non-U.S. payor paying foreign source interest outside the United States, and there is no indication that the amount is received in the United States under § 1.6049–4(f)(16). Thus, paragraph (b)(6) of this section exempts the payment from reporting under section 6049.

Example 7. (i) *Facts.* USP, a U.S. payor as defined in paragraph (c)(5) of this section that is not an FFI, makes a payment of U.S. source interest that is a withholdable payment to NQI, a nonqualified intermediary as defined in § 1.1441–1(c)(14), that is a certified deemed-compliant FFI under § 1.1471–5(f)(2). The interest is paid inside the United States to an account of a bank or other financial institution maintained in the United States. NQI has provided USP with a nonqualified intermediary withholding certificate, as described in § 1.1441–1(e)(3)(iii) that includes its chapter 4 status, but has not attached any documentation from the persons on whose behalf it acts or a withholding statement as described in § 1.1441–1(e)(3)(iv).

(ii) *Analysis.* U.S. source interest is an amount subject to withholding under § 1.1441–2(a). USP may treat the payment as

made to a foreign intermediary under § 1.1441–1(b)(3)(v)(A) because USP has received a nonqualified intermediary withholding certificate from NQI and may except NQI from withholding under chapter 4 of the Code given NQI's status for chapter 4 purposes as a deemed-compliant FFI. Under paragraph (d)(3)(i) of this section, USP must then apply § 1.1471–3(c)(3) to treat the persons on whose behalf NQI is acting as the payees. Paragraph (d)(3)(i) of this section also requires USP to apply the presumption rules of § 1.1441–1(b)(3)(v) if it cannot reliably associate the payment with valid documentation from a payee. See § 1.1441–1(b)(2)(vii). As the payment is a withholdable payment, the interest is treated as paid to a nonparticipating FFI under § 1.1471–3(f)(4). Therefore, the payment is not subject to reporting on Form 1099 under paragraph (b)(12) of this section. See § 1.1471–2(a) for the withholding requirement with respect to the payment and § 1.1474–1(d)(2) for the requirement to report the payment on Form 1042–S.

Example 8. (i) *Facts.* The facts are the same as in *Example 7,* except that the interest is paid outside the United States, as defined in paragraph (e) of this section to an offshore account, as defined in paragraph (c)(1) of this section and is not a withholdable payment.

(ii) *Analysis.* Under § 1.1441–1(b)(3)(v)(B), the interest is treated as paid to an unknown foreign payee because it cannot be reliably associated with documentation under § 1.1441–1(b)(2)(vii). Therefore, the payment is not subject to reporting on Form 1099 under paragraph (b)(12) of this section because the payment is presumed made to a foreign person. The payment is subject to withholding, however, under § 1.1441–1(b) at a rate of 30% and is subject to reporting on Form 1042–S under § 1.1461–1(c).

Example 9. (i) *Facts.* The facts are the same as in *Example 8,* except that the interest is paid by F, a non-U.S. payor, as defined in paragraph (c)(5) of this section.

(ii) *Analysis.* The analysis and results are the same as in *Example 8.*

Example 10. (i) *Facts.* USP, a U.S. payor as defined in paragraph (c)(5) of this section, makes a payment of foreign source interest (other than deposit interest) to NQI, a foreign corporation and a nonqualified intermediary as defined in § 1.1441–1(c)(14). NQI has provided USP with a nonqualified intermediary withholding certificate, as described in § 1.1441–1(e)(3)(iii), but has not attached any documentation from the persons on whose behalf it acts or a withholding statement as described in § 1.1441–1(e)(3)(iv).

(ii) *Analysis.* Foreign source interest is not an amount subject to withholding under chapter 3 of the Code and is not a withholdable payment. See §§ 1.1441–2(a) and 1.1473–1(a). Under paragraph (d)(3)(ii) of this section, amounts that are not subject to withholding under chapter 3 of the Code and that are not withholdable payments described in paragraph (d)(2)(i) of this section that a payor may treat as paid to a foreign intermediary are treated as made to an exempt recipient described in § 1.6049–4(c) absent actual knowledge that the payee is a U.S. person who is not an exempt recipient. Therefore, the foreign source interest is not subject to reporting on Form 1099.

Example 11. (i) *Facts.* USP is a U.S. payor as defined in paragraph (c)(5) of this section that is a bank. USP pays U.S. source original issue discount from the redemption of an obligation described in section 871(g)(1)(B) to NQI, a foreign corporation that is a nonqualified intermediary as defined in § 1.1441–1(c)(14). The redemption proceeds are not paid outside of the United States as they are paid with respect to an account NQI has with a branch of a bank in the United States. See § 1.6049–5(e)(2). NQI provides a nonqualified intermediary withholding certificate as described in § 1.1441–1(e)(3)(iii) that includes a certification of its status as a registered deemed-compliant FFI but does not attach any payee documentation or a withholding statement described in § 1.1441–1(e)(3)(iv).

(ii) *Analysis.* Under paragraph (d)(3)(ii)(A) of this section, USP must treat the payment as made to an undocumented U.S. payee that is not an exempt recipient and report the payment on Form 1099. Further, because the payment is made inside the United States, the exception to backup withholding with respect to offshore obligations contained in § 31.3406(g)–1(e) of this chapter does not apply, and the payment is subject to backup withholding.

Example 12. (i) *Facts.* P, a payor, makes a payment to NQI of U.S. source interest on debt obligations issued prior to July 18, 1984, that mature 30 years from their issuance dates. Therefore, the interest does not qualify as portfolio interest under section 871(h) or 881(d). Additionally, the interest is not a withholdable payment under § 1.1471–2(b) as the interest is a payment with respect to a grandfathered obligation for purposes of chapter 4 of the Code. NQI, a U.S. payor, is a nonqualified foreign intermediary, as defined in § 1.1441–1(c)(14), and has furnished P a valid nonqualified intermediary withholding certificate described in § 1.1441–1(e)(3)(iii) to which it has attached a valid Form W–9 for A, and two valid beneficial owner Forms W–8, one for B and one for C. A is not an exempt recipient under § 1.6049–4(c). NQI furnishes a withholding statement, described in § 1.1441–1(e)(3)(iv), in which it allocates 20% of the U.S. source interest to A, but does not allocate the remaining 80% of the interest between B and C. B's withholding certificate indicates that B is a foreign pension fund, exempt from U.S. tax under the U.S. income tax treaty with Country T. C's withholding certificate indicates that C is a foreign corporation not entitled to a reduced rate of withholding.

(ii) *Analysis.* As the interest is not a withholdable payment under paragraph (d)(3)(i) of this section, P applies the rules of § 1.1441–1(b)(2)(v) to determine the payees of the interest even though NQI has not certified its status for purposes of chapter 4 of the Code. Under that section, the payees are the persons on whose behalf NQI acts—A, B and C. Because P can reliably associate 20% of the payment with valid documentation provided by A, P must treat 20% of the interest as paid to A, a U.S. person not exempt from reporting, and report the payment on Form 1099. P cannot reliably associate the remaining 80% of the payment with valid documentation under § 1.1441–1(b)(2)(vii) and, therefore, under paragraph (d)(3)(i) of this section must apply the presumption rules of § 1.1441–1(b)(3)(v). Under that section, the interest is presumed paid to an unknown foreign payee. Under paragraph (b)(12) of this section, P is not required to report the interest presumed paid to a foreign person on Form 1099. Under § 1.1441–1(b), 80% of the interest is subject to 30% withholding, however, and the interest is reportable on Form 1042–S under § 1.1461–1(c).

Example 13. (i) *Facts.* The facts are the same as in *Example 12,* except that P can reliably associate 30% of the payment of interest to B, but cannot reliably associate the remaining 70 percent with A or C.

(ii) *Analysis.* Under paragraph (d)(3)(i) of this section, P applies the rules of § 1.1441–1(b)(2)(v) to determine the payees of the interest. Under that section, the payees are the persons on whose behalf NQI acts—A, B and C. Because P can reliably associate 30% of the payment with B, a foreign pensions fund exempt from withholding under an income tax treaty, P may treat that payment as paid to B and not subject to reporting on Form 1099 under paragraph (b)(12) of this section. P cannot reliably associate the remaining 70% of the payment with valid documentation under § 1.1441–1(b)(2)(vii) and, therefore, under paragraph (d)(3)(i) of this section must apply the presumption rules of § 1.1441–1(b)(3)(v). Under that section, the interest is presumed paid to an unknown foreign payee. Under paragraph (b)(12) of this section, P is not required to report the interest presumed paid to a foreign person on Form 1099. Under § 1.1441–1(b), 80% of the interest is subject to 30% withholding, however, and the interest is reportable on Form 1042–S under § 1.1461–1(c).

Example 14. (i) *Facts.* The facts are the same as in *Example 12,* except that P also makes a payment of foreign source interest to NQI.

(ii) *Analysis.* Under paragraph (d)(3)(ii), P may treat the foreign source interest as paid to an exempt recipient as defined in § 1.6049–4(c) and not subject to reporting on Form 1099 even though some or all of the foreign source interest may in fact be owned by A, the U.S. person that is not exempt from reporting.

Example 15. (i) *Facts.* The facts are the same as in *Example 12,* except that NQI is a non-U.S. payor.

(ii) *Analysis.* The analysis is the same as under *Example 12* with respect to B and C. However, because NQI is a non-U.S. payor, it may under § 1.6049–4(c)(4)(iii) allocate the portion of the payment to A to a chapter 4 withholding rate pool of U.S. payees on a withholding statement provided to P in lieu of furnishing the Form W–9 to P when NQI reports the payments in accordance with § 1.6049–4(c)(4)(i). In such a case, provided that P obtains a certification form confirming NQI's status as a participating FFI, P is excepted from reporting the payment under paragraph (b)(14) of this section because P

can reliably associate the payment with the documentation provided by NQI.

(e) *Determination of whether amounts are considered paid outside the United States*—(1) *In general.* For purposes of section 6049 and this section, an amount is considered to be paid by a payor or middleman outside the United States if the payor or middleman completes the acts necessary to effect payment outside the United States. See paragraphs (e)(2) through (5) of this section for further clarification of where amounts are considered paid. A payment shall not be considered to be made within the United States for purposes of section 6049 merely by reason of the fact that it is made on a draft drawn on a United States bank account or by a wire or other electronic transfer from a United States account.

(2) *Amounts paid with respect to deposits or accounts with banks and other financial institutions.* Notwithstanding paragraph (e)(1) of this section, an amount paid by a bank or other financial institution with respect to a deposit or with respect to an account with the institution is considered paid at the branch or office at which the amount is credited unless the amount is collected by the financial institution as the agent of the payee. However, an amount will not be considered to be paid at the branch or office where the amount is considered to be credited unless the branch or office is a permanent place of business that is regularly maintained, occupied, and used to carry on a banking or similar financial business; the business is conducted by at least one employee of the branch or office who is regularly in attendance at such place of business during normal business hours; and the branch or office receives deposits and engages in one or more of the other activities described in § 1.864–4(c)(5)(i).

(3) *Coupon bonds and discount obligations in bearer form.* Notwithstanding paragraph (e)(1) of this section, an amount paid with respect to a bond with coupons attached (including a certificate of deposit with detachable interest coupons) or a discount obligation that is not in registered form (within the meaning of section 163(f) and the regulations thereunder) is considered to be paid where the coupon or the discount obligation is presented to the payor or its paying agent for payment.

(4) *Foreign-targeted registered obligations.* Notwithstanding paragraph (e)(1) of this section, where the payor is the issuer or the issuer's agent, an amount is considered paid outside the United States with respect to a foreign-targeted registered obligation issued before January 1, 2016, as described in § 1.871–14(e)(2), if either the amount is paid by transfer to an account maintained by the registered owner outside the United States, or by mail to an address of the registered owner outside the United States, or by credit to an international account. For purposes of this paragraph (e)(4), the term *international account* means the book-entry account of a financial institution (within the meaning of section 871(h)(4)(B)) or of an international financial organization with the Federal Reserve Bank of New York for which the Federal Reserve Bank of New York maintains records that specifically identify an international financial organization or a financial institution (within the meaning of section 871(h)(4)(B)) as either a non-United States person or a foreign branch of a United States person as registered owner. An international financial organization is a central bank or monetary authority of a foreign government or a public international organization of which the United States is a member to the extent that such central bank, authority, or organization holds obligations solely for its own account and is exempt from tax under section 892 or 895.

(5) *Examples.* The application of the provisions of this paragraph (e) is illustrated by the following examples:

Example 1. FC is a foreign corporation that is not a U.S. payor or U.S. middleman, as defined in paragraph (c)(5) of this section. A holds FC coupon bonds that are not in registered form under section 163(f) and the regulations thereunder. FB, a foreign branch of DC, is the designated paying agent with respect to the bonds issued by FC. A does not have an account with FB. A presents a coupon from a FC bond for payment to FB at its office outside the United States. FB pays A with a check drawn against a bank account maintained in the United States. For purposes of section 6049, the place of payment of interest on the FC bond by FB to A is considered to be outside the United States under paragraph (e)(3) of this section.

Example 2. Individual C deposits funds in an account with FB, a foreign country X branch of DB, a U.S. corporation engaged in the commercial banking business. FB maintains an office and employees in foreign country X, accepts deposits, and conducts one or more of the other activities listed in § 1.864–4(c)(5)(i). The terms of C's deposit provide that it will be payable with accrued interest. Under paragraph (e)(2) of this section, FB is considered to pay the interest on C's deposit outside the United States.

Example 3. DC, a U.S. corporation engaged in the commercial banking business, maintains FB, a branch in foreign country X. FB has an office and employees in foreign country X, accepts deposits, and engages in one or more of the other activities listed in § 1.864–4(c)(5)(i). D, a United States citizen, purchases a certificate of deposit issued in 1980 by FB. The certificate of deposit has a maturity of 20 years and has detachable interest coupons payable at six-month intervals. D presents some of the coupons at the U.S. office of DC and receives payment in cash. Because the coupon is presented to DC for payment within the United States, DC is considered to have made the payment within the United States under paragraph (e)(3) of this section.

Example 4. FB is recognized by both foreign country X and by the Federal Reserve Bank as a foreign country X branch of DC, a U.S. corporation engaged in the commercial banking business. A local foreign country X bank serves as FB's resident agent in Country X. FB maintains no physical office or employees in foreign country X. All the records, accounts, and transactions of FB are handled at the United States office of DC. E deposits funds in an amount maintained with FB. Interest earned on the deposit is periodically credited to E's account with FB by employees of DC. For purposes of section 6049, the place of payment of the interest on E's deposit with FB is considered to be within the United States by reason of paragraphs (e)(1) and (e)(2) of this section.

Example 5. DC is a U.S. corporation. A holds bonds that were issued by DC in registered form under section 163(f), as in effect prior to the amendment by section 502 of the HIRE Act of 2010, and the regulations thereunder and that are foreign-targeted registered obligations as defined in § 1.871–14(e)(2). DB, a commercial banking business, is the registrar of bonds issued by DC. Interest on the DC bonds is paid to A and other bondholders by check prepared by DB at its principal office inside the United States and mailed from there to A's address outside the United States. The check is drawn on a United States account maintained by DC with DB within the United States. The place of payment to A by DB of the interest on the DC bonds is considered to be outside the United States under paragraph (e)(4) of this section.

* * * * *

(g) *Effective/applicability date.* This section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments made after December 31, 2000, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.)

§ 1.6049–5T [Removed]

■ **Par. 36.** Section 1.6049–5T is removed.

■ **Par. 37.** Section 1.6050N–1 is amended by revising (c)(1)(ii) to read as follows:

§ 1.6050N–1 Statements to recipients of royalties paid after December 31, 1986.

* * * * *

(c) * * *

(1) * * *

(ii) Returns of information are not required for payments of royalties from sources outside the United States paid by a non-U.S. payor or non-U.S. middleman and that are paid and received outside the United States. For a definition of non-U.S. payor or non-U.S. middleman, see § 1.6049–5(c)(5). For circumstances in which a payment is considered to be paid and received outside the United States, see § 1.6049–4(f)(16).

* * * * *

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

■ **Par. 38.** The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 39.** Section 31.3406(g)–1 is amended by revising paragraph (e) and adding paragraph (f) to read as follows:

§ 31.3406(g)–1 Exception for payments to certain payees and certain other payments.

* * * * *

(e) *Certain reportable payments made outside the United States by foreign persons, foreign offices of United States banks and brokers, and others.* For reportable payments made after June 30, 2014, a payor is not required to backup withhold under section 3406 on a reportable payment that is paid and received outside the United States (as defined in § 1.6049–4(f)(16)) with respect to an offshore obligation (as defined in § 1.6049–5(c)(1)) or on gross proceeds from a sale effected outside the United States (as defined in § 1.6045–1(g)(3)(iii)), unless the payor has actual knowledge that the payee is a United States person. Further, no backup withholding is required on a reportable payment of an amount already withheld upon by a participating FFI (as defined in § 1.1471–1(b)(91)) or another payor in accordance with the withholding provisions under chapter 3 or 4 of the Code and the regulations under those chapters even if the payee is a known U.S. person. For example, a participating FFI is not required to backup withhold on a reportable payment allocable to its chapter 4 withholding rate pool (as defined in § 1.6049–4(f)(5)) of recalcitrant account holders (as described in § 1.6049–4(f)(11)), if withholding was applied to the payment (either by the participating FFI or another payor) pursuant to § 1.1471–4(b) or § 1.1471–2(a). For rules applicable to notional principal contracts, see § 1.6041–1(d)(5) of this chapter. For rules applicable to reportable payments made before July 1, 2014, see this paragraph (e) as in effect and contained in 26 CFR part 1 revised April 1, 2013.)

(f) *Effective/applicability date.* This section applies on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, revised April 1, 2016).

§ 31.3406(g)–1T [Removed]

■ **Par. 40.** Section 31.3406(g)–1T is removed.

■ **Par. 41.** Section 31.3406(h)–2 is amended by revising paragraph (a)(3)(i) and adding paragraph (i) to read as follows:

§ 31.3406(h)–2 Special rules.

(a) * * *

(3) * * *

(i) *In general.* If the relevant payee listed on a jointly owned account or instrument provides a Form W–8 or documentary evidence described in § 1.1441–1(e)(1)(ii) regarding its foreign status, withholding under section 3406 applies unless every joint payee provides the statement regarding foreign status (under the provisions of chapters 3 or 61 of the Internal Revenue Code and the regulations under those provisions); any one of the joint owners who has not established foreign status provides a taxpayer identification number to the payor in the manner required in §§ 31.3406(d)–1 through 31.3406(d)–5; or, in the case of a withholdable payment (as defined in § 1.6049–4(f)(15)), any joint payee does not appear to be an individual as described in § 1.1471–3(f)(7). See § 1.6049–5(d)(2)(iii) of this chapter for corresponding joint payees provisions.

* * * * *

(i) *Effective/applicability date.* This section applies to payments made on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, revised April 1, 2016.)

§ 31.3406(h)–2T [Removed]

■ **Par. 42.** Section 31.3406(h)–2T is removed.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 43.** The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 44.** Section 301.6402–3 is amended by revising paragraphs (e) and (f) to read as follows:

§ 301.6402–3 Special rules applicable to income tax.

* * * * *

(e) In the case of a nonresident alien individual or foreign corporation, the appropriate income tax return on which the claim for refund or credit is made must contain the tax identification number of the taxpayer required pursuant to section 6109 and the entire amount of income of the taxpayer subject to tax, even if the tax liability for that income was fully satisfied at source through withholding under chapters 3 or 4 of the Internal Revenue Code (Code). Also, if the overpayment of tax resulted from the withholding of tax at source under chapter 3 or 4 of the Code, a copy of the Form 1042–S, ''Foreign Person's U.S. Source Income subject to Withholding,'' Form 8805, ''Foreign Partner's Information Statement of Section 1446 Withholding Tax,'' or other statement (required under § 1.1446–3(d)(2) of this chapter) required to be provided to the beneficial owner or partner pursuant to § 1.1461–1(c)(1)(i), § 1.1474–1(d)(1)(i), or § 1.1446–3(d) of this chapter must be attached to the return. For purposes of claiming a refund, the Form 8805 or other statement must include the taxpayer identification number of the beneficial owner or partner even if not otherwise required. No claim for refund or credit under chapter 65 of the Code may be made by the taxpayer for any amount that the payor has repaid to the taxpayer pursuant to reimbursement or set-off procedures (described in § 1.1461–2(a)(2),(3) or § 1.1474–2(a)(3), (4) of this chapter). In addition, no claim for refund or credit may be made by a taxpayer for any amount that has been repaid to a qualified intermediary (as described in § 1.1441–1(e)(5)(ii)) or a participating FFI (as described in § 1.1471–1(b)(91)) pursuant to a collective refund filed by such entity on behalf of the taxpayer. See § 1.1441–1(e)(5)(iii) (describing a qualified intermediary agreement) and § 1.1471–4(h) (describing a collective refund). Upon request, a taxpayer must also submit such documentation as the IRS, may require establishing that the taxpayer is the beneficial owner of the income for which a claim for refund or credit is being made and verifying the grounds and facts set forth in taxpayer's claim as required by § 301.6402–2(b)(1). See § 1.1474–5 for additional requirements that may apply in the case of a refund of tax withheld under chapter 4.

(f) *Effective/applicability date*—(1) Except as provided in paragraph (f)(2) of this section, this section applies on or after January 6, 2017. (For payments made after June 30, 2014, and before January 6, 2017, see this section as in

effect and contained in 26 CFR part 1, revised April 1, 2016.)

(2) References in paragraph (e) of this section to Form 8805 or other statements required under § 1.1446–3(d)(2) shall apply to partnership taxable years beginning after April 29, 2008. References in paragraph (e) of this section to amounts withheld under chapter 4 of the Code and claims made with respect to amounts withheld under chapter 4 of the Code shall apply to withholdable payments made after June 30, 2014.

§ 301.6402–3T [Removed]

■ **Par. 46.** Section 301.6402–3T is removed.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: December 22, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

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Part VI

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1 and 301

Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities; Rules

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[TD 9809]

RIN 1545–BL72
RIN 1545–BN79

Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Removal of temporary regulations; final regulations; temporary regulations.

SUMMARY: This document contains final and temporary regulations under chapter 4 of Subtitle A (sections 1471 through 1474) of the Internal Revenue Code of 1986 (Code) regarding information reporting by foreign financial institutions (FFIs) with respect to U.S. accounts and withholding on certain payments to FFIs and other foreign entities. This document finalizes (with changes) certain proposed regulations under chapter 4, and withdraws corresponding temporary regulations. This document also includes temporary regulations providing additional rules under chapter 4. The text of the temporary regulations also serves as the text of proposed regulations set forth in a notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**. The regulations included in this document affect persons making certain U.S.-related payments to FFIs and other foreign persons and payments by FFIs to other persons.

DATES:

Effective date. These regulations are effective on January 6, 2017.

Applicability date. For dates of applicability, see §§ 1.1471–1(c), 1.1471–2(c), 1.1471–3(g), 1.1471–4(j), 1.1471–5(l), 1.1471–6(i), 1.1472–1(h), 1.1473–1(f), 1.1474–1(j), and 1.1474–6(g).

FOR FURTHER INFORMATION CONTACT: Kamela Nelan at (202) 317–6942 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information in these final and temporary regulations is contained in a number of provisions including §§ 1.1471–3, 1.1471–4, 1.1472–1, 1.1474–1, and 1.1474–6. In addition, these final and temporary regulations amend a number of collections of information set out in final regulations under chapter 4 issued in TD 9610 and temporary regulations under chapter 4 issued in TD 9657. The IRS intends that the information collection requirements of these final and temporary regulations will be satisfied by filing Forms 8957, 8966, the W–8 series of forms, W–9, 1042, 1042–S, and the 1099 series of forms, as well as certain income tax returns (for example, Forms 1040 and 1120F). As a result, for purposes of the Paperwork Reduction Act (44 U.S.C. 3507), the reporting burden associated with the collection of information in these final and temporary regulations will be reflected in the information collection burden and OMB control number of the appropriate IRS form. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

Books and records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to the regulations under chapter 4 of the Code (sections 1471 through 1474) commonly known as the Foreign Account Tax Compliance Act, or FATCA. Chapter 4 generally requires U.S. withholding agents to withhold tax on certain payments to FFIs that do not agree to report certain information to the IRS regarding their U.S. accounts, and on certain payments to certain nonfinancial foreign entities (NFFEs) that do not provide information on their substantial United States owners (substantial U.S. owners) to withholding agents.

On January 28, 2013, final regulations (TD 9610) under chapter 4 were published in the **Federal Register** (78 FR 5874), and on September 10, 2013, corrections to the final regulations (September 2013 corrections) were published in the **Federal Register** (78 FR 55202). TD 9610 and the September 2013 corrections are referred to collectively in this preamble as the 2013 final regulations. On March 6, 2014, the Department of the Treasury (Treasury Department) and the IRS published temporary regulations (TD 9657) under chapter 4 in the **Federal Register** (79 FR 12812), and corrections to the temporary regulations were published in the **Federal Register** on July 1, 2014 (July 2014 corrections), and November 18, 2014 (November 2014 corrections) (79 FR 37175 and 78 FR 68619, respectively). TD 9657, the July 2014 corrections, and the November 2014 corrections are referred to collectively in this preamble as the 2014 temporary regulations. A notice of proposed rulemaking cross-referencing the 2014 temporary regulations was published in the **Federal Register** on March 6, 2014 (79 FR 12868).

On March 6, 2014, the Treasury Department and the IRS published temporary regulations (TD 9658) under chapters 3 and 61 and sections 3406 and 6402 (79 FR 12726) (temporary coordination regulations). A notice of proposed rulemaking cross-referencing the temporary coordination regulations was published in the **Federal Register** on March 6, 2014 (79 FR 12880). The temporary coordination regulations modify certain provisions of the regulations under chapters 3 and 61 and sections 3406 and 6402 to coordinate with the 2013 final regulations and the 2014 temporary regulations.

Comments were received in response to the 2014 temporary regulations, but no public hearing was requested and none was held. After consideration of the comments received, this Treasury decision generally adopts as final regulations the 2014 temporary regulations, with the modifications described in the Summary of Comments and Explanation of Revisions and Provisions of this preamble, and removes the corresponding temporary regulations. This Treasury decision also includes corrections and makes certain modifications to the 2013 final regulations. Additionally, this Treasury decision includes temporary regulations, cross-referenced in a notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**, revising certain sections of the 2013 final regulations. Following the publication of the 2014 temporary regulations, the Treasury Department and the IRS received comments suggesting changes to the 2013 final regulations. These comments are not individually discussed in the Summary of Comments and Explanation of Revisions and Provisions except where a suggestion is adopted in the temporary regulations.

Part I of the Summary of Comments and Explanation of Revisions and Provisions of this preamble summarizes comments received regarding the 2014 temporary regulations and explains the changes made to the 2013 final

regulations and 2014 temporary regulations in response to those comments. Several of these revisions were described in Notice 2014–33, 2014–21 I.R.B. 1033; Notice 2015–66, 2015–41 I.R.B. 541; and Notice 2016–08, 2016–6 I.R.B. 304. Part I of the Summary of Comments and Explanation of Revisions and Provisions of this preamble also describes additional technical corrections and revisions to the 2013 final regulations and 2014 temporary regulations. Part II of the Summary of Comments and Explanation of Revisions and Provisions of this preamble summarizes the temporary regulations included in this document.

Summary of Comments and Explanation of Revisions and Provisions

I. Final Regulations

A. Comments and Changes to § 1.1471–1—Scope of Chapter 4 and Definitions

1. Branch

The 2014 temporary regulations define the term *branch* in § 1.1471–1T(b)(10) for purposes of chapter 4 by cross-referencing the definition of branch for participating FFIs in § 1.1471–4T(e)(2)(ii). However, § 1.1471–4T(e)(2)(ii) states that the definition of branch in that paragraph applies only to participating FFIs for purposes of § 1.1471–4, which is inconsistent with the cross-reference in § 1.1471–1T(b)(10) to § 1.1471–4T(e)(2)(ii) for the general definition of branch for chapter 4, and does not cover foreign branches of U.S. financial institutions. Therefore, these final regulations provide a definition of branch that applies for purposes of chapter 4 with respect to a branch of a financial institution.

2. Nonreporting IGA FFI

Under the 2014 temporary regulations, the term *nonreporting IGA FFI* means an FFI that is identified as a nonreporting financial institution pursuant to a Model 1 IGA or Model 2 IGA that is not a registered deemed-compliant FFI, and an FFI that is a resident of, or located or established in, a Model 1 or Model 2 IGA jurisdiction, as the context requires, and that meets the requirements for certified deemed-compliant FFI status under § 1.1471–5T(f)(2). This definition of a nonreporting IGA FFI, however, excludes a nonreporting financial institution that is treated as a registered deemed-compliant FFI under Annex II of the Model 2 IGA and a nonreporting financial institution that satisfies the requirements of a deemed-compliant FFI under the chapter 4 regulations rather than the IGA. The Instructions for Form W–8BEN–E, ''Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities),'' state that an FFI that is treated as a nonreporting IGA FFI under an applicable IGA, including an entity treated as a registered deemed-compliant FFI under an applicable IGA, should certify its status as a nonreporting IGA FFI. The Instructions for Form W–8BEN–E also provide that a nonreporting IGA FFI claiming a deemed-compliant status under the chapter 4 regulations should certify its status as a nonreporting IGA FFI.

To provide an inclusive definition of nonreporting IGA FFI consistent with the IGAs and to coordinate with the Instructions for Form W–8BEN–E, these final regulations revise the definition of nonreporting IGA FFI in the 2014 temporary regulations to mean an FFI that is a resident of, or located or established in, a Model 1 or Model 2 IGA jurisdiction, as the context requires, and that is a nonreporting financial institution described in Annex II of the Model 1 or Model 2 IGA, a registered deemed-compliant FFI described in § 1.1471–5(f)(1)(i)(A) through (F), a certified deemed-compliant FFI described in § 1.1471–5(f)(2)(i) through (v), or an exempt beneficial owner described in § 1.1471–6.

To coordinate with the revised definition of nonreporting IGA FFI, these final regulations modify the definition of certified deemed-compliant FFI to exclude nonreporting IGA FFIs because some nonreporting IGA FFIs are required to obtain global intermediary identification numbers (GIINs). These final regulations instead include all nonreporting IGA FFIs in the definition of deemed-compliant FFI in § 1.1471–5(f).

These final regulations also modify the documentation rules in § 1.1471–3(d)(7)(i) to incorporate the registration requirements for certain nonreporting IGA FFIs. Under these final regulations, a withholding agent must obtain a GIIN from a nonreporting IGA FFI that is treated as a registered deemed-compliant FFI under Annex II of the Model 2 IGA or that is a registered deemed-compliant FFI described in § 1.1471–5(f)(1)(i)(A) through (F).

3. Preexisting Obligation (and Related Documentation Requirements)

Under the 2014 temporary regulations, the term *preexisting obligation* is defined as: (i) An obligation outstanding on the later of the date the FFI is issued a GIIN or June 30, 2014, for a withholding agent that is a participating FFI; (ii) an obligation issued prior to the later of the date of the FFI's registration or the date the FFI is required to implement its account opening procedures, for a withholding agent that is a registered-deemed compliant FFI; and (iii) an obligation outstanding on June 30, 2014, for any other withholding agent not described in (i) and (ii).

Comments to the 2014 temporary regulations and revised Forms W–8BEN and W–8BEN–E (published shortly after the 2014 temporary regulations were published) noted difficulties for withholding agents and FFIs to document new account holders and payees by the time specified in the 2014 temporary regulations. In response to comments, Notice 2014–33 was issued and announced further transitional relief for withholding agents to treat certain new entity accounts as preexisting accounts for purposes of documenting such account holders. These final regulations implement the transitional relief by modifying the definition of a preexisting obligation to provide that a withholding agent or an FFI may treat an obligation held by an entity with the withholding agent or FFI that is issued, opened, or executed on or after July 1, 2014, and before January 1, 2015, as a preexisting obligation. However, the timeframe for documenting preexisting entity obligations in § 1.1471–4(c)(3) is unchanged; that is, the timeframes provided in § 1.1471–4(c)(3) apply to all preexisting entity obligations, including those obligations described in the preceding sentence. Furthermore, as provided in Notice 2014–33, these final regulations specify that if a participating FFI treats an entity account opened on or after July 1, 2014, and before January 1, 2015, as a preexisting account, the FFI may not apply the exception from identification and documentation for certain low-value preexisting entity accounts under § 1.1471–4(c)(3)(iii)(A) to that account.

These final regulations also clarify the definition of a preexisting obligation in the 2014 temporary regulations to remove the references to withholding agents in the second and third sentences of § 1.1471–1(b)(104)(i) because the term *preexisting obligation* may apply to a participating FFI or registered deemed-compliant FFI that is not a withholding agent because the FFI never has control or custody of withholdable payments (as, for example, in the case of a participating FFI or registered deemed-compliant FFI that is documenting preexisting account holders). Therefore, under these final regulations, a preexisting obligation includes an

obligation maintained by a participating FFI on the later of the date the FFI is issued a GIIN or June 30, 2014, and an obligation maintained by a registered deemed-compliant FFI prior to the later of the date of the FFI's registration or the date the FFI is required to implement its account opening procedures, regardless of whether the participating FFI or registered deemed-compliant FFI is a withholding agent.

4. U.S. Person

The 2014 temporary regulations define the term *U.S. person* to include a person described in section 7701(a)(30), but do not specify whether a U.S. person includes a dual resident (that is, an individual who is considered a resident of the United States and also a resident of a country with which the United States has an income tax treaty). For purposes of chapter 3, a person that is a resident of a foreign country under the residence article of an income tax treaty and § 301.7701(b)–7(a)(1) (which therefore includes a person that is a dual resident) is a nonresident alien individual. See § 1.1441–1(c)(3)(ii). The Treasury Department and the IRS have determined that the treatment of dual residents should be consistent in chapters 3 and 4 and that dual residents should be treated as non-U.S. persons for purposes of chapters 3 and 4. Accordingly, these final regulations revise the 2014 temporary regulations to provide that an individual will not be treated as a U.S. person for a taxable year or any portion of a taxable year that the individual is a dual resident taxpayer (within the meaning of § 301.7701(b)–7(a)(1)) who is treated as a nonresident alien pursuant to § 301.7701(b)–7 for purposes of computing the individual's U.S. tax liability. Final regulations under chapter 3 published elsewhere in this issue of the **Federal Register** modify the definition of nonresident alien individual to provide a description of a dual resident consistent with the definition included in these final regulations (but do not change the substantive rule in chapter 3).

The regulations under chapter 3 also provide that an alien individual who has made an election under section 6013(g) or (h) to be treated as a resident of the United States is treated as a nonresident alien individual for purposes of chapter 3. In order to have a consistent rule, these final regulations provide that a U.S. person does not include an alien individual who has made an election under section 6013(g) or (h) to be treated as a resident of the United States.

These final regulations also revise the definition of U.S. person to remove an unnecessary restriction on certain foreign insurance companies. The 2014 temporary regulations provide that a U.S. person includes a foreign insurance company that has made an election under section 953(d) to be treated as a U.S. person if the foreign insurance company is not a specified insurance company (as defined in § 1.1471–5(e)(1)(iv)) and is not licensed to do business in any state. The preamble to the 2014 temporary regulations explains that the definition of U.S. person in the 2013 final regulations is modified in the 2014 temporary regulations to include certain foreign insurance companies that have made an election under section 953(d) in light of the existing requirements applicable to these types of entities to report U.S. owners on the entity's U.S. income tax return. The requirement included in the 2014 temporary regulations that a U.S. person that is not a specified insurance company not be licensed to do business in any state is unnecessary because insurance companies that are not specified insurance companies are required under section 953(d) to report information regarding their U.S. owners regardless of whether they are licensed to do business in a state. These final regulations revise the 2014 temporary regulations to provide that a U.S. person includes a foreign insurance company that has made an election under section 953(d) and that is not a specified insurance company (regardless of whether such entity is licensed to do business in a state).

5. Withholding

The 2013 final regulations define the term *withholding* as the deduction and remittance of tax at the applicable rate from a payment. However, the definition of withholding for purposes of chapter 3 does not include remittance. See § 1.1441–1(c)(1). In order to coordinate with chapter 3, these final regulations modify the definition of withholding in the 2013 final regulations to mean the deduction and withholding of tax at the applicable rate from a payment.

B. Comments and Changes to § 1.1471–2—Requirement To Deduct and Withhold Tax on Withholdable Payments to Certain FFIs

1. Requirement To Withhold on Payments to FFIs—Special Withholding Rules—Withholding Obligation of a Foreign Branch of a U.S. Financial Institution

The 2014 temporary regulations generally provide that a foreign branch of a U.S. financial institution is a withholding agent and is not an FFI. The 2014 temporary regulations also provide that a foreign branch of a U.S. financial institution that is a reporting Model 1 FFI is both a withholding agent and a registered deemed-compliant FFI, and must withhold in accordance with § 1.1471–2 and § 1.1472–1(b). However, the 2014 temporary regulations do not fully coordinate such branch's withholding and documentation obligations as a U.S. withholding agent with its obligations as a reporting Model 1 FFI. These final regulations clarify in § 1.1471–2(a)(2)(v) that a foreign branch of a U.S. financial institution is a U.S. withholding agent and a payee that is a U.S. person, and therefore has primary withholding responsibility on withholdable payments that it makes and is not subject to withholding under chapter 4 on withholdable payments that it receives. A foreign branch of a U.S. financial institution that is a reporting Model 1 FFI or that has entered into a qualified intermediary (QI) agreement may also be an FFI. The treatment of a foreign branch as an FFI, however, does not affect its withholding responsibilities as a U.S. withholding agent. These final regulations allow a foreign branch that is treated as an FFI to apply the procedures under Annex I of an applicable Model 1 or Model 2 IGA to document the chapter 4 status of a payee of a withholdable payment that is a holder of an account maintained by the branch in the Model 1 or Model 2 IGA jurisdiction.

2. Grandfathered Obligations

i. Definitions

Under the 2013 final regulations, a withholdable payment does not include a payment made under a grandfathered obligation. A grandfathered obligation includes certain obligations outstanding on July 1, 2014, as well as any agreement requiring a secured party to make a payment with respect to, or to repay, collateral posted to secure a grandfathered obligation. If collateral (or a pool of collateral) is posted to secure both grandfathered obligations and obligations that are not grandfathered,

the collateral posted to secure the grandfathered obligations must be determined by allocating, pro rata by value, the collateral (or each item in the pool of collateral) to all outstanding obligations secured by the collateral (or pool of collateral). Comments stated that it is unduly burdensome for withholding agents that are financial institutions to comply with the pro rata rule described in the preceding sentence. As announced in Notice 2015–66, these final regulations modify the 2013 final regulations to provide that the pro rata rule is not mandatory, and that if a withholding agent does not apply the pro rata rule, the withholding agent may allocate all withholdable payments on collateral (or a pool of collateral) to obligations that are not grandfathered and, if applicable, apply withholding to such payments.

The Treasury Department and the IRS also received comments requesting that the definition of grandfathered obligation include a new obligation that is created as a result of posting a grandfathered obligation as collateral. Under the 2013 final regulations, to the extent that a secured party is treated as the beneficial owner of a grandfathered obligation that is pledged as collateral after July 1, 2014, payments made by the secured party to the pledgor are treated as made under a newly created obligation, resulting in substitute payments. Under the 2014 temporary regulations, such substitute payments are subject to withholding if paid after January 1, 2017 (when the transitional exception from withholding for payments on collateral arrangements expires). The comment noted difficulties for certain withholding agents that are financial institutions to determine whether payments made with respect to collateral are substitute payments or payments made with respect to the collateral because collateral is frequently rehypothecated from omnibus accounts that include collateral from many counterparties. As previewed in Notice 2015–66, these final regulations amend the definition of grandfathered obligation to include any obligation that gives rise to a payment of substitute interest (as defined in § 1.861–2(a)(7)) and that arises from the payee posting collateral that is a grandfathered obligation under § 1.1471–2(b)(2)(i)(A)(*1*).

ii. Determination by Withholding Agent of Grandfathered Treatment—Determination of Material Modification

The 2014 temporary regulations provide that a withholding agent is required to treat a modification of an obligation as material only if the withholding agent has actual knowledge thereof, such as in the event the withholding agent receives a disclosure indicating that there has been or will be a material modification to the obligation. A comment requested that receipt of disclosure from the issuer be the only instance in which a withholding agent has actual knowledge of a material modification. The Treasury Department and the IRS considered similar comments when drafting the 2014 temporary regulations and believe that the 2014 temporary regulations strike the correct balance by providing withholding agents with a standard that is narrow in scope without limiting the circumstances when there is actual knowledge. While the expectation is that a withholding agent that is a broker might only have actual knowledge of a material modification upon receiving notice from the issuer, the Treasury Department and the IRS do not believe that it is appropriate to foreclose the possibility that a withholding agent might otherwise have actual knowledge of the material modification absent notice from the issuer. Therefore, these final regulations do not include any revisions to the determination of a material modification.

C. Comments and Changes to § 1.1471–3—Identification of Payee

1. Rules for Reliably Associating a Payment With a Withholding Certificate or Other Appropriate Documentation

i. Requirements for Validity of Certificates—Withholding Certificate of an Intermediary, Flow-Through Entity, or U.S. Branch (Form W–8IMY)

The 2014 temporary regulations provide that a withholding agent may treat a person receiving a withholdable payment as a QI if the withholding agent can reliably associate the payment with a valid Form W–8IMY, ''Certificate for Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting,'' as described in § 1.1471–3(c)(3)(iii). Section 1.1471–3(c)(3)(iii) provides the requirements for a withholding certificate of an intermediary, flow-through entity, or U.S. branch. QIs must provide a qualified intermediary withholding certificate (that is, a Form W–8IMY) to a withholding agent, even when the QI is acting as a qualified derivatives dealer (QDD) under § 1.1441–1(e)(6)(i). See § 1.1441–1(e)(3)(ii) and (e)(6)(i)(A). To coordinate with the requirements of a QI that is acting as a QDD, these final regulations provide that an intermediary, QI, flow-through entity, or U.S. branch must provide a valid Form W–8IMY to a withholding agent for chapter 4 purposes. This revision is intended only to clarify which entities provide a Form W–8IMY and does not affect the general meaning of intermediary in the chapter 4 regulations as including QIs.

The 2014 temporary regulations provide that a U.S. branch of a participating FFI or registered deemed-compliant FFI (whether or not the U.S. branch is treated as a U.S. person) must provide on its withholding certificate the GIIN assigned to the participating FFI or a registered deemed-compliant FFI. Under § 1.1441–1T(b)(2)(iv)(C) of the temporary coordination regulations, a U.S. branch of an FFI that agrees to be treated as a U.S. person is subject to the withholding, due diligence, and information reporting rules that apply to U.S. withholding agents under chapters 3 and 4 and must be either a participating FFI or registered deemed-compliant FFI to qualify for treatment as a U.S. person. Under the 2014 temporary regulations, a U.S. branch of an FFI that does not agree to be treated as a U.S. person is required to report for chapter 4 purposes under § 1.1471–4T(d)(2)(iii)(C). Due to the expiration on January 1, 2017, of the transitional rules in § 1.1471–4T(e)(2)(v) and (e)(3)(iv) (relating to limited FFI and limited branch statuses), it may become more difficult for an FFI to continue to be able to claim participating FFI or registered deemed-compliant FFI status, including when it has other branches that do not agree to comply with the requirements to be a participating FFI or registered deemed-compliant FFI, and therefore more difficult for a U.S. branch to avoid being withheld upon under chapter 4 (even though the U.S. branch is compliant with FATCA and subject to IRS examination and summons procedures in the same manner as a U.S. withholding agent).

In recognition that a U.S. branch of an FFI that agrees to be treated as a U.S. person is subject to withholding, due diligence, and information reporting requirements similar to any other U.S. withholding agent (and U.S. payor for chapter 61 reporting), these final regulations no longer require a U.S. branch of an FFI that agrees to be treated as a U.S. person to be a participating FFI or registered deemed-compliant FFI when acting as an intermediary. Therefore, a U.S. branch of an FFI that acts as an intermediary and that agrees to be treated as a U.S. person will not need to furnish a GIIN of the FFI of which it forms a part. In order to prevent a U.S. branch that is treated as a U.S. person from acting on behalf of other branches of the FFI that are treated

as nonparticipating FFIs to avoid withholding under chapter 4 on payments made to customers of such other branches, if any, regulations under chapter 3 published elsewhere in this issue of the **Federal Register** provide that the U.S. branch must withhold on payments made to the other branch to the extent required for chapter 4 purposes as if the U.S. branch were an entity separate from such other branch.

Under these final regulations, a U.S. branch that does not agree to be treated as a U.S. person is not required to be part of an FFI that is a participating FFI or registered deemed-compliant FFI, provided that such branch, when acting as an intermediary for a payment, applies the rules described in § 1.1471–4(d)(2)(iii)(C). Section 1.1471–4(d)(2)(iii)(C) of these final regulations provides that such a U.S. branch must report its U.S. accounts and accounts held by owner-documented FFIs under § 1.1471–4(d)(3), (d)(5), or (d)(6) and apply the withholding and due diligence rules in § 1.1471–4(b) and (c)(2) to all of its accounts as if the U.S. branch were a participating FFI. These final regulations do not impose the verification requirements in § 1.1471–4(f) and (g) on such U.S. branches because such branches are subject to IRS examination and summons procedures in the same manner as a U.S. withholding agent.

Under these final regulations, a withholding agent making a withholdable payment to an intermediary that is a U.S. branch that is not treated as a U.S. person must obtain the EIN of the U.S. branch and a certification that the U.S. branch is applying the rules described in § 1.1471–4(d)(2)(iii)(C). However, for a payment made before June 30, 2017, that the withholding agent can reliably associate with valid documentation from an intermediary that is a U.S. branch not treated as a U.S. person, the withholding agent will not be required to obtain the certification described in the preceding sentence. Therefore, a withholding agent that has previously documented such U.S. branch will have additional time to obtain the certification that the U.S. branch is applying the rules described in § 1.1471–4(d)(2)(iii)(C).

Because a U.S. branch of an FFI treated as a U.S. person is not required to be part of a participating FFI, and a U.S. branch not treated as a U.S. person may avoid being withheld upon under chapter 4 even if the FFI of which it is a part has one or more branches that are treated as nonparticipating FFIs, these final regulations modify the definition of the term *participating FFI* to provide that an FFI that registers to agree to the terms of an FFI agreement may only do so if it agrees that all branches of the FFI, other than a branch that is a reporting Model 1 FFI or a U.S. branch, will comply with the terms of the FFI agreement. See Revenue Procedure 2014–38, 2014–29 I.R.B. 131, as may be amended, for the FFI agreement.

The changes in these final regulations only affect a U.S. branch when it is acting as an intermediary for a payment. For a U.S. branch that receives a payment for an entity that is the beneficial owner of the payment, see § 1.1471–3(c)(3)(ii) and the Instructions for Form W–8BEN–E (requiring a U.S. branch to provide on its withholding certificate a GIIN of the participating FFI or registered deemed-compliant FFI of which it is a part or any branch of such FFI).

ii. Requirements for Validity of Certificates—Withholding Certificate of an Intermediary, Flow-Through Entity, or U.S. Branch (Form W–8IMY)—Withholding Statement—Special Requirements for an FFI Withholding Statement

The FFI agreement permits a participating FFI to provide a withholding statement that allocates a portion of a withholdable payment to a group of account holders for whom no reporting is required on any of Form 1042–S, ''Foreign Person's U.S. Source Income Subject to Withholding,'' the Form 1099 series, and Form 8966, ''FATCA Report'' (an *exempt payee pool*). The preamble to the FFI agreement in Revenue Procedure 2014–38 provides that the 2014 temporary regulations will be amended to incorporate the allowance for an exempt payee pool on an FFI withholding statement. However, the preamble to the FFI agreement incorrectly adds that an FFI providing an exempt payee pool is not required to provide documentation for the payees in the pool (even though such documentation would be required for chapter 3 purposes under a similar rule in the regulations under chapter 3).

To coordinate with the allowance in the FFI agreement, these final regulations provide that an FFI may include on its FFI withholding statement an allocation of a portion of a withholdable payment to a pool of account holders (other than nonqualified intermediaries and flow-through entities) for whom no reporting is required on any of Forms 1042–S, 1099, and 8966, provided the FFI provides to the withholding agent, for each account holder in the pool: (1) Payee-specific information (including chapter 4 status) and any other information required for purposes of chapter 3 or 61 on the withholding statement; and (2) documentation. For example, a participating FFI may provide on its withholding statement an exempt payee pool for a payment of U.S. source interest on a bank deposit not subject to withholding or reporting under chapter 4 that is allocable to a pool of foreign account holders (that is, a withholdable payment that is not required to be reported on any of Forms 1042–S, 1099, and 8966) and provide the withholding agent with documentation for each account holder in the pool.

Under the 2014 temporary regulations, an FFI withholding statement, a chapter 4 withholding statement, or an exempt beneficial owner withholding statement that includes payee-specific information for purposes of chapter 4 must indicate both the portion of the payment allocated to each payee and each payee's chapter 4 status. The 2014 temporary regulations also provide that an FFI withholding statement, a chapter 4 withholding statement, or an exempt beneficial owner withholding statement must include any other information that the withholding agent needs in order to fulfill its obligations under chapter 4. Since a withholding agent is required to report the chapter 4 status code for each payee on Form 1042–S, these final regulations clarify that the chapter 4 status of a payee shown on a withholding statement must be the applicable chapter 4 status code used to report the payee on Form 1042–S. This modification is consistent with the requirement in the temporary coordination regulations that a nonqualified intermediary withholding statement include the chapter 4 status code for each payee (excluding a payee included in a chapter 4 withholding rate pool) used for filing Form 1042–S. Additionally, to coordinate with the temporary coordination regulations, these final regulations clarify that an FFI withholding statement provided by an FFI other than an FFI acting as a QI, WP, or WT must identify the GIIN of an intermediary or flow-through entity when required under § 1.1471–3(d) and the chapter 4 status code used for filing Form 1042–S. Finally, the description of the recalcitrant account holder pool on an FFI withholding statement in § 1.1471–3(c)(3)(iii)(B)(*2*)(*i*) is revised to cross-reference § 1.1471–1(b)(20) (rather than § 1.1471–4(d)(6)) to coordinate with the revisions to § 1.1471–1T(b)(20) in the July 2014 corrections.

iii. Requirements for Validity of Certificates—Withholding Certificate of an Intermediary, Flow-Through Entity, or U.S. Branch (Form W–8IMY)—Withholding Statement—Special Requirements for Chapter 4 Withholding Statement

Under the 2014 temporary regulations, a chapter 4 withholding statement must include an allocation of the payment to each payee (other than a payee that is a nonparticipating FFI). The Treasury Department and the IRS have determined that allocation information is unnecessary for purposes of this withholding statement when there is no withholding or reporting requirement with respect to a payment. Therefore, these final regulations provide that a chapter 4 withholding statement may include an allocation of a portion of the payment to a pool of payees (rather than to each payee) for whom no reporting is required on any of Forms 1042–S, 1099, and 8966, provided that the withholding statement contains payee-specific information (including chapter 4 status) and any other information required for purposes of chapter 3 or 61, and documentation is provided to the withholding agent for each payee in the pool.

The 2014 temporary regulations permit a chapter 4 withholding statement to include pooled allocation information with respect to payees that are nonparticipating FFIs. These final regulations clarify that when a chapter 4 withholding statement provides pooled allocation information with respect to payees that are treated as nonparticipating FFIs, the withholding agent does not need to obtain documentation for each nonparticipating FFI included in the pool. These final regulations also remove an unnecessary cross-reference to chapter 61 in § 1.1471–3(c)(3)(iii)(B)(*3*).

iv. Requirements for Documentary Evidence—Foreign Status—Entity Government Documentation

Under the 2013 final regulations, acceptable documentary evidence supporting a claim of foreign status includes, with respect to an entity, official documentation issued by an authorized government body. However, some common types of organizational documentation may not be considered ''issued'' by a governmental body (for example, articles of incorporation and partnership agreements). Therefore, these final regulations revise the 2013 final regulations to provide that acceptable documentary evidence supporting a claim of foreign status includes any documentation that substantiates that the entity is actually organized or created under the laws of a foreign country.

v. Applicable Rules for Withholding Certificates, Written Statements, and Documentary Evidence—Period of Validity—Indefinite Validity

A comment noted that contemporaneous receipt of a beneficial owner withholding certificate and documentary evidence is not always practical and should not be a condition for indefinite validity of a withholding certificate. The Treasury Department and the IRS agree with the comment and have determined that these rules should be revised in both chapters 3 and 4. With respect to individuals, these final regulations cross-reference § 1.1441–1(e)(4)(ii)(B)(*1*), which is modified in regulations published elsewhere in this issue of the **Federal Register** to provide that a beneficial owner withholding certificate and documentary evidence supporting the individual's claim of foreign status will be treated as provided together if they are provided within 30 days of each other, regardless of which the withholding agent receives first. With respect to entities, these final regulations incorporate the rule in § 1.1441–1(e)(4)(ii)(B)(*2*), which is modified in regulations published elsewhere in this issue of the **Federal Register** to provide that a beneficial owner withholding certificate and documentary evidence supporting an entity's claim of foreign status will be valid indefinitely when both are received by the withholding agent before the validity period of either would otherwise expire (that is, both the withholding certificate and the documentary evidence are received by the withholding agent and neither has expired).

vi. Applicable Rules for Withholding Certificates, Written Statements, and Documentary Evidence—Period of Validity—Change in Circumstances

Under the 2013 final regulations, a withholding agent cannot rely on a withholding certificate or documentation if it knows or has reason to know that a change in circumstances affects the correctness of the certificate or documentation. The 2013 final regulations define a change in circumstances as a change that would affect a person's chapter 4 status and require the person whose name is on the certificate or documentation to notify the withholding agent within 30 days and provide a new certificate or documentation following a change in circumstance.

A comment requested relief from a withholding agent's requirement to obtain new documentation from an FFI following a change in circumstances that does not affect whether withholding under chapter 4 is required on payments to the FFI. In response to the comment, these final regulations provide that a withholding agent will not have reason to know of a change in circumstances with respect to an FFI's chapter 4 status that results solely because the jurisdiction in which the FFI is resident, organized, or located is one that is later treated as having an IGA in effect (including a jurisdiction that had a Model 2 IGA in effect and is later treated as having a Model 1 IGA in effect). In lieu of providing a new withholding certificate to the withholding agent to document the new chapter 4 status, these final regulations allow an FFI to provide to the withholding agent oral or written confirmation (including by email) of the FFI's change in its chapter 4 status within 30 days after the change in circumstances described in the preceding sentence or a change in circumstances with respect to the FFI's chapter 4 status that results solely because a jurisdiction is later treated as not having an IGA in effect. In such a case, the withholding agent must retain a record of the confirmation, which will become part of the FFI's withholding certificate or other documentation. See section II.C.1.iii of this Summary of Comments and Explanation of Revisions and Provisions for an explanation of temporary regulations on a withholding agent's reason to know of a change in circumstances if a jurisdiction ceases to be treated as having an IGA in effect.

vii. Applicable Rules for Withholding Certificates, Written Statements, and Documentary Evidence—Electronic Transmission of Withholding Certificate, Written Statement, and Documentary Evidence

The 2014 temporary regulations provide that a withholding agent may accept a withholding certificate, written statement, or other such form as the IRS may prescribe, electronically in accordance with the requirements of § 1.1441–1(e)(4)(iv). A comment to the temporary coordination regulations requested a modification of the effective date of § 1.1441–1(e)(4)(iv) so that withholding agents may rely upon forms or documentary evidence received electronically after March 6, 2014, even if the payment was made prior to such date. The Treasury Department and the IRS agree with this comment, and have determined that the applicability date for reliance on electronically

transmitted documentation should be the same in chapters 3 and 4. In regulations published elsewhere in this issue of the **Federal Register**, the temporary coordination regulations are modified so that § 1.1441–1(e)(4)(iv)(D) applies to any open tax year. Likewise, these final regulations provide that a taxpayer may apply § 1.1471–3(c)(6)(iv) to all of its open tax years.

viii. Applicable Rules for Withholding Certificates, Written Statements, and Documentary Evidence—Reliance on Prior Versions of Withholding Certificates

Under the 2013 final regulations, a withholding agent can accept a prior version of a withholding certificate for six months after the revision date of an updated version of the certificate, unless the IRS has issued guidance that indicates otherwise. The temporary coordination regulations include a similar rule for chapter 3 purposes. In regulations published elsewhere in this issue of the **Federal Register**, § 1.1441–1(e)(4)(viii)(C) is modified to permit withholding agents to accept a prior version of a withholding certificate until the later of six full months after the revision date of the updated form or the end of the calendar year during which the revised version is issued, unless the Treasury Department and the IRS designate a shorter transition period. The Treasury Department and the IRS have determined that the requirements for reliance on prior versions of withholding certificates under chapter 3 should be adopted for both chapters 3 and 4. Therefore, these final regulations modify the 2013 final regulations by cross-referencing to the rule in § 1.1441–1(e)(4)(viii)(C) regarding reliance on prior versions of forms.

ix. Curing Documentation Errors—Curing Inconsequential Errors on a Withholding Statement

The 2013 final regulations provide that a withholding agent may treat a withholding certificate as valid, notwithstanding that the certificate contains an inconsequential error, if the withholding agent has sufficient documentation on file to supplement the information missing from the withholding certificate due to the error and such documentation is conclusive. The 2013 final regulations include an example of a withholding agent using government issued identification to cure an abbreviation of a country of residence on a withholding certificate provided by an individual, implying that any abbreviation (whether ambiguous or unambiguous) must be cured. However, since the Instructions for Form W–8BEN do not require an individual to provide the full name of a country, an unambiguous abbreviation is not an error. For consistency with chapter 3 (see § 1.1441–1(b)(7)(iv)), these final regulations revise the example to provide that an abbreviation of a country of residence is an inconsequential error that would need to be cured only if it is an ambiguous abbreviation.

2. Documentation Requirements To Establish a Payee's Chapter 4 Status

i. Identification of U.S. Persons—In General

The 2014 temporary regulations provide that a withholding agent receiving a Form W–9, ''Request for Taxpayer Identification Number and Certification,'' indicating that the payee is a U.S. person that is not a specified U.S. person must treat the payee as a specified U.S. person if the withholding agent knows or has reason to know that the payee's claim that it is other than a specified U.S. person is incorrect. A comment requested that the final regulations either eliminate reason to know in § 1.1471–3T(d)(2)(i) or clarify when a withholding agent would have reason to know that a Form W–9 is incorrect with respect to an entity payee. The comment also notes that it would be burdensome for withholding agents to research publicly available information to determine if the entity's claim that it is not a specified U.S. person is incorrect. The Treasury Department and the IRS believe that reason to know is the appropriate standard for Form W–9 because it is the same as the standard of knowledge applied to forms in the W–8 series and the application of reason to know to Form W–9 is already clear. Reason to know is defined generally in § 1.1471–3(e)(4) and specifically for withholding certificates in § 1.1471–3(e)(4)(ii)(A). Under § 1.1471–3(e)(4)(ii)(A), a withholding agent has reason to know that a withholding certificate is unreliable or incorrect if the withholding certificate is incomplete with respect to any item on the certificate that is relevant to the claims made by the person, the withholding certificate contains any information that is inconsistent with the person's claim, the withholding agent has other account information that is inconsistent with the person's claim, or the withholding certificate lacks information necessary to establish entitlement to an exemption from withholding for chapter 4 purposes. Therefore, these final regulations do not adopt the comment.

ii. Documentation, GIIN Verification, and Registration of Sponsored Investment Entities, Sponsored Controlled Foreign Corporations, and Sponsored Direct Reporting NFFEs

These final regulations modify the procedures for withholding agents to document the chapter 4 status of a payee that is a sponsored investment entity or sponsored controlled foreign corporation described § 1.1471–5(f)(1)(i)(F) or a sponsored direct reporting NFFE described in § 1.1472–1(c)(5) (each referred to as a sponsored entity for purposes of this section I.C.2.ii) to incorporate the provisions of Notice 2015–66. Under the 2014 temporary regulations, for a transitional period that was to expire on January 1, 2016, a withholding agent may obtain the GIIN of a sponsoring entity if the sponsored entity has not yet obtained a GIIN. A comment noted that it would be difficult for withholding agents to verify the GIINs of sponsored entities by the date provided in the 2014 temporary regulations. In response to the comment, the Treasury Department and the IRS announced in Notice 2015–66 that the 2014 temporary regulations would be amended to extend the time for withholding agents to verify sponsored entity GIINs. These final regulations, therefore, extend the transitional period to apply to withholdable payments made before January 1, 2017. These final regulations also provide that a withholding agent is not required to verify the GIIN of a sponsored entity before January 1, 2017 (even if the sponsored entity obtains a GIIN before such date), if the withholding agent verifies the GIIN of the sponsoring entity in the manner described in these final regulations.

Notice 2015–66 announced that sponsoring entities must register their sponsored entities by January 1, 2017, and, beginning on that date, sponsoring entities must use the GIIN of the sponsored entity when reporting with respect to the sponsored entity on Form 8966 and must provide the GIIN to withholding agents making payments to the sponsored entity. The Notice also informed withholding agents that they would be required to obtain GIINs of sponsored entities for payments made on or after January 1, 2017. After Notice 2015–66 was issued, comments requested additional time for withholding agents to obtain the GIIN of a sponsored entity. In response to the comments, these final regulations provide that for a payment made after December 31, 2016, to a payee that the withholding agent has documented prior to January 1, 2017, as a sponsored

entity with a valid withholding certificate that includes the GIIN of the sponsoring entity, the withholding agent must obtain and verify the GIIN of the sponsored entity against the IRS FFI list by March 31, 2017. Notwithstanding the preceding sentence, a GIIN is not required for a payee that provides a valid withholding certificate prior to January 1, 2017, that identifies the payee as a sponsored FFI and includes the GIIN of the sponsoring entity if the withholding agent determines, based on information provided on the withholding certificate, that the payee is resident, organized, or located in a jurisdiction that is treated as having a Model 1 IGA in effect. A withholding certificate provided on or after January 1, 2017, by a payee that is a sponsored entity subject to a Model 1 IGA must identify the payee as a nonreporting IGA FFI or, if the payee identifies itself as a sponsored FFI, must include the payee's GIIN. As previewed in Notice 2015–66, the withholding agent may obtain a GIIN for a sponsored entity described in this paragraph by oral or written confirmation (including by email) rather than obtaining a new withholding certificate, provided that the withholding agent retains a record of the confirmation, which will become part of the withholding certificate.

As announced in Notice 2015–66, and to coordinate with the transitional dates for documentation and GIIN verification discussed in the preceding paragraph, these final regulations provide that a sponsoring entity must register each sponsored entity for which it acts by the later of January 1, 2017, or the date the sponsored entity identifies itself to a withholding agent or financial institution as having such status.

iii. Identification of Participating FFIs and Registered Deemed-Compliant FFIs—Reason To Know

The 2014 temporary regulations provide rules in both § 1.1471–3T(d)(4)(v) and (e) for when a withholding agent has reason to know that a payee's claim of status as a participating FFI or registered deemed-compliant FFI is invalid or incorrect. However, § 1.1471–3T(d)(4)(v) is duplicative of the more detailed rules on reason to know in § 1.1471–3T(e). To eliminate this duplication, these final regulations modify § 1.1471–3T(d)(4)(v) to cross-reference § 1.1471–3(e) for the applicable reason to know rules.

iv. Identification of Excepted NFFEs—Identification of Active NFFEs

Under § 1.1472–1(b), a withholding agent making a withholdable payment to a NFFE that does not provide information on its substantial U.S. owners (or certify that it has no substantial U.S. owners) must withhold on the payment unless the NFFE is an excepted NFFE described in § 1.1472–1(c)(1) (for example, an active NFFE described in § 1.1472–1(c)(1)(iv)). A withholding agent making a withholdable payment must apply the documentation rules in § 1.1471–3(d) to determine the chapter 4 status of a payee. Specifically, under § 1.1471–3(d)(11)(ix), a withholding agent may treat a payee as an active NFFE described in § 1.1472–1(c)(1)(iv) if the NFFE provides a withholding certificate identifying itself as an active NFFE. In contrast, a reporting Model 1 FFI or reporting Model 2 FFI documenting an account for purposes of satisfying the due diligence requirements of a Model 1 or Model 2 IGA applies the procedures in Annex I of the applicable IGA to determine whether an account holder is an active or passive NFFE. The chapter 4 regulations provide that a NFFE must determine its status under chapter 4 for purposes of documenting itself to a withholding agent making a withholdable payment to the NFFE. See § 1.1471–3(d)(11) and (12). A comment requested that the chapter 4 regulations be revised to permit a NFFE to determine its status under the Model 1 or Model 2 IGA of the jurisdiction where the NFFE is organized for purposes of certifying its status to both a withholding agent documenting a payee under the chapter 4 regulations and an FFI documenting an account holder under an applicable IGA. The Treasury Department and the IRS have decided that the chapter 4 regulations should not be revised in this regard. The due diligence procedures under the Model 1 IGA and Model 2 IGA allow financial institutions subject to an applicable IGA to document using such procedures and are not broadly intended for NFFEs. An entity resident in, or organized under the laws of, an applicable IGA jurisdiction may apply the IGA to determine its classification as an FFI or NFFE; however, it may not otherwise apply the IGA to determine whether it is an active or passive NFFE or whether it should identify controlling U.S. persons instead of substantial U.S. owners when it is documenting itself to a withholding agent making a withholdable payment to the entity.

v. Excepted Inter-Affiliate FFIs

The 2014 temporary regulations provide that an excepted inter-affiliate FFI may hold a depository account with a withholding agent that is not a member of the expanded affiliated group if the account is held in the country in which the excepted inter-affiliate FFI is operating to pay for expenses in that country. The 2014 temporary regulations also include identification rules for excepted inter-affiliate FFIs that provide that a withholding agent that is a participating FFI may treat a payee as an excepted inter-affiliate FFI if it has obtained a withholding certificate or a written statement (in the case of an offshore obligation) identifying the payee as such an entity.

Although the 2014 temporary regulations provide that an excepted inter-affiliate FFI is permitted to hold ''a depository account'' in the country in which the entity is operating to pay for expenses in that country, these final regulations permit an excepted inter-affiliate FFI to hold more than one depository account in a country in which the FFI is operating to pay for expenses in that country.

In addition, the restriction on withholding agents of an excepted inter-affiliate FFI to participating FFIs in § 1.1471–3(d)(11)(xii) is inconsistent with the allowance for an excepted inter-affiliate FFI to hold a depository account with a withholding agent that is not a member of the FFI's expanded affiliated group in § 1.1471–5(e)(5)(iv)(B). Therefore, these final regulations replace ''participating FFI'' with ''withholding agent'' in § 1.1471–3(d)(11)(xii)(A) through (C). Additionally, since an excepted inter-affiliate FFI can receive any payments from a member of the FFI's expanded affiliated group (not only payments of U.S. source bank deposit interest), these final regulations revise the reason to know rule in § 1.1471–3(d)(11)(xii)(C) so that it is limited to withholding agents that are not members of the FFI's expanded affiliated group.

3. Standards of Knowledge

i. GIIN Verification—In General

The 2014 temporary regulations provide that a withholding agent that receives a payee's claim of status as a participating FFI or registered deemed-compliant FFI must verify: (1) The GIIN assigned to the FFI identifying its country of residence or place of organization; or (2) with respect to a payment that is made to a branch of, or an entity that is disregarded as an entity separate from, a participating FFI or registered deemed-compliant FFI located outside of the FFI's country of residence or organization, the GIIN assigned to the FFI identifying the country in which the branch or disregarded entity receiving the payment is located. However, a

disregarded entity that is a reporting Model 1 FFI may register separately from its FFI owner and be issued its own GIIN, and the Instructions for Form W–8BEN–E require the form to include the GIIN of a disregarded entity in such a case. To account for this situation, these final regulations revise § 1.1471–3T(e)(3)(i) to provide that a withholding agent making a payment to a branch (including a disregarded entity) of a participating FFI or registered deemed-compliant FFI located outside of the FFI's country of residence or organization must confirm the GIIN of the branch (or disregarded entity) receiving the payment. In addition, § 1.1471–3(d)(4)(i) is revised to provide that a withholding certificate identifying a payee as a participating FFI, registered deemed-compliant FFI, or branch thereof (including an entity that is disregarded as an entity separate from the FFI) must contain a GIIN described in § 1.1471–3(e)(3).

Under the 2014 temporary regulations, a withholding agent has reason to know that a withholdable payment is made to a limited branch (including a disregarded entity) of a participating FFI or registered deemed-compliant FFI when: (1) The withholding agent is directed to make the payment to an address in a jurisdiction other than that of the participating FFI or registered deemed-compliant FFI (or branch (including a disregarded entity) of such FFI) that is identified by such FFI as receiving the payment; and (2) the withholding agent does not receive a GIIN assigned to the FFI identifying the country in which the branch (or disregarded entity) is located. A comment noted that an FFI may direct a payment to an account held by the FFI at another financial institution at a location outside the FFI's country of residence where the FFI does not have a branch. In response to the comment, these final regulations provide that a withholding agent is not required to apply the reason to know rule to an FFI that is an investment entity. In addition, if an FFI other than an investment entity directs a withholding agent to make a payment to an account held by the FFI and maintained by another financial institution at a location outside the jurisdiction where the FFI is resident or incorporated or the jurisdiction where the branch receiving the payment is located, the FFI must provide to the withholding agent a statement in writing that the FFI is not directing the payment to any branch of such FFI that is not a participating FFI or a registered deemed-compliant FFI. Additionally, these final regulations clarify that if a withholding agent is required to apply the reason to know rule described in this paragraph, it must treat the branch as other than a participating FFI or registered deemed-compliant FFI.

ii. Reason To Know—Reason To Know Regarding an Entity's Chapter 4 Status

The 2014 temporary regulations revised the reason to know standard for claims of chapter 4 status in the 2013 final regulations to provide that, if a withholding agent has classified an entity as engaged in a particular type of business based on its records, the withholding agent has reason to know that the chapter 4 status claimed by the entity is unreliable or incorrect if the entity's claim conflicts with the withholding agent's classification of the entity's business type. The intent of the 2014 temporary regulations was to limit the reason to know rules to *only* those situations in which the classification recorded by the withholding agent is inconsistent with the chapter 4 status claimed. The preamble of the 2014 temporary regulations accurately describes this intent. These final regulations correct the 2014 temporary regulations and implement the preamble to the 2014 temporary regulations.

iii. Reason To Know—Specific Standards of Knowledge Applicable to Documentation Received From Intermediaries and Flow-Through Entities—In General

Under the 2013 final regulations, a withholding agent that receives documentation for a payee through an intermediary or flow-through entity is required to review the documentation by applying the standards of knowledge applicable to chapter 4. The 2014 temporary regulations permit a withholding agent to accept a Form W–8 (or a substitute Form W–8) electronically through a system established by the withholding agent that meets the requirements described in § 1.1441–1(e)(4)(iv)(B). A comment requested that withholding agents be allowed to rely on documentation that the intermediary or flow-through entity received through an electronic system established by the intermediary or flow-through entity (rather than the withholding agent) to collect documentation from a payee. In Notice 2016–08, the Treasury Department and the IRS announced an intent to modify the standards of knowledge under §§ 1.1441–7(b)(10) and 1.1471–3(e)(4)(vi)(A)(*2*) to allow a withholding agent to rely on a withholding certificate collected through an electronic system maintained by a nonqualified intermediary, nonwithholding foreign partnership, or nonwithholding foreign trust. However, the Treasury Department and the IRS have determined that the primary concern raised by the comment (validation and reliance on a signature on a Form W–8BEN–E) should be addressed in temporary regulations that allow withholding agents to accept forms signed electronically. See section II.C.1.i of this Summary of Comments and Explanation of Revisions and Provisions for a description of the temporary regulation on electronic signatures. In light of the new allowance for withholding agents to accept forms signed electronically, the Treasury Department and the IRS have determined that it is not necessary to modify the standards of knowledge as previewed in Notice 2016–08.

iv. Reason To Know—Specific Standards of Knowledge Applicable to Documentation Received From Intermediaries and Flow-Through Entities—Limits on Reason To Know With Respect to Documentation Received From Participating FFIs and Registered Deemed-Compliant FFIs That Are Intermediaries or Flow-Through Entities

These final regulations clarify that a withholding agent that receives documentation from an intermediary or flow-through entity that is a reporting Model 1 FFI or reporting Model 2 FFI may rely on the chapter 4 status for a payee that is determined based on payee documentation or information that is publicly available that determines the chapter 4 status of the payee if such documentation or information is permitted under an applicable IGA, provided that the withholding agent has the information necessary to report on Form 1042–S. See § 1.1441–1(e)(3)(iv)(C)(*2*)(*iv*) (requiring that a nonqualified intermediary withholding statement for a reportable amount that is a withholdable payment include the recipient code for chapter 4 purposes used for filing Form 1042–S for an entity payee). However, a withholding agent paying an amount subject to chapter 3 withholding is still required to obtain documentation that satisfies the requirements of chapter 3. This revision is consistent with the Instructions for the Requester of Forms W–8BEN, W–8BEN–E, W–8ECI, W–8EXP, and W–8IMY.

v. Reason To Know—Reasonable Explanation Supporting Claim of Foreign Status

The chapter 3 regulations provide that a withholding agent may rely on the foreign status of an individual account

holder irrespective of certain U.S. indicia in certain cases when the account holder provides a reasonable explanation supporting the account holder's claim of foreign status. The temporary coordination regulations provide that a reasonable explanation of foreign status is either: (1) A written statement from a payee (in which the payee may provide any explanation to support its claim of foreign status); or (2) the payee's identification of one of the explanations on a checklist provided by the withholding agent to the payee that lists the explanations described in § 1.1441–7(b)(12)(i) through (iv). The rule in the 2013 final regulations is similar to the rule in the temporary coordination regulations, except that the 2013 final regulations provide that a reasonable explanation, whether provided in the form of a written statement from the payee or the payee's identification of one of the explanations on a checklist provided by the withholding agent, must be one of the explanations described in § 1.1471–3(e)(4)(vii)(A) through (D) (which are identical to the explanations listed in § 1.1441–7(b)(12)(i) through (iv)). The explanations listed in § 1.1471–3(e)(4)(vii)(A) through (D) are common explanations easily reducible to a checklist on a standardized form, but are not intended to be an exhaustive list of reasonable explanations that a payee may provide to rebut the U.S. indicia on the account. Therefore, as previewed in Notice 2014–33, these final regulations amend the 2013 final regulations to be consistent with the temporary coordination regulations by cross-referencing § 1.1441–7(b)(12) for the definition of a reasonable explanation of foreign status.

vi. Presumptions Regarding Chapter 4 Status of the Person Receiving the Payment in the Absence of Documentation—Presumption of Chapter 4 Status for a Foreign Entity

The chapter 4 regulations require a withholding agent to apply the presumption rules in § 1.1471–3(f) if the withholding agent cannot reliably associate a payment with valid documentation. Under § 1.1471–3(f)(4), a withholding agent must presume that an entity payee is a nonparticipating FFI and withhold on withholdable payments to the entity if the withholding agent cannot document the entity's chapter 4 status. A comment suggested that a reporting Model 1 FFI that receives a withholdable payment as an intermediary on behalf of, or makes a withholdable payment to, an account held by an undocumented entity should be permitted to treat such account as a U.S. reportable account and not as a nonparticipating FFI subject to withholding pursuant to the presumption rules under § 1.1471–3(f)(4). The Treasury Department and the IRS do not agree with the comment. Under Annex I of the Model 1 and Model 2 IGA, reporting Model 1 FFIs and reporting Model 2 FFIs must apply the due diligence procedures described in Annex I to document the status of their account holders under the IGA as U.S. reportable accounts, nonparticipating FFIs, or additionally in the case of a reporting Model 2 FFI, non-consenting U.S. accounts, and if such procedures are applied, cases in which an entity account is undocumented should not arise. If a reporting Model 1 FFI or reporting Model 2 FFI does not have information in its possession or that is publicly available based on which it can reasonably determine the status of an entity account holder the FFI must obtain a self-certification to establish the status of such entity (or in some cases, a self-certification to establish the status of the controlling persons of a passive NFFE) consistent with Annex I of the applicable IGA. In cases where a reporting Model 1 FFI or reporting Model 2 FFI acts as an intermediary for a withholdable payment that is allocated to an entity account and is unable to document the account by obtaining such information or self-certification consistent with the procedures described in Annex I of the applicable IGA, the chapter 4 regulations provide presumption rules for withholdable payments made to such account (and if an FFI has many such undocumented accounts, the U.S. Competent Authority may determine that there is significant non-compliance with the requirements of the IGA with respect to the FFI). In such cases, the reporting Model 1 FFI or reporting Model 2 FFI must apply the presumption rules in § 1.1471–3(f) to treat such entity account as a nonparticipating FFI and provide sufficient information to the upstream withholding agent to withhold on the payment (or, if such reporting Model 1 FFI or reporting Model 2 FFI is a WP, WT, or a QI that assumes primary withholding responsibility on the payment for chapters 3 and 4, the WP, WT, or QI must withhold). Withholding on undocumented entity accounts as accounts of nonparticipating FFIs is consistent with the IGAs, which contemplates that nonparticipating FFIs would remain subject to withholding on withholdable payments received through a reporting Model 1 FFI or reporting Model 2 FFI.

D. Comments and Changes to § 1.1471–4—FFI Agreement

1. Withholding Requirements—Foreign Passthru Payments

Under section 1471(b)(1)(D)(i), a participating FFI must agree to withhold on passthru payments (that is, withholdable payments and foreign passthru payments) made to recalcitrant account holders of the FFI and nonparticipating FFIs. The 2013 final regulations reserve on the definition of foreign passthru payment and provide that a participating FFI is not required to withhold tax on a foreign passthru payment made to a recalcitrant account holder or a nonparticipating FFI before the later of January 1, 2017, or the date of publication in the **Federal Register** of final regulations defining foreign passthru payment. As announced in Notice 2015–66, this transition period is extended in order to facilitate an orderly phase-in of withholding under chapter 4. Therefore, these final regulations modify the 2013 final regulations to provide that a participating FFI is not required to withhold tax on a foreign passthru payment made to a recalcitrant account holder or a nonparticipating FFI before the later of January 1, 2019, or the date of publication in the **Federal Register** of final regulations defining the term *foreign passthru payment.*

2. Due Diligence for the Identification and Documentation of Account Holders and Payees—Certifications of Responsible Officer

The 2013 final regulations require a participating FFI to certify to the IRS that the FFI has complied with the applicable due diligence requirements with respect to preexisting accounts of the FFI and that the FFI did not have any formal or informal practices or procedures in place from August 6, 2011, through the date of such certification to assist account holders in the avoidance of chapter 4. Under the 2013 final regulations, this certification must be made no later than 60 days following the date that is two years after the effective date of the participating FFI's FFI agreement. As announced in Notice 2016–08, these final regulations modify the time for an FFI to make this certification by providing that the certification must be submitted to the IRS by the due date of the FFI's first certification of compliance required under § 1.1471–4(f)(3). Additionally, in order to mitigate any increased burden caused by the modified due date (for example, if an FFI has undergone changes in management personnel since August 6, 2011), these final regulations require a participating FFI to certify that

it did not have any formal or informal practices or procedures in place from August 6, 2011, through the date that is two years after the effective date of the FFI's FFI agreement (rather than the date when the certification is due). These final regulations also reinstate a sentence that was unintentionally removed in § 1.1471–4(c)(7) in the September 2013 corrections requiring a participating FFI to certify that it did not have any practices or procedures to assist account holders in avoidance of chapter 4.

3. Account Reporting

i. Reporting Requirements in General—Accounts Subject to Reporting

Comments requested an exemption from filing Form 8966 for a participating FFI that is a partnership filing Form 1065 and Schedule K–1 to report its U.S. partners. While the forms collect some overlapping information, the Schedule K–1 does not provide all of the same information as Form 8966. In particular, Form 8966 collects information about both direct and indirect owners of a passive NFFE, while Form 1065 and Schedule K–1 only identifies direct partners. Therefore, the Treasury Department and the IRS at this time do not believe that it would be appropriate to provide an exemption for partnerships from having to file Form 8966 on behalf of its U.S. partners. The Treasury Department and the IRS will evaluate the information received on Forms 8966 filed with the IRS and may assess the utility of that information, taking into account any information filed on Form 1065 and Schedule K–1 and any other relevant information about offshore activities of U.S. persons that are filed with the IRS.

ii. Reporting Requirements in General—Reporting by Participating FFIs and Registered Deemed-Compliant FFIs (Including QIs, WPs, WTs, and Certain U.S. Branches Not Treated as U.S. Persons) for Accounts of Nonparticipating FFIs (Transitional)

Under § 1.1471–4(d)(2)(ii)(F), a participating FFI that maintains an account of a nonparticipating FFI must report to the IRS foreign reportable amounts paid to or with respect to the account for each of calendar years 2015 and 2016. A foreign reportable amount is defined in the 2014 temporary regulations as a foreign source payment described in § 1.1471–4(d)(4)(iv) (which includes gross proceeds). In lieu of reporting foreign reportable amounts, a participating FFI may report all income, gross proceeds, and redemptions (irrespective of source) paid to the nonparticipating FFI's account by the participating FFI during the year. Under a transitional rule in § 1.1471–4(d)(7)(ii)(B), a participating FFI is not required to report gross proceeds paid to a U.S. account or an account held by an owner-documented FFI in the 2015 calendar year. As announced in Notice 2016–08, these final regulations provide that a participating FFI is not required to report gross proceeds from the sale or redemption of property paid or credited to a custodial account that are paid to or with respect to an account held by a nonparticipating FFI for calendar year 2015. This exception applies regardless of whether the FFI is reporting foreign reportable amounts or all income, gross proceeds, and redemptions. These final regulations also remove an incorrect reference to a registered deemed-compliant FFI in the first sentence of § 1.1471–4(d)(2)(ii)(F).

iii. Reporting of Accounts Under Section 1471(c)(1)—Accounts Held by U.S. Owned Foreign Entities

Under the 2013 final regulations, a participating FFI is required to report each U.S. account, which is defined as an account held by one or more specified U.S. persons or U.S. owned foreign entities. With respect to U.S. owned foreign entities, the Treasury Department and the IRS intended for participating FFIs to report only substantial U.S. owners of NFFEs that are passive NFFEs (defined in § 1.1471–1(b)(94)). Accordingly, these final regulations revise the reporting requirements for participating FFIs to clarify that FFIs are required to report on accounts held by passive NFFEs that are U.S. owned foreign entities. Conforming changes have also been made throughout these final regulations.

iv. Election To Perform Chapter 61 Reporting—In General—Election To Report in a Manner Similar to Section 6047(d)

The 2013 final regulations allow a participating FFI to elect to report cash value insurance contracts or annuity contracts that are U.S. accounts in a manner similar to section 6047(d), but require that such reporting include the account balance or value of the account. In contrast, a participating FFI that elects to perform chapter 61 reporting on a U.S. account other than a cash value insurance contract or annuity contract does not need to report the account balance or value. These final regulations remove the requirement for an FFI that elects to report a U.S. account that is a cash value insurance contract or annuity contract under section 6047(d) to report the account balance or value in order to achieve parity with the election to report other U.S. accounts under chapter 61. This revision reduces burden on FFIs electing to report U.S. accounts that are cash value insurance contracts or annuity contracts on Form 1099–R, ''Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.,'' in lieu of Form 8966.

4. Expanded Affiliated Group Requirements—Limited Branches and Limited FFIs

i. Term of Limited Branch Status and Limited FFI Status (Transitional)

The 2014 temporary regulations require that each member of an expanded affiliated group have a chapter 4 status of participating FFI, deemed-compliant FFI, or exempt beneficial owner in order for any member of such group to obtain a chapter 4 status of participating FFI or registered deemed-compliant FFI. Each member of the group (except a certified deemed-compliant FFI or exempt beneficial owner) must also agree to the status for which it applies for all of its branches. For a transitional period, an expanded affiliated group may include an FFI that cannot comply with the requirements of a participating FFI if certain conditions specified in the regulations are satisfied (limited FFI). Another transitional rule allows an FFI to have a branch that cannot satisfy all the requirements of a participating FFI if certain requirements specified in the regulations are satisfied (limited branch).

Under the 2013 final regulations, the transitional period for limited branch or limited FFI status expires on December 31, 2015. In Notice 2015–66, the Treasury Department and the IRS announced that this transitional period will be extended in order to provide FFIs and other stakeholders additional time to determine whether to continue operating in jurisdictions where limited branches or limited FFIs exist. Accordingly, these final regulations extend the availability of limited branch status and limited FFI status until December 31, 2016.

ii. Conditions for Limited Branch and Limited FFI Status

One of the conditions in the 2013 final regulations for limited FFI or limited branch status is that the FFI or branch agree that it will not open accounts that it is required to treat as U.S. accounts or accounts held by nonparticipating FFIs, including accounts transferred from any member

of its expanded affiliated group (and, with respect to a limited branch, any other branch of the FFI). A comment noted that this restriction prevents certain FFIs from agreeing to the conditions of limited status. In response to this comment and as previewed in Notice 2014–33, these final regulations relax this restriction by permitting a limited FFI or limited branch to open U.S. accounts for persons resident in the same jurisdiction in which the limited FFI is a resident or organized, or the limited branch is located or operating, and accounts for nonparticipating FFIs that are resident in the same jurisdiction, provided that: (1) The limited FFI or limited branch does not solicit U.S. accounts or accounts for nonparticipating FFIs from persons not resident in the same jurisdiction in which such limited FFI is resident or organized or such limited branch is located or operating; and (2) the FFI or branch is not used by any FFI in its expanded affiliated group to circumvent the obligations of such FFI under section 1471.

iii. Conditions for Limited FFI Status—Registration

A comment stated that certain jurisdictions prohibit FFIs resident in, or organized under the laws of, the jurisdiction from registering with the IRS for the status of limited FFI. As previewed in Notice 2015–66, these final regulations provide that a prohibition from registration will not prevent an FFI from becoming a limited FFI if certain conditions specified in these final regulations are satisfied. A member of the FFI's expanded affiliated group that is a U.S. financial institution, participating FFI, or reporting Model 1 FFI must register on the FATCA registration Web site as a lead FI and identify the FFI as a limited FFI. If the limited FFI is prohibited from being identified by its legal name on the FATCA registration Web site, the lead FI may use the term *limited FFI* in place of the FFI's name and indicate the FFI's jurisdiction of residence or organization. By identifying a limited FFI on its FATCA registration as described in the preceding sentences, the lead FI is confirming that the limited FFI has represented that it will meet the conditions for limited FFI status and has agreed to notify the lead FI within 30 days of the date that the FFI ceases to meet the requirements of a limited FFI or the date that the FFI can comply with the requirements of a participating FFI or deemed-compliant FFI (in which case the FFI will separately register for that status). If the lead FI receives a notification described in the preceding sentence or otherwise knows that the limited FFI has not complied with the conditions for limited FFI status or can comply with the requirements of a participating FFI or deemed-compliant FFI, these final regulations require the lead FI to remove the FFI from its registration and maintain a record of the date on which the FFI ceased to be a limited FFI and (if applicable) the circumstances of the limited FFI's non-compliance, which will be available to the IRS upon request.

5. Verification

i. Certification of Compliance—In General

The 2013 final regulations provide that the responsible officer of a participating FFI must submit the certification of compliance required in § 1.1471–4(f)(3) to the IRS six months following the end of each certification period. As previewed in Notice 2016–08, to conform the time for submitting the certification of compliance to the time specified in the FFI agreement, these final regulations provide that the certification of compliance must be submitted on or before July 1 of the calendar year following the end of each certification period. The IRS intends to publish instructions for making this certification, which will require an FFI to complete and submit the certification electronically through the FATCA registration Web site. Accordingly, these final regulations specify that a responsible officer of a participating FFI must make a certification of effective internal controls or qualified certification on the form and in the manner prescribed by the IRS.

In addition, § 1.1471–4(f)(3)(i) states that if the participating FFI has failed to remediate any material failures as of the date of the certification, the FFI must make the qualified certification described in § 1.1471–4(f)(3)(iii). However, § 1.1471–4(f)(3)(iii) provides that the responsible officer must make the qualified certification if it has identified either an event of default or a material failure that the participating FFI has not corrected as of the date of the certification. These final regulations conform these sections by modifying § 1.1471–4(f)(3)(i) so that a qualified certification must be made if the FFI has identified an event of default (in addition to a material failure) that has not been corrected as of the date of the certification.

ii. IRS Review of Compliance—General Inquiries

The 2014 temporary regulations provide that the IRS, based upon the information reporting forms described in § 1.1471–4(d)(3)(v), (d)(5)(vii), or (d)(6)(iv) (Form 8966 or Form 1099) filed with the IRS for each calendar year, may request additional information with respect to the information reported on the forms or may request the account statements described in § 1.1471–4(d)(4)(v). The 2014 temporary regulations are silent on whether the IRS can request such information if the FFI does not file information reporting forms for the calendar year.

As described in the preamble to the 2014 temporary regulations, the 2014 temporary regulations add a second sentence to § 1.1471–4T(f)(4)(i) to ''further allow the IRS to request additional information to determine an FFI's compliance with the applicable FFI agreement.'' The Treasury Department and the IRS did not intend for the 2014 temporary regulations to be limited such that the IRS cannot request information if the FFI fails to file the specified information reporting forms. Thus, these final regulations clarify that IRS requests for additional information under § 1.1471–4(f)(4)(i) may be based on the absence of any information reporting forms filed by the FFI with the IRS for the calendar year, and that the IRS may request additional information with respect to the information reported or required to be reported, including confirmation that the FFI has no reporting requirements.

E. Comments and Changes to § 1.1471–5—Definitions Applicable to Section 1471

1. Definition of U.S. Account

Comments requested that the definition of a U.S. account exclude accounts held by U.S. individuals resident in the same jurisdiction as the FFI with which the account is held. This comment is not adopted. The U.S. federal income tax system largely relies on voluntary compliance, and third party information reporting of the financial accounts of U.S. taxpayers is used to encourage voluntary compliance. For this reason, U.S. financial institutions are generally required to report under chapter 61 U.S. and foreign source investment income paid to account holders that are U.S. individuals. However, before FATCA, FFIs (in particular, non-U.S. payors) generally were not required to report foreign source payments made to U.S. taxpayers. The information reporting required by FATCA is intended to address the use of foreign accounts to facilitate tax evasion, and also to strengthen the integrity of the voluntary

compliance system by placing U.S. taxpayers with accounts held with FFIs in a comparable position to U.S. taxpayers with accounts held with U.S. financial institutions. This is the case even for U.S. taxpayers resident abroad, since U.S. citizens and U.S. resident aliens are subject to U.S. income tax on their worldwide income regardless of where they reside and regardless of whether their accounts are maintained by U.S. financial institutions or FFIs. The Treasury Department and the IRS have also decided that the risk of U.S. tax avoidance by a U.S. taxpayer holding an account with an FFI exists regardless of whether the U.S. taxpayer holds an account in his or her foreign country of residence or another foreign country.

2. Definition of FFI

Under the 2013 final regulations, FFI means, with respect to any entity that is not resident in a country that has in effect a Model 1 IGA or Model 2 IGA, any financial institution that is a foreign entity; and, with respect to any entity that is resident in a country that has in effect a Model 1 IGA or Model 2 IGA, FFI means any entity that is treated as a financial institution pursuant to such IGA. Because some IGAs use an organizational test, rather than a residence test, to determine whether a financial institution is covered by the IGA, these final regulations modify the definition of FFI to refer to an entity that is (or is not) resident in, or organized under the laws of, as applicable, a country that has in effect an IGA. In addition, with respect to an entity resident in a country that has in effect a Model 1 or Model 2 IGA, these final regulations modify the definition of FFI to mean an entity that is treated as a FATCA Partner Financial Institution under the IGA, not any entity that is treated as a financial institution under the IGA, because the term *financial institution* in the IGAs includes a U.S. financial institution. Finally, these final regulations cross-reference § 1.1471–2(a)(2)(v) for when a foreign branch of a U.S. financial institution is an FFI. See section I.B.1 of this Summary of Comments and Explanation of Revisions and Provisions for an explanation of the changes to § 1.1471–2(a)(2)(v).

3. Definition of Financial Institution

i. Exclusions—Excepted Nonfinancial Group Entities—In General

One of the requirements for an excepted nonfinancial group entity is that the entity cannot be formed in connection with or availed of by certain arrangements or investment vehicles. The 2014 temporary regulations provide that an entity will not be considered to have been formed in connection with or availed of by an arrangement or investment vehicle if the entity existed at least six months prior to its acquisition by the arrangement or investment vehicle and, prior to the acquisition, regularly conducted activities in the ordinary course of business. A comment noted that the phrase ''ordinary course of business'' is unclear with respect to a holding company, captive finance company, or treasury center. In response to the comment, these final regulations clarify the 2014 temporary regulations by cross-referencing § 1.1471–5(e)(5)(i)(C), (D), or (E) (as applicable) to describe the activities of a holding company, captive finance company, or treasury center.

ii. Exclusions—Excepted Nonfinancial Group Entities—Nonfinancial Group

A comment noted that the treatment of receivables related to financing to customers as passive assets makes it difficult for an expanded affiliated group to qualify as a nonfinancial group, even if the receivables are originated by a captive finance company in the expanded affiliated group. The Treasury Department and the IRS believe that certain receivables related to financing to customers should not make a group ineligible to qualify as a nonfinancial group because customer financing is common in some nonfinancial businesses and is not necessarily indicative of a financial business. Further, customer financing is a permissible activity for a captive finance company, but status as a captive finance company is only relevant for qualifying as a nonfinancial group entity. Therefore, these final regulations exclude from the passive income and asset tests in § 1.1471–5(e)(5)(i)(B)(*1*) receivables that are notes issued by customers to a member of the expanded affiliated group that is a captive finance company to finance the customer's purchase of inventory or goods manufactured by a member of the expanded affiliated group.

A comment noted that it is difficult for a nonfinancial group operating on a non-calendar fiscal year basis to measure its income and assets on a calendar year basis in order to determine whether it meets the income and asset tests in § 1.1471–5(e)(5)(i)(B)(*1*). In response to the comment, these final regulations provide that the income and asset tests should be performed for the three-year period (or the period during which the expanded affiliated group has been in existence, if shorter) ending December 31 (or the end of the fiscal year of one or more members of the group) of the year preceding the year in which the determination is made.

A comment requested elimination of the requirement that each FFI in a nonfinancial group be a participating FFI or deemed-compliant FFI. The Treasury Department and the IRS believe that a limitation on the types of FFIs that can be members of nonfinancial groups is necessary to prevent an excepted nonfinancial group entity from acting as a ''blocker'' for a nonparticipating FFI. The Treasury Department and the IRS also note that the rules for a participating FFI group similarly prohibit nonparticipating FFI members. However, since the 2014 temporary regulations permit participating FFI groups to include exempt beneficial owners (see § 1.1471–4T(e)(1)), these final regulations provide the same allowance for exempt beneficial owners to be members of nonfinancial groups.

A comment described situations in which an acquisition of an entity by a member of the expanded affiliated group or a change in chapter 4 status of a member of an expanded affiliated group may disqualify the group as a nonfinancial group. The comment requested a grace period for certain unintentional disqualifications from nonfinancial group status. The Treasury Department and the IRS agree with the comment and have determined that the rules for an acquisition or a change in chapter 4 status of a member of a nonfinancial group should not be stricter than those for a participating FFI group. The FFI agreement allows 90 days for a lead FI of an FFI group to inform the IRS of an acquisition or sale of a member of the FFI group or a change affecting the chapter 4 status of a member of the group before the acquisition or change becomes an event of default. In response to the comment and for consistency with the treatment of FFI groups, these final regulations provide that a change affecting the chapter 4 status of a member of a nonfinancial group, or an acquisition by a member of the expanded affiliated group of an FFI that does not have a permissible chapter 4 status, disqualifies the group as a nonfinancial group 90 days after such change or acquisition.

4. Deemed-Compliant FFIs

i. Preexisting Account Certifications by Registered Deemed-Compliant FFIs

The 2013 final regulations require a registered deemed-compliant FFI that is a local FFI or restricted fund to make a

certification to the IRS regarding its review of preexisting accounts that it is required to review as a condition of its status as a registered deemed-compliant FFI. The certification by a restricted fund regarding its preexisting accounts must be completed by the later of December 31, 2014, or six months after the date the FFI registers as a deemed-compliant FFI, but no due date for the certification of a local FFI regarding its preexisting accounts is specified. In Notice 2016–08, the Treasury Department and the IRS announced that the due date for the preexisting account certifications of restricted funds and local FFIs would be modified to on or before July 1 of the calendar year following the end of the certification period to provide FFIs with additional time to prepare their certifications and to streamline compliance. Accordingly, these final regulations provide that a preexisting account certification by a local FFI or restricted fund must be submitted by the due date of the FFI's first certification of compliance required under § 1.1471–5(f)(1)(ii)(B). See section I.E.4.iii of this Summary of Comments and Explanation of Revisions and Provisions for the timing of certifications of compliance by registered deemed-compliant FFIs.

ii. Registered Deemed-Compliant FFIs—Sponsored Investment Entities and Controlled Foreign Corporations

Under the 2013 final regulations, an FFI may not be a sponsored investment entity, sponsored controlled foreign corporation, or sponsored, closely held investment vehicle if it is a QI, WP, or WT. In Notice 2016–42, 2016–29 I.R.B. 67, the Treasury Department and the IRS announced that they are considering including in the WP Agreement an allowance for consolidated periodic reviews and certifications for WPs that are FFIs, similar to the allowance for QIs (see section 10.02(B) of the QI Agreement in Revenue Procedure 2014–39, 2014–29 I.R.B. 150 (as may be amended)). In order to accommodate an allowance for consolidated periodic reviews and certifications for WPs, these final regulations provide that a WP may be a sponsored investment entity to the extent permitted in the WP Agreement if the WP otherwise meets the requirements for status as a sponsored investment entity.

The 2013 final regulations provide that a sponsoring entity of a sponsored investment entity or controlled foreign corporation must be authorized to act on behalf of the FFI ''to fulfill the requirements of the FFI agreement.'' See § 1.1471–5(f)(1)(i)(F)(*3*)(*i*). However, the 2013 final regulations also provide that the sponsoring entity must agree to perform, on behalf of the FFI, ''all due diligence, withholding, reporting, and other requirements that the FFI would have been required to perform if it were a participating FFI.'' See § 1.1471–5(f)(1)(i)(F)(*3*)(*iv*). Because a sponsored FFI does not enter into an FFI agreement with the IRS, these final regulations modify § 1.1471–5(f)(1)(i)(F)(*3*)(*i*) to conform with § 1.1471–5(f)(1)(i)(F)(*3*)(*iv*).

The preamble to the 2014 temporary regulations states that the 2014 temporary regulations revise the 2013 final regulations to clarify that a sponsoring entity will not be jointly and severally liable for a sponsored FFI's withholding and reporting obligations under chapter 4, even if the sponsoring entity performs these responsibilities on behalf of such FFI, unless the sponsoring entity is also a withholding agent that is separately liable for such obligations. The text of the 2014 temporary regulations, however, inaccurately provides that a sponsoring entity of a sponsored FFI will not be liable for any failure to comply with the obligations contained in § 1.1471–5(f)(1)(i)(F)(*3*) or (f)(2)(iii)(D) (as applicable) unless the sponsoring entity is a withholding agent that is separately liable for the failure to withhold on or report with respect to ''a payment made *to* the sponsored FFI'' (emphasis added). In order to correct this inconsistency between the preamble and the text of the 2014 temporary regulations, these final regulations revise the 2014 temporary regulations to provide that a sponsoring entity that is a withholding agent is separately liable for the failure to withhold on or report with respect to a payment made by the sponsoring entity on behalf of (rather than to) a sponsored FFI. This revision does not affect a sponsoring entity's liability as a withholding agent for payments unrelated to the sponsoring entity's obligations as a sponsoring entity of a sponsored FFI. This change is made in § 1.1471–5(f)(1)(i)(F)(*5*) for sponsoring entities of sponsored investment entities and controlled foreign corporations and in § 1.1471–5(f)(2)(iii)(E) for sponsoring entities of sponsored, closely held investment vehicles.

iii. Registered Deemed-Compliant FFIs—Procedural Requirements for Registered Deemed-Compliant FFIs—Certification Requirement

Under the 2014 temporary regulations, a responsible officer of a registered deemed-compliant FFI must periodically certify to the IRS that all of the requirements of the deemed-compliant status claimed by the FFI have been satisfied since the later of the date that the registered deemed-compliant FFI registers, or June 30, 2014. The 2014 temporary regulations provide that the certification is made every three years, but do not specify the date when the certification is due. The 2014 temporary regulations also allow a registered deemed-compliant FFI to make a certification on behalf of all registered deemed-compliant FFIs in the same expanded affiliated group.

As previewed in Notice 2016–08, these final regulations provide that a registered deemed-compliant FFI makes its certification on or before July 1 of the calendar year following the end of each certification period (consistent with the timing for certifications of compliance made by participating FFIs included in these final regulations). These final regulations also provide that the first certification period begins on the later of the date the FFI registers as a deemed-compliant FFI and is issued a GIIN, or June 30, 2014, and ends on the close of the third full calendar year following this date. Each subsequent certification period is the three calendar year period following the previous certification period. Under these final regulations, the FFI will certify to its compliance with the requirements of the deemed-compliant status during the certification period (rather than all periods since the later of the date that the FFI registers, or June 30, 2014).

In addition, these final regulations provide that the certification of compliance must be made on the form and in the manner prescribed by the IRS (consistent with the requirements for certifications of compliance by participating FFIs included in these final regulations). These final regulations also clarify that if a responsible officer of a registered deemed-compliant FFI makes the certification collectively for the FFI's expanded affiliated group, the certification must provide that all of the requirements for the deemed-compliant status claimed by each member of the expanded affiliated group that is a registered deemed-compliant FFI (other than a member that is a reporting Model 1 FFI or deemed-compliant FFI under an applicable Model 1 IGA) have been satisfied during the certification period.

iv. Certified Deemed-Compliant FFIs—Sponsored, Closely Held Investment Vehicles

A comment requested a three-year grace period during which a sponsored, closely held investment vehicle that becomes noncompliant with the requirements of its deemed-compliant status may retain its chapter 4 status.

The Treasury Department and the IRS believe that a bright line rule is necessary for enforcement with respect to certified deemed-compliant FFIs because these entities do not register or certify directly to the IRS regarding their compliance. Further, the Treasury Department and the IRS do not believe that the consequences of a termination of deemed-compliant status would be unduly burdensome for these entities because an FFI that is unable to meet the requirements of a sponsored, closely held investment vehicle may nevertheless become compliant with chapter 4 and avoid being withheld on by entering into an FFI agreement with the IRS. Therefore, this comment is not adopted.

v. Certified Deemed-Compliant FFIs—Limited Life Debt Investment Entities (Transitional)

In response to comments to the 2013 final regulations, the 2014 temporary regulations include significant revisions to the requirements for limited liability debt investment entities (LLDIEs) in order to accommodate industry practices and expand the types of securitization vehicles that qualify as LLDIEs. Since the 2014 temporary regulations were published, the Treasury Department and the IRS have received additional comments requesting modifications to the requirements for LLDIEs. One comment noted that it is unclear under the laws of certain foreign jurisdictions whether a person has authority to fulfill the requirements of a participating FFI. The comment requested that an FFI be permitted to base the determination of authority solely on whether or not the FFI's trust documents contain an explicit reference to the obligations of a participating FFI. The Treasury Department and the IRS do not believe that this would be an appropriate test because it is unlikely that a trust document would have an explicit reference to the obligations of a participating FFI prior to 2013, thereby undermining the rule.

The 2014 temporary regulations provide that substantially all of the assets of an LLDIE must consist of debt instruments or interests therein. The Treasury Department and the IRS received comments that borrowers on a debt instrument held by the LLDIE may encounter financial trouble such that the lender may foreclose or restructure the debt or the borrower may enter bankruptcy proceedings. Under these circumstances, the LLDIE may hold non-debt assets, such as equity or real estate, that may represent a significant portion of the LLDIE's assets during the wind down period. The comments requested that ''debt instruments or interests therein'' include equity or other non-debt assets acquired upon a foreclosure or restructuring of the debt. The Treasury Department and the IRS agree that an entity should not lose its status as an LLDIE because it holds certain non-debt assets as a result of foreclosures or restructurings. Therefore, these final regulations revise the 2014 temporary regulations to provide that debt instruments or interests therein include assets acquired pursuant to a restructuring, workout, or similar event with respect to a debt instrument.

vi. Certified Deemed-Compliant FFIs—Investment Advisors and Investment Managers

The 2014 temporary regulations added a category of certified deemed-compliant FFI for certain investment entities described in § 1.1471–5(e)(4)(i)(A) that do not maintain financial accounts under the heading ''Investment advisors and investment managers.'' A comment noted that an investment entity may meet the substantive requirements of this category even if it is not an investment advisor or investment manager. The Treasury Department and the IRS agree with the comment that the rule in the 2014 temporary regulations is not limited to investment entities that are investment advisors or investment managers. For clarity and in response to this comment, these final regulations change the heading of § 1.1471–5(f)(2)(v) to ''Certain investment entities that do not maintain financial accounts.''

F. Comments and Changes to § 1.1472–1—Withholding on NFFEs

1. In General

Under § 1.1471–2(a)(3), participating FFIs that comply with the withholding requirements of § 1.1471–4(b), exempt beneficial owners, section 501(c) entities described in § 1.1471–5(e)(5)(v), and nonprofit organizations described in § 1.1471–5(e)(5)(vi) are deemed to satisfy their withholding obligations under section 1471(a) and § 1.1471–2. However, under § 1.1472–1(a), only participating FFIs are deemed to satisfy their withholding obligations under section 1472(a). These final regulations revise § 1.1472–1(a) to add exempt beneficial owners, section 501(c) entities described in § 1.1471–5(e)(5)(v), and nonprofit organizations to coordinate with § 1.1471–2(a)(3). In addition, these final regulations cross-reference § 1.1471–5(f) for when deemed-compliant FFIs are deemed to satisfy their withholding obligations under section 1472(a) with respect to withholdable payments to account holders that are NFFEs.

2. Exceptions—Beneficial Owner That Is an Excepted NFFE

A comment requested an exception from withholding on withholdable payments that are property and casualty insurance premiums made to ''hedge fund reinsurance companies.'' According to the comment, such companies generally would not have any substantial U.S. owners because they do not allow a U.S. person to hold 10 percent or more of the voting stock in order prevent the company from being a controlled foreign corporation. The comment assumes that the entity is a NFFE but does not analyze the issue of whether the entity is properly characterized as an FFI or NFFE. Under § 1.1471–5(e)(4)(i)(C), an entity that functions or holds itself out as a hedge fund is an FFI. As an FFI, a hedge fund that has agreed to the terms of the FFI agreement would be required to report U.S. accounts, which are not limited to U.S. persons that hold 10 percent or more of the fund and would generally include any specified U.S. person that owns, directly or indirectly, more than zero percent of the investment entity. In the case of an insurance company that is a passive NFFE, it may elect to be a direct reporting NFFE and report any substantial U.S. owners (which are defined as specified U.S. persons that hold 10 percent of the stock by vote or value) to the IRS if the NFFE does not wish to disclose its substantial U.S. owners to a withholding agent. In addition, if a passive NFFE has no substantial U.S. owners, it may certify that to a withholding agent to avoid withholding on withholdable payments. The Treasury Department and the IRS believe that the chapter 4 regulations already mitigate any burden imposed by FATCA on passive NFFEs by providing an exception for direct reporting NFFEs. Therefore, these final regulations do not adopt this comment.

3. Exceptions—Beneficial Owner That Is an Excepted NFFE—Active NFFE

Under the 2014 temporary regulations, a NFFE satisfies the asset test to be an active NFFE if less than 50 percent of the weighted average percentage of assets (tested quarterly) held by the NFFE are assets that produce or are held for the production of passive income, as determined after the application of § 1.1472–1(c)(1)(iv)(B). To remove ambiguity, these final regulations clarify that a NFFE satisfies the asset test if the

weighted average of the percentage of assets held by it that produce or are held for the production of passive income (weighted by total assets and measured quarterly) is less than 50 percent, as determined after the application of § 1.1472–1(c)(1)(iv)(B). These final regulations also clarify that the asset test is applied to the prior calendar or fiscal year. Finally, these final regulations permit a NFFE to calculate its passive assets using any accounting period permitted under § 1.1472–1(c)(1)(iv)(C), provided the NFFE applies a uniform method of measuring assets for the year.

4. Exceptions—Definition of Direct Reporting NFFE

Under the 2014 temporary regulations, a direct reporting NFFE must make a periodic certification to the IRS regarding its compliance with the requirements of a direct reporting NFFE within each six month period following the end of each certification period. The 2014 temporary regulations provide that the first certification period begins on the date a GIIN is issued to the NFFE. To account for GIINs issued before the implementation of FATCA, and for consistency with certifications by other entities, these final regulations amend the date that the first certification period begins for a direct reporting NFFE to the later of the date a GIIN is issued to the NFFE, or June 30, 2014. These final regulations also require that the NFFE make the periodic certification on the form and in the manner prescribed by the IRS (consistent with other certifications of compliance included in these final regulations). Finally, these final regulations provide that the certification will be due on or before July 1 of the calendar year following the end of each certification period to conform to the due dates for the certifications of compliance by participating FFIs and registered deemed-compliant FFIs included in these final regulations.

5. Exceptions—Election To Be Treated as a Direct Reporting NFFE—Revocation of Election

Under the 2014 temporary regulations, a NFFE can elect to be treated as a direct reporting NFFE by registering with the IRS on Form 8957, ''Foreign Account Tax Compliance Act (FATCA) Registration,'' or the FATCA registration Web site. The 2014 temporary regulations provide that this election can only be revoked if the NFFE obtains consent from the Commissioner and, upon revocation, the NFFE must notify its sponsoring entity (for a NFFE that is a sponsored direct reporting NFFE) and all relevant withholding agents of the revocation. The 2014 temporary regulations also provide that the IRS may revoke the direct reporting status of a NFFE upon an event of default.

The Treasury Department and the IRS have determined that the requirement for a direct reporting NFFE to obtain consent to revoke its direct reporting NFFE status is unnecessary. Therefore, these final regulations remove this requirement and provide that a direct reporting NFFE may revoke its election by canceling its registration account on the FATCA registration Web site and by notifying the IRS in such manner as the IRS may prescribe in the Instructions for Form 8966. Further, these final regulations amend the notification requirements in the 2014 temporary regulations to require a NFFE to send notification within 30 days of the revocation to each financial institution (in addition to each withholding agent) from which it receives payments or with which it holds an account for which the NFFE provided a withholding certificate or written statement representing its status as a direct reporting NFFE. This amendment reflects that a NFFE may have provided documentation of its status to a financial institution that is not a withholding agent, and that in certain cases a NFFE is permitted to provide a written statement (rather than a withholding certificate).

G. Comments and Changes to § 1.1473–1—Section 1473 Definitions

1. Definition of Withholdable Payment—In General

Under the 2013 final regulations, the term *withholdable payment* means any payment of U.S. source fixed or determinable annual or periodical (FDAP) income, and for sales or other dispositions occurring after December 31, 2016, any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends that are U.S. source FDAP income. After the publication of the 2013 final regulations, a comment stated that additional time is needed to implement withholding on gross proceeds. As announced in Notice 2015–66, these final regulations modify the definition of withholdable payment to include, for sales or other dispositions occurring after December 31, 2018, any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends that are U.S. source FDAP income.

2. Definition of Withholdable Payment—Payments Not Treated as Withholdable Payments—Offshore Payments of U.S. Source FDAP Income Prior to 2017 (Transitional)

The 2013 final regulations under section 1473 provide an exclusion from the definition of withholdable payments for certain non-intermediated offshore payments of U.S. source FDAP income made prior to January 1, 2017. Under the 2014 temporary regulations, this transitional rule was expanded to apply to a non-U.S. insurance broker that pays insurance and reinsurance premiums to a foreign insurance or reinsurance company. Comments requested that the transitional rule for offshore payments made by non-U.S. insurance brokers be extended for another year to allow non-U.S. brokers additional time to develop withholding and information reporting systems. A comment requesting further guidance about the sourcing of premiums was also submitted.

Withholding under chapter 4 is intended to incentivize foreign entities to report certain information about U.S. persons that make use of offshore accounts or passive NFFEs. The preamble to the 2013 final chapter 4 regulations stated that ''[t]his information reporting strengthens the integrity of the U.S. voluntary tax compliance system by placing U.S. taxpayers that have access to international investment opportunities on an equal footing with U.S. taxpayers that do not have such access or otherwise choose to invest within the United States.'' 78 FR 5874. Withholding under chapter 4 is broad and may apply whenever a withholding agent, whether U.S. or foreign, makes a withholdable payment to ensure that the information reporting objectives of chapter 4 are met. As a result, chapter 4 withholding under sections 1471 and 1472 may apply to a withholdable payment made by a non-U.S. payor to a foreign payee. Consistent with these information reporting objectives of chapter 4, a passive NFFE may avoid being subject to withholding under chapter 4 by furnishing the documentation described in § 1.1471–3(d)(12) to its withholding agent or by electing to be treated as a direct reporting NFFE and providing information directly to the IRS.

The Treasury Department and the IRS have not accepted the comment to extend further the offshore payment transition rule to exclude from the definition of withholdable payments insurance and reinsurance premiums that are U.S. source FDAP income and paid by a non-U.S. broker to a foreign

insurance or reinsurance company. A privately-held foreign insurance or reinsurance company is treated as a passive NFFE that is required to report information about its substantial U.S. owners, or to certify that it does not have any such owners, in order to avoid chapter 4 withholding on withholdable payments. The Treasury Department and the IRS have not excluded privately-held insurance or reinsurance companies from treatment as passive NFFEs because of concerns that these entities may be used to avoid U.S. taxation. Treating U.S. source premiums paid with respect to an insurance or reinsurance contract as withholdable payments will help to ensure that the IRS receives information about the substantial U.S. owners, if any, of these insurance or reinsurance companies, which will strengthen IRS enforcement efforts with respect to the use of foreign insurance and reinsurance companies for tax avoidance. These requirements were promulgated in the 2013 final regulations published on January 28, 2013, which provided a generous transition period to allow for the development of systems necessary to implement the regulations. Furthermore, because the transitional offshore payment rule does not apply to U.S. brokers that pay insurance and reinsurance premiums to a foreign company, the expiration of the transition rule will ensure equivalent treatment of withholdable payments made by either a U.S. or non-U.S. broker to a foreign insurance or reinsurance company and consistent documentation and information reporting requirements under chapter 4 for all withholding agents. In addition, the Treasury Department and the IRS believe that guidance on sourcing rules for premiums is beyond the scope of chapter 4. The question of how insurance and reinsurance premiums are sourced is not unique to FATCA and the determination may need to be made for other purposes under the Code (for example, for purposes of determining the limitation on foreign tax credits under section 904).

From a policy perspective, the question of whether a foreign insurance or reinsurance company is a passive foreign investment company within the meaning of section 1297 is similar to the question of whether the foreign insurance or reinsurance company is a passive NFFE. On April 24, 2015, the Treasury Department and the IRS published proposed regulations (REG–108214–15) in the **Federal Register** (80 FR 22954) regarding when a foreign insurance company's income is excluded under section 1297(b)(2)(B) from the definition of passive income for purposes of the passive foreign investment company rules. The Treasury Department and the IRS continue to study these issues. If the Treasury Department and the IRS issue final regulations addressing the issues raised by those proposed regulations, it is possible that the scope of foreign insurance or reinsurance companies treated as passive NFFEs may be modified or potentially conformed to the scope of foreign insurance companies treated as passive foreign investment companies under such final regulations.

H. Comments and Changes to § 1.1474–1—Liability for Withheld Tax and Withholding Agent Reporting

1. Payments and Returns of Tax Withheld—Use of Agents—Authorized Agent

Under the 2013 final regulations, a withholding agent must file Form 8655, ''Reporting Agent Authorization,'' with the IRS if it appoints an agent to act as its reporting agent for filing Form 1042 or making tax deposits and payments with respect to Form 1042. A comment suggested that Form 8655 should only be required to be filed when an agent files a Form 1042 in its own name (and under its own EIN) on behalf of another withholding agent. In response to the comment, these final regulations amend the 2013 final regulations to provide that a withholding agent must file Form 8655 only when its agent files a Form 1042 as the filer on behalf of the withholding agent. This revision is also included in final regulations under chapter 3 that are published elsewhere in this issue of the **Federal Register**.

2. Information Returns for Payment Reporting—Filing Requirement—In General

The 2014 temporary regulations require withholding agents to file Form 1042–S, ''Foreign Person's U.S. Source Income Subject to Withholding,'' to report a chapter 4 reportable amount and to furnish a copy of the form to the recipient and any intermediary or flow-through entity. The chapter 3 regulations include a similar filing requirement for amounts subject to reporting under chapter 3. The Treasury Department and the IRS have determined that withholding agents should be permitted to send Forms 1042–S to recipients electronically for purposes of both chapters 3 and 4 if certain requirements are met. These final regulations allow electronic recipient copies of Form 1042–S for chapter 4 purposes by cross-referencing § 1.1461–1(c)(1)(i)(A) (added in regulations published elsewhere in this issue of the **Federal Register**).

3. Additional Reporting Requirements With Respect to U.S. Owned Foreign Entities and Owner-Documented FFIs—Reporting by Certain Withholding Agents With Respect to Owner-Documented FFIs

The 2014 temporary regulations require reporting by a withholding agent that makes a withholdable payment to an FFI that it treats as an owner-documented FFI, regardless of whether the owner-documented FFI is reported by another FFI or withholding agent under § 1.1471–4(d) or § 1.1474–1(i)(1). These final regulations relieve a withholding agent of this reporting when: (1) The withholding agent obtains from a participating FFI or reporting Model 1 FFI receiving a withholdable payment allocable to the owner-documented FFI a certification that the FFI is reporting for the year of the payment to the IRS all of the information described in § 1.1471–4(d) or § 1.1474–1T(i)(1) (as appropriate); and (2) the withholding agent does not know or have reason to know that the certification is incorrect or unreliable. These final regulations also amend the requirements for an FFI withholding statement to permit an FFI to include the certification described in the preceding sentence on the FFI's withholding statement.

Finally, the 2014 temporary regulations do not allow a withholding agent reporting under § 1.1474–1T(i)(1) on an owner-documented FFI to request an extension of time to file Form 8966. However, an FFI that otherwise qualifies to be an owner-documented FFI but instead reports its accounts as a participating FFI on Form 8966 would be eligible for the extensions of time to file Form 8966 provided in § 1.1471–4(d)(3)(vii). In order to allow a withholding agent the same period of time to report the accounts of an owner-documented FFI as the FFI could have if it performed its own reporting, these final regulations provide that such withholding agent may request an automatic 90-day extension of time to file Form 8966 and, under certain hardship conditions, an additional 90-day extension.

4. Additional Reporting Requirements With Respect to U.S. Owned Foreign Entities and Owner-Documented FFIs—Reporting by Certain Withholding Agents With Respect to U.S. Owned Foreign Entities That Are NFFEs

The 2014 temporary regulations require reporting on Form 8966 by a withholding agent of information about any substantial U.S. owners of a passive NFFE to which the withholding agent makes a withholdable payment, and require this reporting regardless of whether the passive NFFE is reported by a participating FFI as a U.S. account or by a reporting Model 1 FFI as a U.S. reportable account under an applicable IGA. To eliminate duplicative reporting of U.S. owners, these final regulations relieve a withholding agent of reporting with respect to a passive NFFE with one or more substantial U.S. owners if: (1) The NFFE is an account holder of a participating FFI or a registered deemed-compliant FFI; (2) the withholding agent obtains the certification described in § 1.1471–3(c)(3)(iii)(B)(*2*)(*iv*) (added by these final regulations) that the FFI receiving the payment is reporting for the year of the payment a passive NFFE with one or more substantial U.S. owners (or, with respect to a reporting Model 1 FFI or reporting Model 2 FFI, one or more controlling persons that are specified U.S. persons, as defined in the applicable IGA) as a U.S. account (other than a non-consenting U.S. account or an account held by a recalcitrant account holder) or U.S. reportable account (as applicable); and (3) the withholding agent does not know or have reason to know that the certificate is unreliable or incorrect. These final regulations also modify the requirements for an FFI withholding statement to provide that the statement may include the FFI's certification described in the preceding sentence. These modifications were previewed in the preamble to the FFI agreement in Revenue Procedure 2014–38.

The 2014 temporary regulations do not provide an exception for intermediaries and flow-through entities receiving a payment for a passive NFFE with one or more substantial U.S. owners that are not required to report under § 1.1471–4(d) or an applicable IGA, even though reporting by those entities duplicates the reporting required of the withholding agent under § 1.1474–1(i)(2). To eliminate this duplicative reporting, these final regulations provide that an entity not subject to any other coordination rule in § 1.1474–1(i)(2) (including as described in the preceding paragraph) that is a flow-through entity or an entity acting as an intermediary for a withholdable payment allocable to a passive NFFE is not required report on the substantial U.S. owners of the passive NFFE under § 1.1474–1(i)(2) if: (1) The entity provides to the withholding agent from which it receives the payment documentation with respect to the passive NFFE's substantial U.S. owners sufficient for the withholding agent to report this information under § 1.1474–1(i)(2); and (2) the intermediary or flow-through entity does not know or have reason to know that the withholding agent does not report this information.

I. Comments and Changes to § 301.1474–1—Required Use of Magnetic Media for Financial Institutions Filing Form 1042–S or Form 8966—Failure To File

The 2013 final regulations provide that a failure by a financial institution to file Form 1042–S or Form 8966 electronically is a failure to comply with the information reporting requirements under section 6723. However, section 6723 applies only to a ''specified information reporting requirement,'' which does not include Form 1042–S or Form 8966. See section 6724(d)(3). The correct citation is section 6721, which provides penalties applicable to an ''information return,'' which is defined in section 6724(d)(1) to include any form, statement, or schedule required to be filed under chapter 4. Therefore, these final regulations correct the 2013 final regulations to cross-reference section 6721 rather than section 6723.

J. Nonsubstantive Clarifications and Corrections

These final regulations include various nonsubstantive clarifications and corrections to the 2013 final regulations and the 2014 temporary regulations.

Erroneous cross-references are corrected in §§ 1.1471–2(a)(4)(iii), 1.1471–3(c)(6)(ii)(C)(*2*)(*x*), 1.1471–4(c)(2)(v), 1.1471–4(d)(9) *Examples 1* and *2,* 1.1471–4(e)(4), 1.1471–5(f)(1)(i)(D)(*8*), 1.1471–5(f)(2), 1.1471–5(f)(2)(iii)(E), and 1.1474–1(d)(3)(vii). In the first sentence of § 1.1471–3(c)(8)(iii), ''consolidated accounts'' is changed to ''consolidated obligations'' to use the correct defined term, and in the last sentence of § 1.1471–2(a)(2)(ii), ''QI withholding agreement'' is changed to ''QI agreement'' to use the defined term. These final regulations also revise the description of the U.S. payee pool in § 1.1471–3(c)(3)(iii)(B)(*2*)(*ii*) to align with the limitations on the use of this pool in regulations under chapter 61 (see § 1.6049–4(c)(4)(ii)). Additionally, the heading of § 1.1471–3(d)(11)(x) is revised to clarify that the documentation rules in that section do not apply to sponsored direct reporting NFFEs.

These final regulations revise § 1.1471–4(a)(4), which provides rules concerning expanded affiliated groups, to conform to the revisions to § 1.1471–4T(e)(1) in the 2014 temporary regulations, which allow exempt beneficial owners and certified deemed-compliant FFIs to be members of an expanded affiliated group that includes a participating FFI. These final regulations also modify references to territory financial institutions acting as intermediaries in § 1.1471–4(d)(2)(ii)(B) to refer to both territory financial institutions acting as intermediaries and territory financial institutions that are flow-through entities, because the rules described in these sections apply to both types of territory financial institutions. In § 1.1471–4(d)(3)(vii) and (d)(6)(vi), references to Form 8809 are revised because the IRS created a new form (Form 8809–I, ''Application for Extension of Time to File FATCA Form 8966'') for applications for extensions of time to file Form 8966.

The 2013 final regulations are inconsistent when describing the specified U.S. persons that a participating FFI is required to report with respect to an owner-documented FFI. Under § 1.1471–4(d)(2)(ii)(D), a participating FFI is required to report the information described in § 1.1471–4(d)(3)(iv) or (d)(5)(iii) with respect to each specified U.S. person identified in § 1.1471–3(d)(6)(iv)(A)(*1*). However, § 1.1471–4(d)(3)(iv)(B) and (d)(5)(iii)(B) provide that the participating FFI reports the name, address, and TIN of each specified U.S. person identified in § 1.1471–3(d)(6)(iv)(A)(*1*) and (*2*). These final regulations clarify the 2013 final regulations and correct the inconsistency by adding a cross-reference to § 1.1471–3(d)(6)(iv)(A)(*2*) in § 1.1471–4(d)(2)(ii) for the specified U.S. persons that the participating FFI must report. Finally, these final regulations revise the definition of chapter 4 reportable amount to coordinate with § 1.1474–1(d)(1)(ii)(A)(*1*)(*xi*), which provides that a recipient for purposes of reporting on Form 1042–S includes a person or U.S. branch receiving income that is effectively connected with a U.S. trade or business. Under these final regulations, a chapter 4 reportable amount includes an amount that would be a withholdable payment but for the fact that the payment is income effectively connected with a U.S. trade or business (as described in § 1.1473–1(a)(4)(ii)).

II. Temporary Regulations

A. In General

In response to comments and after further consideration, this document includes temporary regulations that revise or clarify certain sections of the 2013 final regulations. The following portions of this preamble provide a discussion of the additions and modifications made by these temporary regulations to the 2013 final regulations.

B. Comments and Changes to § 1.1471–1—Scope of Chapter 4 and Definitions—Permanent Residence Address

The 2013 final regulations provide that an address that is provided subject to an instruction to hold all mail to that address is not a permanent residence address. The temporary coordination regulations apply this rule to chapter 3. A comment noted that some withholding agents interpret this provision to mean that a payee that provides an address subject to a hold mail instruction cannot generally establish non-U.S. status (because, for example, a Form W–8BEN requires a permanent residence address). The Treasury Department and the IRS agree with this interpretation but did not intend for an account to be treated as undocumented if there is a permanent residence address with a hold mail instruction. In regulations published elsewhere in this issue of the **Federal Register**, the temporary coordination regulations are modified to provide that an address that is subject to a hold mail instruction can be relied upon as a permanent residence address if the account holder provides documentary evidence establishing residence in the country where the account holder is claiming to be a resident. These temporary regulations incorporate this rule by revising the definition of permanent residence address to provide that an address that is subject to a hold mail instruction can be used to the extent accompanied by documentary evidence described in § 1.1441–1(c)(38)(ii) supporting the claim of foreign status.

C. Comments and Changes to § 1.1471–3—Identification of Payee

1. Rules for Reliably Associating a Payment With a Withholding Certificate or Other Appropriate Documentation

i. In General

The 2013 final regulations provide that a withholding agent may reliably associate a withholdable payment with valid documentation supporting a payee's chapter 4 status if the documentation is obtained ''either directly or through an agent.'' See § 1.1471–3(c)(1). The 2013 final regulations further provide that such documentation must be ''provided by a payee.'' Id. For chapter 3 purposes, a withholding agent can reliably associate a payment with a Form W–8BEN that is ''furnished by'' the beneficial owner. See § 1.1441–1(e)(1)(ii)(A)(*1*). A comment noted that it is unclear whether the chapter 3 regulations and chapter 4 regulations permit a withholding agent to rely on a withholding certificate provided by a payee or beneficial owner to a repository that houses these forms for access by withholding agents (a third party repository).

In consideration of this comment, the temporary coordination regulations are revised in regulations published elsewhere in this issue of the **Federal Register** to permit a withholding agent to rely on withholding certificates housed by a third party repository when certain requirements are met. Consistently, these temporary regulations clarify that, in general, a withholding agent must obtain documentation ''either directly from the payee or through its agent.'' These temporary regulations also provide that a withholding certificate will be considered provided by a payee if a withholding agent obtains the certificate from a third party repository (rather than directly from the payee or through its agent) and the requirements in § 1.1441–1(e)(4)(iv)(E) are satisfied. A withholding certificate obtained from a third party repository must be reviewed by the withholding agent in the same manner as any other documentation to determine whether it may be relied upon for chapter 4 purposes.

The 2014 temporary regulations and the temporary coordination regulations do not permit a withholding agent to accept Forms W–8 with an electronic signature, other than Forms W–8 electronically transmitted through the withholding agent's electronic system. The Treasury Department and the IRS have determined that Forms W–8 received by facsimile, email, or from a third party repository may include an electronic signature, and that this rule should be consistent in chapters 3 and 4. Therefore, the temporary coordination regulations are revised in regulations published elsewhere in this issue of the **Federal Register** to permit a withholding agent to accept Forms W–8 with electronic signatures provided that the requirements in the temporary coordination regulations are met. These temporary regulations incorporate this rule into chapter 4 by cross-referencing the amended chapter 3 rule.

ii. Requirements for Validity of Certificates—Withholding Certificate of an Intermediary, Flow-Through Entity, or U.S. Branch (Form W–8IMY)—Withholding Statement

Temporary regulations under chapter 3 that are published elsewhere in this issue of the **Federal Register** include an allowance for a withholding agent to accept an alternative withholding statement from a nonqualified intermediary that meets the requirements in § 1.1441–1(e)(3)(iv)(C)(*3*). To coordinate with chapter 3, these temporary regulations provide that a withholding agent making a withholdable payment to a nonqualified intermediary for which a withholding statement is required for purposes of both chapters 3 and 4 may accept a withholding statement that meets the requirements described in § 1.1441–1(e)(3)(iv)(C)(*3*).

iii. Applicable Rules for Withholding Certificates, Written Statements, and Documentary Evidence—Change in Circumstances

On July 29, 2016, the Treasury Department and the IRS released Announcement 2016–27, 2016–33 I.R.B. 238, which provides that on January 1, 2017, the Treasury Department will begin updating the list of jurisdictions treated as if they have an IGA in effect to provide that certain jurisdictions that have not brought their IGA into force will no longer be treated as if they have an IGA in effect. The list of jurisdictions treated as if they have an IGA in effect (the ''IGA List'') is located at *https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.* Announcement 2016–27 also provides that, in order to provide notice to FFIs, a jurisdiction will not cease to be treated as having an IGA in effect until at least 60 days after the jurisdiction's status on the IGA List is updated. Under the 2014 temporary regulations, a change in circumstances includes any change that affects a person's chapter 4 status. These temporary regulations provide that a withholding agent will have reason to know of a change in circumstances with respect to an FFI's chapter 4 status on the date that the jurisdiction where the FFI is resident, organized, or located ceases to be treated as having an IGA in effect. The rule under § 1.1471–3(c)(6)(ii)(E)(*3*) will still apply to allow the withholding agent 90 days to cure the change in circumstances.

iv. Curing Documentation Errors—Documentation Received After the Time of Payment

The 2013 final regulations provide rules for when a withholding agent may rely on documentation received after the time of payment to establish that no withholding was required under chapter 4 on the payment. The temporary coordination regulations provide similar rules for establishing that no withholding was required under chapter 3. In regulations published elsewhere in this issue of the **Federal Register**, the temporary coordination regulations are revised to include additional requirements for documentation obtained after the time of payment to establish that the payment is income effectively connected with the conduct of a trade or business in the United States. These temporary regulations cross-reference the chapter 3 rules for additional requirements for reliance on documentation received after the time of payment to establish that a payment was income effectively connected with the conduct of a U.S. trade or business (and therefore is not a withholdable payment).

2. Documentation Requirements To Establish Payee's Chapter 4 Status—Identification of Owner-Documented FFIs

Under the 2013 final regulations, an FFI cannot qualify as an owner-documented FFI if it is a member of an expanded affiliated group with any FFI that is a depository institution, custodial institution, or specified insurance company. That is, under the 2013 final regulations, all FFIs in the expanded affiliated group must be investment entities. The 2013 final regulations further provide that a withholding agent cannot act as a designated withholding agent for an owner-documented FFI if the withholding agent knows or has reason to know that the owner-documented FFI is a member of an expanded affiliated group with any FFI other than an FFI that is also treated as an owner-documented FFI by the withholding agent. These temporary regulations modify the reason to know rule for designated withholding agents to conform to the requirements of an owner-documented FFI that is a member of an expanded affiliated group. Under these temporary regulations, a withholding agent cannot act as a designated withholding agent for an owner-documented FFI if the withholding agent knows or has reason to know that the owner-documented FFI is a member of an expanded affiliated group with any FFI that is a depository institution, custodial institution, or specified insurance company,

D. Comments and Changes to § 1.1471–4—FFI Agreement

1. Due Diligence for the Identification and Documentation of Account Holders and Payees—Standards of Knowledge—Limits on Reason To Know With Respect to Certain Accounts Acquired in a Merger or Bulk Acquisition

The 2013 final regulations provide limitations on the standards of knowledge that apply in a merger or bulk acquisition if a participating FFI (transferee FFI) acquires the accounts of a participating FFI or deemed-compliant FFI (including a U.S. branch of either such FFI) that applies the due diligence requirements of § 1.1471–4(c) as a condition of its status, or of a U.S. financial institution (transferor FI), provided certain requirements are met. One such requirement is that a transferor FI that is a branch of a participating FFI or of a registered deemed-compliant FFI (other than a U.S. branch that is treated as a U.S. person) or that is a deemed-compliant FFI that applies the due diligence rules of § 1.1471–4(c) as a condition of its status provide a written representation to the transferee FFI regarding the transferor FI's application of required due diligence procedures. Because this written representation is to be provided by all transferor FIs that are FFIs, these temporary regulations provide that a transferee FFI must obtain the written representation described in § 1.1471–4(c)(2)(ii)(B)(*2*)(*iii*) from a transferor FI that is a participating FFI or registered deemed-compliant FFI (or a U.S. branch of either such entity, excluding a U.S. branch that is treated as a U.S. person), or a deemed-compliant FFI that applies the due diligence rules of § 1.1471–4(c) as a condition of its status.

2. Account Reporting—Reporting Requirements in General

i. Financial Institution Required To Report an Account—Combined Reporting on Form 8966 Following a Merger or Bulk Acquisition of Accounts

The 2014 temporary regulations require a participating FFI to report information with respect to U.S. accounts and accounts held by owner-documented FFIs maintained at any time during the calendar year. A participating FFI is also required to report foreign reportable amounts paid to accounts held by nonparticipating FFIs. Comments requested guidance on reporting accounts acquired in a merger or bulk acquisition on Form 8966. In response to the comment, these temporary regulations provide that if a participating FFI (successor) acquires accounts of another participating FFI (predecessor) in a merger or bulk acquisition of accounts, the successor may assume the predecessor's obligations to report the acquired accounts under § 1.1471–4(d) with respect to the calendar year of the merger or acquisition (acquisition year) provided certain requirements are met. First, the successor must acquire substantially all of the accounts maintained by the predecessor, or substantially all of the accounts maintained at a branch of the predecessor, in a merger or bulk acquisition of accounts. Second, the successor must agree to report the acquired accounts for the acquisition year on Forms 8966 to the extent required in § 1.1471–4(d)(3) or (d)(5). Third, the successor may not elect to report under section 1471(c)(2) and § 1.1471–4(d)(5) with respect any acquired account that is a U.S. account for the acquisition year. Fourth, the successor must notify the IRS on the form and in the manner prescribed by the IRS that Form 8966 is being filed on a combined basis. If the requirements described in this paragraph are not satisfied, the predecessor is required to report the acquired accounts for the portion of the acquisition that it maintains the accounts (marking the accounts as closed), and the successor is required to report the acquired accounts for the portion of the acquisition year that it maintains the accounts. For the rules for reporting on Forms 1042–S for chapter 4 purposes following a merger or bulk acquisition, see section II.E of this Summary of Comments and Explanation of Revisions and Provisions.

ii. Descriptions Applicable to Reporting Requirements of § 1.1471–4(d)(3)—Payments Made With Respect to an Account—Other Accounts

Under the 2013 final regulations, a participating FFI reporting an account that is a debt or equity interest in the FFI must report the gross amounts paid or credited to the account holder during the calendar year including payments in redemption (in whole or part) of the account. A comment requested clarification of the requirements for such reporting by a participating FFI that is a partnership for U.S. tax purposes. The comment noted disparities between the amount required to be reported by the partnership on Form 8966 and the amount of income allocated to the partner by the partnership, including that the reporting would overstate the partner's share of

the partnership's income and would include redemption payments already included in a partner's income. The comment also noted that tax return information may not be available by the due date for filing Form 8966 for a partnership that invests in other partnerships and files an extension of time for filing Schedules K–1 (which is longer than the extension of time for filing Form 8966).

In response to the comment, these temporary regulations modify the account reporting requirements for participating FFIs that are partnerships. Under these temporary regulations, a participating FFI that is a partnership reporting an account under § 1.1471–4(d)(3) must report the partner's distributive share of the partnership's income or loss for the calendar year, without regard to whether any such amount is distributed to the partner during the year, and any guaranteed payments for the use of capital. The amount required to be reported with respect to a partner may be determined based on the partnership's tax returns or, if the tax returns are unavailable by the due date for filing Form 8966, the partnership's financial statements or any other reasonable method used by the partnership for calculating the partner's share of partnership income by such date. These temporary regulations provide that the modifications to account reporting by partnerships described in this paragraph apply beginning with reporting with respect to calendar year 2017. However, taxpayers may apply these temporary regulations retroactively to January 28, 2013.

iii. Descriptions Applicable to Reporting Requirements of § 1.1471–4(d)(3)—Payments Made With Respect to an Account—Transfers and Closings of Deposit, Custodial, Insurance, and Annuity Financial Accounts

Under the 2013 final regulations, a participating FFI is required to report payments made with respect to an account that the FFI is required to treat as a U.S. account or account held by an owner-documented FFI. The 2013 final regulations provide that in the case of an account closed or transferred in its entirety by an account holder, the payments made with respect to the account are the payments made to the account until the date of transfer or closure and the amount withdrawn or transferred. The Treasury Department and the IRS intended for FFIs to report a closed or transferred account regardless of who initiates the closure or transfer. Therefore, these temporary regulations modify the 2013 final regulations to require reporting on a closed or transferred account when the account is closed or transferred by any person (not just the account holder). This modification is necessary to prevent FFIs from abusing the rules by claiming that no reporting is required if the FFI initiates the closure or transfer rather than the account holder. This modification is also consistent with the reporting required on closed accounts under the Model 1 IGA, which is not limited to accounts closed by the account holder.

E. Changes to § 1.1474–1—Liability for Withheld Tax and Withholding Agent Reporting—Information Returns for Payment Reporting—Method of Reporting—Payments by U.S. Withholding Agent to Recipients

Revenue Procedure 99–50, 1999–2 C.B. 757, provides procedures for combined reporting on Forms 1042–S following a merger or acquisition for purposes of chapter 3. To provide a consistent rule for reporting on Forms 1042–S under chapters 3 and 4 in these cases, these temporary regulations provide that a withholding agent required to report on Forms 1042–S under chapter 4 may rely on the procedures used for combined reporting on Form 1042–S that apply for chapter 3 purposes (even if the withholding agent is not required to report under chapter 3) following a merger or acquisition provided that all of the requirements for such reporting provided in the Instructions for Form 1042–S are satisfied.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required.

For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the cross-referenced notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, the temporary regulations in this document and the notice of proposed rulemaking preceding the final regulations in this document were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Kamela Nelan, Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.1471–0 is amended by:

■ 1. Revising the entries for § 1.1471–1(b)(7) through (142).

■ 2. Adding entries for § 1.1471–1(b)(143) through (151).

■ 3. Revising the entries for § 1.1471–2(a)(2)(i), (a)(4)(ii), and (a)(5).

■ 4. Revising the entries for § 1.1471–3(a)(3)(v) and (vi), (c)(3)(iii)(H), (c)(5)(ii)(B), and (c)(8)(iv).

■ 5. Adding an entry for § 1.1471–3(c)(8)(v).

■ 6. Revising the entry for § 1.1471–3(d)(4).

■ 7. Adding entries for § 1.1471–3(d)(4)(vi) through (vi)(C) and (d)(5)(iii) through (iii)(B).

■ 8. Revising the entries for § 1.1471–3(d)(6)(iii) and (vii).

■ 9. Adding entries for § 1.1471–3(d)(11)(x) through (xii)(C).

■ 10. Revising the entry for § 1.1471–3(e)(3).

■ 11. Adding entries for § 1.1471–3(e)(3)(iii) through (iv)(B).

■ 12. Revising the entries for § 1.1471–3(e)(4)(i), (e)(4)(ii) introductory text, (e)(4)(ii)(B).

■ 13. Removing the entries for § 1.1471–3(e)(4)(ii)(B)(1) through (D).

■ 14. Revising the entries for § 1.1471–3(e)(4)(iii), (e)(4)(iv) introductory text, (e)(4)(iv)(B).

■ 15. Removing the entries for § 1.1471–3(e)(4)(iv)(B)(1) through (E).

■ 16. Revising the entries for § 1.1471–3(e)(4)(vii)(B), (e)(4)(vii)(D), and (f)(2).

■ 17. Removing the entries for § 1.1471–3(f)(2)(i) and (ii) and (f)(3)(i) through (iii).

■ 18. Revising the entry for § 1.1471–3(f)(5).

■ 19. Adding entries for § 1.1471–4(b)(3)(i) through (iii).
■ 20. Revising the entries for § 1.1471–4(b)(7), (c)(2)(v), (c)(5)(iv)(E), (d)(2)(ii)(D) and (E).
■ 21. Adding entries for § 1.1471–4(d)(2)(ii)(F) and (d)(2)(iii)(C).
■ 22. Revising the entries for § 1.1471–4(d)(3)(v) through (vii).
■ 23. Removing the entry for § 1.1471–4(d)(3)(viii).
■ 24. Revising the entries for § 1.1471–4(d)(4)(iv)(D), and (d)(6)(vi).
■ 25. Adding an entry for § 1.1471–4(d)(6)(vii).
■ 26. Revising the entries for § 1.1471–4(d)(7), (d)(7)(ii)(A), and (d)(7)(iv)(B).
■ 27. Adding entries for § 1.1471–4 (e)(2)(vi), and (e)(3)(v) and (vi).
■ 28. Revising the entry for § 1.1471–4(i)(2).
■ 29. Revising the entries for § 1.1471–5(a)(3)(ii) through (v).
■ 30. Removing the entry for § 1.1471–5(a)(3)(vi).
■ 31. Revising the entries for § 1.1471–5(b)(1)(iii)(A), (b)(3)(v), (b)(3)(vi) and (vii), (b)(4)(iv), (e)(4)(iii)(B), and (f)(1)(i)(E).
■ 32. Adding an entry for § 1.1471–5(f)(2)(v).
■ 33. Revising the entry for § 1.1471–5(f)(4).
■ 34. Removing the entries for § 1.1471–5(i)(2)(i) and (ii).
■ 35. Revising the entries for § 1.1471–5(i)(3) through (5).
■ 36. Adding entries for § 1.1471–5(i)(6) through (10).
■ 37. Revising the entry for § 1.1471–5(j).
■ 38. Adding entries for § 1.1471–5(k) and (l).
■ 39. Revising the entries for § 1.1471–6(d)(4) and (f)(3).
■ 40. Revising the entries for § 1.1472–1(c)(1) and (2), (d)(2), and (f).
■ 41. Adding entries for § 1.1472–1(c)(1)(vi) and (vii), (c)(3) through (c)(5)(iv), (g), and (h).
■ 42. Revising the entry for § 1.1473–1(a)(3)(i)(C).
■ 43. Adding entries for § 1.1473–1(a)(4)(vii) and (viii).
■ 44. Revising the entries for § 1.1474–1(d)(4)(i)(C), (d)(4)(iii) introductory text, and (d)(4)(iii)(B) and (C).
■ 45. Adding an entry for § 1.1474–1(i)(4).
■ 46. Removing the entry for § 1.1474–1(d)(4)(iii)(D).
■ 47. Revising the entries for § 1.1474–6(c)(2) and (f).
■ 48. Adding an entry for § 1.1474–6(g).

The revisions and additions read as follows:

§ 1.1471–0 Outline of regulation provisions for sections 1471 through 1474.

This section lists the table of contents for §§ 1.1471–1 through 1.1474–7 and § 301.1474–1 of this chapter.

§ 1.1471–1 Scope of chapter 4 and definitions.

* * * * *

(b) Definitions.

* * * * *

(7) Backup withholding.
(8) Beneficial owner.
(9) Blocked account.
(10) Branch.
(11) Broker.
(12) Cash value.
(13) Cash value insurance contract.
(14) Certified deemed-compliant FFI.
(15) Change in circumstances.
(16) Chapter 3.
(17) Chapter 4.
(18) Chapter 4 reportable amount.
(19) Chapter 4 status.
(20) Chapter 4 withholding rate pool.
(21) Clearing organization.
(22) Complex trust.
(23) Consolidated obligations.
(24) Custodial account.
(25) Custodial institution.
(26) Customer master file.
(27) Deemed-compliant FFI.
(28) Deferred annuity contract.
(29) Depository account.
(30) Depository institution.
(31) Direct reporting NFFE.
(32) Documentary evidence.
(33) Documentation.
(34) Dormant account.
(35) Effective date of the FFI agreement.
(36) EIN.
(37) Election to be withheld upon.
(38) Electronically searchable information.
(39) Entity.
(40) Entity account.
(41) Excepted NFFE.
(42) Exempt beneficial owner.
(43) Exempt recipient.
(44) Expanded affiliated group.
(45) FATF.
(46) FATF-compliant jurisdiction.
(47) FFI.
(48) FFI agreement.
(49) Financial account.
(50) Financial institution.
(51) Flow-through entity.
(52) Flow-through withholding certificate.
(53) Foreign entity.
(54) Foreign passthru payment.
(55) Foreign payee.
(56) Foreign person.
(57) GIIN.
(58) Grandfathered obligation.
(59) Grantor trust.
(60) Gross proceeds.
(61) Group annuity contract.
(62) Group insurance contract.
(63) Immediate annuity.
(64) Individual account.
(65) Insurance company.
(66) Insurance contract.
(67) Intergovernmental agreement (IGA).
(68) Intermediary.
(69) Intermediary withholding certificate.
(70) Investment entity.
(71) Investment-linked annuity contract.
(72) Investment-linked insurance contract.
(73) IRS FFI list.
(74) Life annuity contract.
(75) Life insurance contract.
(76) Limited branch.
(77) Limited FFI.
(78) Model 1 IGA.
(79) Model 2 IGA.
(80) NFFE.
(81) Non-exempt recipient.
(82) Nonparticipating FFI.
(83) Nonreporting IGA FFI.
(84) Non-U.S. account.
(85) NQI.
(86) NWP.
(87) NWT.
(88) Offshore obligation.
(89) Owner.
(90) Owner-documented FFI.
(91) Participating FFI.
(92) Participating FFI group.
(93) Partnership.
(94) Passive NFFE.
(95) Passthru payment.
(96) Payee.
(97) Payment with respect to an offshore obligation.
(98) Payor.
(99) Permanent residence address.
(100) Person.
(101) Preexisting account.
(102) Preexisting entity account.
(103) Preexisting individual account.
(104) Preexisting obligation.
(105) Pre-FATCA Form W–8.
(106) Prima facie FFI.
(107) QI.
(108) QI agreement.
(109) QI branch of a U.S. financial institution.
(110) Recalcitrant account holder.
(111) Registered deemed-compliant FFI.
(112) Relationship manager.
(113) Reportable payment.
(114) Reporting Model 1 FFI.
(115) Reporting Model 2 FFI.
(116) Responsible officer.
(117) Restricted distributor.
(118) Simple trust.
(119) Specified insurance company.
(120) Specified U.S. person.
(121) Sponsored FFI.
(122) Sponsored FFI group.
(123) Sponsored direct reporting NFFE.

(124) Sponsoring entity.
(125) Standardized industry coding system.
(126) Standing instructions to pay amounts.
(127) Subject to withholding.
(128) Substantial U.S. owner.
(129) Territory entity.
(130) Territory financial institution.
(131) Territory financial institution treated as a U.S. person.
(132) Territory NFFE.
(133) TIN.
(134) U.S. account.
(135) U.S. branch treated as a U.S. person.
(136) U.S. financial institution.
(137) U.S. indicia.
(138) U.S. owned foreign entity.
(139) U.S. payee.
(140) U.S. payor.
(141) U.S. person.
(142) U.S. source FDAP income.
(143) U.S. territory.
(144) U.S. withholding agent.
(145) Withholdable payment.
(146) Withholding.
(147) Withholding agent.
(148) Withholding certificate.
(149) WP.
(150) Written statement.
(151) WT.

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§ 1.1471–2 Requirement to deduct and withhold tax on withholdable payments to certain FFIs.

(a) * * *
(2) * * *
(i) Requirement to withhold on payments of U.S. source FDAP income to participating FFIs and deemed-compliant FFIs that are NQIs, NWPs, or NWTs, and U.S. branches acting as intermediaries.

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(4) * * *
(ii) Exception to withholding for certain payments made prior to July 1, 2016 (transitional).

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(5) Withholding requirements if source or character of payment is unknown.

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§ 1.1471–3 Identification of payee.

(a) * * *
(3) * * *
(v) Disregarded entity or limited branch.
(vi) U.S. branch of treated as a U.S. person.

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(c) * * *
(3) * * *
(iii) * * *
(H) Rules applicable to a withholding certificate of a U.S. branch.

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(5) * * *
(ii) * * *
(B) Preexisting obligation documentary evidence.

* * * * *

(8) * * *
(iv) Document sharing for gross proceeds.
(v) Preexisting account.

* * * * *

(d) * * *
(4) Identification of participating FFIs and registered deemed-compliant FFIs.

* * * * *

(vi) Sponsored investment entities and sponsored controlled foreign corporations.
(A) In general.
(B) Payments made prior to January 1, 2017 (transitional).
(C) Payments made after December 31, 2016, to payees documented prior to January 1, 2017.
(5) * * *
(iii) Certain investment entities that do not maintain financial accounts.
(A) In general.
(B) Offshore obligations.
(6) * * *
(iii) Documentation for owners and debt holders of payee.

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(vii) Exception for certain offshore obligations of $1,000,000 or less.

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(11) * * *
(x) Identifying a direct reporting NFFE (other than a sponsored direct reporting NFFE).
(A) In general.
(B) Exception for offshore obligations.
(C) Special rule for preexisting offshore obligations.
(xi) Identifying a sponsored direct reporting NFFE.
(A) In general.
(1) Payments made prior to January 1, 2017 (transitional).
(2) Payments made after December 31, 2016, to payees documented prior to January 1, 2017.
(B) Exception for offshore obligations.
(xii) Identification of excepted inter-affiliate FFI.
(A) In general.
(B) Offshore obligations.
(C) Reason to know.

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(e) * * *
(3) GIIN verification.

* * * * *

(iii) Special rules for direct reporting NFFEs.
(iv) Special rules for sponsored direct reporting NFFEs and sponsoring entities.
(A) Sponsored direct reporting NFFEs.
(B) Sponsoring entities (transitional).
(4) * * *
(i) Reason to know regarding an entity's chapter 4 status.
(ii) Reason to know applicable to withholding certificates.

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(B) Withholding certificate provided by an FFI.
(iii) Reason to know applicable to written statements.
(iv) Reason to know applicable to documentary evidence.

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(B) Standards of knowledge applicable to certain types of documentary evidence.

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(vii) * * *
(B) Reason to know there are U.S. indicia associated with preexisting obligations.

* * * * *

(D) Limits on reason to know for multiple obligations belonging to a single person.

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(f) * * *
(2) Presumptions of classification as an individual or entity and entity as the beneficial owner.

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(5) Presumption of chapter 4 status of payee with respect to a payment to an intermediary or flow-through entity.

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§ 1.1471–4 FFI agreement.

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(b) * * *
(3) * * *
(i) In general.
(ii) Withholding not required.
(iii) Election to withhold under section 3406.

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(7) Withholding requirements for U.S. branches of FFIs treated as U.S. persons.
(c) * * *
(2) * * *
(v) Documentation rules for U.S. branches of FFIs that are treated as U.S. persons.

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(5) * * *
(iv) * * *
(E) Exception for preexisting individual accounts previously documented as held by foreign individuals.

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(d) * * *
(2) * * *
(ii) * * *
(D) Special reporting of accounts held by owner-documented FFIs.
(E) Requirement to identify the GIIN of a branch that maintains an account.

(F) Reporting by participating FFIs and registered deemed-compliant FFIs (including QIs, WPs, WTs, and certain U.S. branches not treated as U.S. persons) for accounts of nonparticipating FFIs (transitional).

(iii) * * *

(C) Rules for U.S. branches of FFIs not treated as U.S. persons.

(3) * * *

(v) Form for reporting accounts under section 1471(c)(1).

(vi) Time and manner of filing.

(vii) Extensions in filing.

(4) * * *

(iv) * * *

(D) Transfers and closings of deposit, custodial, insurance, and annuity financial accounts.

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(6) * * *

(vi) Extensions in filing.

(vii) Record retention requirements.

(7) Special reporting rules with respect to the 2014 and 2015 calendar years.

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(ii) * * *

(A) Reporting with respect to the 2014 calendar year.

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(iv) * * *

(B) Special determination date and timing for reporting with respect to the 2014 calendar year.

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(e) * * *

(2) * * *

(vi) Exception from restriction on opening U.S. accounts and nonparticipating FFI accounts.

(3) * * *

(v) Exception from registration requirement.

(A) Conditions for exception.

(B) Confirmation requirements of lead FI.

(vi) Exception from restriction on opening U.S. accounts and nonparticipating FFI accounts.

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(i) * * *

(2) Requesting waiver or closure of a U.S. account.

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§ 1.1471–5 Definitions applicable to section 1471.

(a) * * *

(3) * * *

(ii) Financial accounts held by agents that are not financial institutions.

(iii) Jointly held accounts.

(iv) Account holder for insurance and annuity contracts.

(v) Examples.

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(b) * * *

(1) * * *

(iii) * * *

(A) Equity or debt interests in an investment entity.

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(3) * * *

(v) Value of interest determined, directly or indirectly, primarily by reference to assets that give rise (or could give rise) to withholdable payments.

* * * * *

(vi) Return earned on the interest (including upon a sale, exchange, or redemption) determined, directly or indirectly, primarily by reference to one or more investment entities or passive NFFEs.

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(vii) Cash value insurance contract.

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(4) * * *

(iv) Currency translation of balance or value.

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(e) * * *

(4) * * *

(iii) * * *

(B) Special rule for start-up entities.

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(f) * * *

(1) * * *

(i) * * *

(E) Qualified credit card issuers and servicers.

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(2) * * *

(v) Certain investment entities that do not maintain financial accounts.

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(4) Definition of a restricted distributor.

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(i) * * *

(1) Scope of paragraph.

(2) Expanded affiliated group defined.

(3) Member of expanded affiliated group.

(4) Ownership test.

(i) Corporations.

(A) Stock not to include certain preferred stock.

(B) Valuation.

(ii) Partnerships.

(iii) Trusts.

(5) Treatment of warrants, options, and obligations convertible into equity for determining ownership.

(6) Exception for FFIs holding certain capital investments.

(7) Seed capital.

(8) Anti-abuse rule.

(9) Exception for limited life debt investment entities.

(10) Partnerships, trusts, and other non-corporate entities.

(j) Sponsoring entity verification.

(k) Sponsoring entity event of default.

(l) Effective/applicability date.

§ 1.1471–6 Payments beneficially owned by exempt beneficial owners.

* * * * *

(d) * * *

(4) Income on certain transactions.

* * * * *

(f) * * *

(3) Narrow participation retirement funds.

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§ 1.1472–1 Withholding on NFFEs.

* * * * *

(c) * * *

(1) Payments to an excepted NFFE.

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(vi) Direct reporting NFFEs.

(vii) Sponsored direct reporting NFFEs.

(2) Payments made to an exempt beneficial owner.

(3) Definition of direct reporting NFFE.

(4) Election to be treated as a direct reporting NFFE.

(i) Manner of making election.

(ii) Effective date of election.

(iii) Revocation of election by NFFE.

(iv) Revocation of election by Commissioner.

(v) Event of default.

(vi) Notice of event of default.

(vii) Remediation of event of default.

(5) Election by a direct reporting NFFE to be treated as a sponsored direct reporting NFFE.

(i) Definition of sponsored direct reporting NFFE.

(ii) Requirements for sponsoring entity of a sponsored direct reporting NFFE.

(iii) Revocation of status as sponsoring entity.

(iv) Liability of sponsoring entity.

(d) * * *

(2) Payments made to a NFFE that is a QI, WP, or WT.

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(f) Sponsoring entity verification.

(g) Sponsoring entity event of default.

(h) Effective/applicability date.

§ 1.1473–1 Section 1473 definitions.

(a) * * *

(3) * * *

(i) * * *

(C) Special rule for gross proceeds from sales settled by a clearing organization.

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(4) * * *

(vii) Collateral arrangements prior to 2017 (transitional).

(viii) Certain dividend equivalents.

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§ 1.1474–1 Liability for withheld tax and withholding agent reporting.

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(d) * * *

(4) * * *

(i) * * *

(C) Amounts paid to a U.S. branch.

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(iii) Reporting by participating FFIs and deemed-compliant FFIs (including QIs, WPs, and WTs) and U.S. branches not treated as U.S. persons.

(A) * * *

(B) Special reporting requirements of participating FFIs, deemed-compliant FFIs, FFIs that make an election under section 1471(b)(3), and U.S. branches not treated as U.S. persons.

(C) Reporting by a U.S. branch treated as a U.S. person.

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(i) * * *

(4) Extensions of time to file.

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§ 1.1474–6 Coordination of chapter 4 with other withholding provisions.

* * * * *

(c) * * *

(2) Determining the amount of the distribution from certain domestic corporations subject to section 1445 or chapter 4 withholding.

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(f) Coordination with section 3406.

(g) Effective/applicability date.

■ **Par. 3.** Section 1.1471–1 is amended by revising paragraphs (b)(6) and (7), (b)(10), (b)(20), (b)(23), (b)(31), (b)(35), (b)(41), (b)(43), (b)(48), (b)(50), (b)(67), (b)(76) and (77), (b)(81), (b)(83), (b)(88), (b)(91), (b)(98) through (100), (b)(104)(i), (b)(104)(ii)(A) through (C), (b)(105), (b)(113), (b)(115), (b)(123) through (125), (b)(128), (b)(135), (b)(141), (b)(146), and (c) to read as follows:

§ 1.1471–1 Scope of chapter 4 and definitions.

* * * * *

(b) * * *

(6) *Assumes primary withholding responsibility.* The term *assumes primary withholding responsibility* refers to when a QI, territory financial institution, or U.S. branch assumes responsibility for withholding on a payment for purposes of chapters 3 and 4 as if it were a U.S. person. A QI may only assume primary withholding responsibility if it does not make an election to be withheld upon with respect to the payment.

(7) *Backup withholding.* The term *backup withholding* means the withholding required under section 3406.

* * * * *

(10) *Branch.* With respect to a financial institution, the term *branch* means a unit, business, or office of a financial institution that is treated as a branch under the regulatory regime of a country or that is otherwise regulated under the laws of a country as separate from other offices, units, or branches of the financial institution and also includes an entity that is disregarded as an entity separate from the financial institution (including branches maintained by such disregarded entity). A branch includes a unit, business, or office of a financial institution located in a country in which it is resident, and a unit, business, or office of a financial institution located in the country in which the financial institution is created or organized. All units, businesses, and offices of a participating FFI located in a single country, and all entities disregarded as entities separate from a participating FFI and located in a single country, shall be treated as a single branch and may use the same GIIN. An account will be treated as maintained by a branch or disregarded entity if the rights and obligations of the account holder and the participating FFI with regard to such account (including any assets held in the account) are governed by the laws of the country of the branch or disregarded entity.

* * * * *

(20) *Chapter 4 withholding rate pool.* The term *chapter 4 withholding rate pool* means a pool of payees that are nonparticipating FFIs provided on a chapter 4 withholding statement (as described in § 1.1471–3(c)(3)(iii)(B)(*3*)) to which a withholdable payment is allocated. The term *chapter 4 withholding rate pool* also means a pool provided on an FFI withholding statement (as described in § 1.1471–3(c)(3)(iii)(B)(*2*)) to which a withholdable payment is allocated to—

(i) A pool of payees consisting of each class of recalcitrant account holders described in § 1.1471–4(d)(6) (or with respect to an FFI that is a QI, a single pool of recalcitrant account holders without the need to subdivide into each class of recalcitrant account holders described in § 1.1471–4(d)(6)), including a separate pool of account holders to which the escrow procedures for dormant accounts apply; or

(ii) A pool of payees that are U.S. persons as described in § 1.1471–3(c)(3)(iii)(B)(*2*).

* * * * *

(23) *Consolidated obligations.* The term *consolidated obligations* means multiple obligations that a withholding agent (including a withholding agent that is an FFI) has chosen to treat as a single obligation in order to treat the obligations as preexisting obligations pursuant to paragraph (b)(104)(ii) of this section or in order to share documentation between the obligations pursuant to § 1.1471–3(c)(8). A withholding agent that has opted to treat multiple obligations as consolidated obligations pursuant to the previous sentence must also treat the obligations as a single obligation for purposes of satisfying the standards of knowledge requirements set forth in §§ 1.1471–3(e) and 1.1471–4(c)(2)(ii), and for purposes of determining the balance or value of any of the obligations when applying any of the account thresholds applicable to due diligence or reporting as set forth in §§ 1.1471–3(c)(6)(ii), 1.1471–3(d), 1.1471–4(c), 1.1471–5(a)(4), and 1.1471–5(b)(3)(vii). For example, with respect to consolidated obligations, if a withholding agent has reason to know that the chapter 4 status assigned to the account holder or payee of one of the consolidated obligations is inaccurate, then it has reason to know that the chapter 4 status assigned for all other consolidated obligations of the account holder or payee is inaccurate. Similarly, to the extent that an account balance or value is relevant for purposes of applying any account threshold to one or more of the consolidated obligations, the withholding agent must aggregate the balance or value of all such consolidated obligations.

* * * * *

(31) *Direct reporting NFFE.* The term *direct reporting NFFE* has the meaning set forth in § 1.1472–1(c)(3).

* * * * *

(35) *Effective date of the FFI agreement.* The term *effective date of the FFI agreement* with respect to an FFI or a branch of an FFI that is a participating FFI means the date on which the IRS issues a GIIN to the FFI or branch. For participating FFIs that receive a GIIN prior to June 30, 2014, the effective date of the FFI agreement is June 30, 2014.

* * * * *

(41) *Excepted NFFE.* The term *excepted NFFE* means a NFFE that is described in § 1.1472–1(c)(1).

* * * * *

(43) *Exempt recipient.* The term *exempt recipient* means a person described in § 1.6049–4(c)(1)(ii) (for interest, dividends, and royalties), a person described in § 1.6045–2(b)(2)(i) (for broker proceeds), and a person described in § 1.6041–3(q) (for rents, amounts paid on notional principal contracts, and other fixed or determinable income).

* * * * *

(48) *FFI agreement.* The term *FFI agreement* means an agreement that is described in § 1.1471–4(a). An FFI agreement includes a QI agreement, a WP agreement, and a WT agreement that is entered into by an FFI (other than an FFI that is a registered deemed-compliant FFI, including a reporting Model 1 FFI) and that has an effective date or renewal date on or after June 30, 2014. The term *FFI agreement* also includes a QI agreement that is entered into by a foreign branch of a U.S. financial institution (other than a branch that is a reporting Model 1 FFI) and that has an effective date or renewal date on or after June 30, 2014.

* * * * *

(50) *Financial institution.* The term *financial institution* has the meaning set forth in § 1.1471–5(e) and includes a financial institution as defined in an applicable Model 1 or Model 2 IGA.

* * * * *

(67) *Intergovernmental agreement (IGA).* The term *intergovernmental agreement* or *IGA* means any applicable Model 1 or Model 2 IGA.

* * * * *

(76) *Limited branch.* The term *limited branch* has the meaning set forth in § 1.1471–4(e)(2)(iii). With respect to a reporting Model 2 FFI, a limited branch is a branch of the reporting Model 2 FFI that operates in a jurisdiction that prevents such branch from fulfilling the requirements of a participating FFI or deemed-compliant FFI, or that cannot fulfill the requirements of a participating FFI or deemed-compliant FFI due to the expiration of the transitional rule for limited branches under § 1.1471–4(e)(2)(v), and for which the reporting Model 2 FFI meets the terms of the applicable Model 2 IGA with respect to the branch.

(77) *Limited FFI.* The term *limited FFI* has the meaning set forth in § 1.1471–4(e)(3)(ii). With respect to a reporting Model 2 FFI, a limited FFI is a related entity that operates in a jurisdiction that prevents the entity from fulfilling the requirements of a participating FFI or deemed-compliant FFI or that cannot fulfill the requirements of a participating FFI or deemed-compliant FFI due to the expiration of the transitional rule for limited FFIs under § 1.1471–4(e)(3)(iv), and for which the reporting Model 2 FFI meets the requirements of the applicable Model 2 IGA with respect to the entity.

* * * * *

(81) *Non-exempt recipient.* The term *non-exempt recipient* means a person that is not an exempt recipient.

* * * * *

(83) *Nonreporting IGA FFI.* The term *nonreporting IGA FFI* means an FFI that is a resident of, or located or established in, a Model 1 or Model 2 IGA jurisdiction, as the context requires, and that meets the requirements of one of the following—

(i) A nonreporting financial institution described in Annex II of the Model 1 IGA;

(ii) A nonreporting financial institution described in Annex II of the Model 2 IGA;

(iii) A registered deemed-compliant FFI described in § 1.1471–5(f)(1)(i)(A) through (F);

(iv) A certified deemed-compliant FFI described in § 1.1471–5(f)(2)(i) through (v); or

(v) An exempt beneficial owner described in § 1.1471–6.

* * * * *

(88) *Offshore obligation.* The term *offshore obligation* means an offshore obligation defined in § 1.6049–5(c)(1) (by substituting the terms *withholding agent* or *financial institution* for the term *payor*).

* * * * *

(91) *Participating FFI.* The term *participating FFI* means an FFI that has agreed to comply with the requirements of an FFI agreement with respect to all branches of the FFI, other than a branch that is a reporting Model 1 FFI or a U.S. branch. The term *participating FFI* also includes an FFI described in a Model 2 IGA that has agreed to comply with the requirements of an FFI agreement with respect to a branch (a *reporting Model 2 FFI*), and a QI branch of a U.S. financial institution, unless such branch is a reporting Model 1 FFI.

* * * * *

(98) *Payor.* The term *payor* has the meaning set forth in §§ 31.3406(a)–2 and 1.6049–4(a)(2) and generally includes a withholding agent.

(99) [Reserved]. For further guidance, see § 1.1471–1T(b)(99).

(100) *Person.* The term *person* has the meaning set forth in section 7701(a)(1) and the regulations thereunder and includes an entity or arrangement that is an insurance company. The term *person* also includes, with respect to a withholdable payment, a QI branch of a U.S. financial institution.

* * * * *

(104) * * *

(i) The term *preexisting obligation* means any account, instrument, contract, debt, or equity interest maintained, executed, or issued by the withholding agent that is outstanding on June 30, 2014. With respect to a participating FFI, the term *preexisting obligation* means any account, instrument, or contract (including any debt or equity interest) maintained, executed, or issued by the FFI that is outstanding on the effective date of the FFI agreement. With respect to a registered deemed-compliant FFI, a preexisting obligation means any account, instrument, or contract (including any debt or equity interest) that is maintained, executed, or issued by the FFI prior to the later of the date that the FFI registers as a deemed-compliant FFI pursuant to § 1.1471–5(f)(1) and receives a GIIN or the date the FFI is required to implement its account opening procedures under § 1.1471–5(f). Notwithstanding the previous provisions of this paragraph (b)(104)(i), a preexisting obligation includes an obligation held by an entity that is issued, opened, or executed on or after July 1, 2014, and before January 1, 2015, by or with a withholding agent or FFI that treats the obligation as a preexisting obligation. See §§ 1.1471–2(a)(4)(ii), 1.1472–1(b)(2), and 1.1471–4(c)(3) for the due diligence requirements applicable to preexisting obligations for withholding agents and participating FFIs.

(ii) * * *

(A) The account holder or payee also holds with the withholding agent (or a member of the withholding agent's expanded affiliated group or sponsored FFI group) an account, instrument, contract, or equity interest that is a preexisting obligation under paragraph (b)(104)(i) of this section;

(B) The withholding agent (and, as applicable, the member of the withholding agent's expanded affiliated group or sponsored FFI group) treats both of the aforementioned obligations, and any other obligations of the payee or account holder that are treated as preexisting obligations under this paragraph (b)(104)(ii), as consolidated obligations; and

(C) With respect to an obligation that is subject to AML due diligence, the withholding agent is permitted to satisfy such AML due diligence for the obligation by relying upon the AML due diligence performed for the preexisting obligation described in paragraph (b)(104)(i) of this section.

(105) *Pre-FATCA Form W–8.* The term *pre-FATCA Form W–8* means a version of a Form W–8 that was issued by the IRS prior to 2013 (including an acceptable substitute form based on such version) and that does not contain chapter 4 statuses but otherwise meets the requirements of § 1.1441–1(e)(1)(ii) applicable to such certificate (or substitute form) and has not expired, or a Form W–8 that was issued prior to 2013 and furnished by an individual to

establish such individual's foreign status but otherwise meets the requirements of § 1.1441–1(e)(1)(ii) applicable to such certificate and has not expired.

* * * * *

(113) *Reportable payment.* The term *reportable payment* means a payment of interest or dividends (as defined in section 3406(b)(2)) and other reportable payments (as defined in section 3406(b)(3)).

* * * * *

(115) *Reporting Model 2 FFI.* The term *reporting Model 2 FFI* means a participating FFI that is described in § 1.1471–1(b)(91).

* * * * *

(123) *Sponsored direct reporting NFFE.* The term *sponsored direct reporting NFFE* has the meaning set forth in § 1.1472–1(c)(5).

(124) *Sponsoring entity.* The term *sponsoring entity* means (i) an entity that registers with the IRS and agrees to perform the due diligence, withholding, and reporting obligations of one or more FFIs pursuant to § 1.1471–5(f)(1)(i)(F) or (f)(2)(iii); or (ii) an entity that registers with the IRS and agrees to perform the due diligence and reporting obligations of one or more direct reporting NFFEs pursuant to § 1.1472–1(c)(5).

(125) *Standardized industry coding system.* The term *standardized industry coding system* means a coding system used by the withholding agent or FFI to classify account holders by business type for purposes other than U.S. tax purposes and that was implemented by the withholding agent by the later of January 1, 2012, or six months after the date the withholding agent was formed or organized.

* * * * *

(128) *Substantial U.S. owner.* The term *substantial U.S. owner* or *substantial United States owner* has the meaning set forth in § 1.1473–1(b). In the case of a reporting Model 2 FFI, in applying this section with respect to a passive NFFE the term *substantial U.S. owner* means a controlling person as defined in the applicable Model 2 IGA.

* * * * *

(135) *U.S. branch treated as a U.S. person.* The term *U.S. branch treated as a U.S. person* means a U.S. branch that agrees to be treated as a U.S. person as described in § 1.1441–1(b)(2)(iv)(A). For the due diligence, withholding, and reporting requirements of a U.S. branch of an FFI treated as a U.S. person for purposes of chapter 4, see § 1.1471–4(b)(7), (c)(2)(v), (d)(2)(iii)(B), § 1.1472–1(a), and § 1.1474–1(i)(1) and (2).

* * * * *

(141) *U.S. person*—(i) Except as otherwise provided in paragraph (b)(141)(ii) of this section, the term *U.S. person* or *United States person* means a person described in section 7701(a)(30), the United States government (including an agency or instrumentality thereof), a State (including an agency or instrumentality thereof), or the District of Columbia (including an agency or instrumentality thereof). The term *U.S. person* or *United States person* also means a foreign insurance company that has made an election under section 953(d), provided that either the foreign insurance company is not a specified insurance company (as described in § 1.1471–5(e)(1)(iv)), or the foreign insurance company is a specified insurance company and is licensed to do business in any State.

(ii) The term *U.S. person* or *United States person* does not include a foreign insurance company that has made an election under section 953(d) if it is a specified insurance company and is not licensed to do business in any State. An individual will not be treated as a U.S. person for a taxable year or any portion of a taxable year that the individual is a dual resident taxpayer (within the meaning of § 301.7701(b)-7(a)(1) of this chapter) who is treated as a nonresident alien pursuant to § 301.7701(b)-7 of this chapter for purposes of computing the individual's U.S. tax liability. A U.S. person does not include an alien individual who has made an election under section 6013(g) or (h) to be treated as a resident of the United States.

* * * * *

(146) *Withholding.* The term *withholding* means the deduction and withholding of tax at the applicable rate from a payment.

* * * * *

(c) *Effective/applicability date.* This section applies on January 6, 2017. However, taxpayers may apply these provisions as of January 28, 2013. (For the rules that apply beginning on January 28, 2013, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2016.)

■ **Par. 4.** Section 1.1471–1T is revised to read as follows:

§ 1.1471–1T Scope of chapter 4 and definitions (temporary).

(a) [Reserved]. For further guidance, see § 1.1471–1(a).

(b) [Reserved]. For further guidance, see § 1.1471–1(b).

(1) through (98) [Reserved]. For further guidance, see § 1.1471–1(b)(1) through (98).

(99) *Permanent residence address.* The term *permanent residence address* is the address in the country of which the person claims to be a resident for purposes of that country's income tax. The address of a financial institution with which the person maintains an account, a post office box, or an address used solely for mailing purposes is not a permanent residence address unless such address is the only permanent address used by the person and appears as the person's registered address in the person's organizational documents. An address that is provided subject to instructions to hold all mail to that address must be accompanied by certain documentary evidence described in § 1.1441–1(c)(38)(ii) supporting the claim of foreign status. If the person is an individual who does not have a tax residence in any country, the permanent address is the place at which the person normally resides. If the person is an entity and does not have a tax residence in any country, then the permanent residence address is the place at which the person maintains its principal office.

(100) through (151) [Reserved]. For further guidance, see § 1.1471–1(b)(100) through (151).

(c) [Reserved]. For further guidance, see § 1.1471–1(c).

(d) *Expiration date.* The applicability of this section expires on December 30, 2019.

■ **Par. 5.** Section 1.1471–2 is amended by revising paragraphs (a)(1), (a)(2)(i), (a)(2)(ii), (a)(2)(iii)(A) introductory text, (a)(2)(v), (a)(4)(ii)(A) and (B) introductory text, (a)(4)(iii), (b)(2)(i)(A), (b)(2)(ii)(A)(*4*), (b)(2)(ii)(B)(*2*), (b)(2)(iv), (b)(4)(ii), and (c) to read as follows:

§ 1.1471–2 Requirement to deduct and withhold tax on withholdable payments to certain FFIs.

(a) * * *

(1) *General rule of withholding.* Under section 1471(a), notwithstanding any exemption from withholding under any other provision of the Code or regulations, a withholding agent must withhold 30 percent of any withholdable payment made after June 30, 2014, to a payee that is an FFI unless either the withholding agent can reliably associate the payment with documentation upon which it is permitted to rely to treat the payment as exempt from withholding under paragraph (a)(4) of this section or the payment is made under a grandfathered obligation that is described in paragraph (b) of this section or constitutes gross proceeds from the disposition of such an obligation. A withholding agent that is making a payment must determine who the payee is under § 1.1471–3(a) with respect to that payment and the chapter 4 status of such payee. See

§ 1.1471–3 for requirements for determining the chapter 4 status of a payee, including additional documentation requirements that apply when a payment is made to an intermediary or flow-through entity that is not the payee. Withholding under this section applies without regard to whether the payee receives a withholdable payment as a beneficial owner or as an intermediary. See paragraph (a)(2)(iv) of this section for a description of the withholding requirements imposed on territory financial institutions as withholding agents under chapter 4. In the case of a withholdable payment to a NFFE, a withholding agent is required to determine whether withholding applies under section 1472 and § 1.1472–1. Except as otherwise provided in the regulations under chapter 4, a withholding obligation arises on the date a payment is made, as determined under § 1.1473–1(a).

(2) * * *

(i) *Requirement to withhold on payments of U.S. source FDAP income to participating FFIs and deemed-compliant FFIs that are NQIs, NWPs, or NWTs, and U.S. branches acting as intermediaries.* A withholding agent that, after June 30, 2014, makes a payment of U.S. source FDAP income to a participating FFI or deemed-compliant FFI that is an NQI receiving the payment as an intermediary, or a NWP or NWT, must withhold 30 percent of the payment unless the withholding is reduced under this paragraph (a)(2)(i). A withholding agent is not required to withhold on a payment, or portion of a payment, that it can reliably associate, in the manner described in § 1.1471–3(c)(2), with a valid intermediary or flow-through withholding certificate that meets the requirements of § 1.1471–3(d)(4) and a withholding statement that meets the requirements of § 1.1471–3(c)(3)(iii)(B) and that allocates the payment or portion of the payment to payees for which no withholding is required under chapter 4. Further, a withholding agent is not required to withhold on a payment that it can reliably associate with documentation indicating that the payee is a U.S. branch treated as a U.S. person (as defined in § 1.1471–1(b)(135)) or is a U.S. branch that is not treated as a U.S. person but that applies the rules described in § 1.1471–4(d)(2)(iii)(C). See also § 1.1471–3(c)(3)(iii)(H) for the rules for valid documentation of a U.S. branch.

(ii) *Residual withholding responsibility of intermediaries and flow-through entities.* An intermediary or flow-through entity that receives a withholdable payment after June 30, 2014, is required to withhold on such payment to the extent required under chapter 4. Notwithstanding the previous sentence, an intermediary or flow-through entity is not required to withhold if another withholding agent has withheld the full amount required. Further, an NQI, NWP, or NWT is not required to withhold with respect to a withholdable payment under chapter 4 if it has provided a valid intermediary withholding certificate or flow-through withholding certificate and all of the information required by § 1.1471–3(c)(3)(iii), and it does not know, and has no reason to know, that another withholding agent failed to withhold the correct amount. A QI's, WP's, or WT's obligation to withhold and report is determined in accordance with its QI agreement, WP agreement, or WT agreement.

(iii) * * *

(A) *Election to be withheld upon for U.S. source FDAP income.* A withholding agent is required to withhold with respect to a payment, or portion of a payment, that is U.S. source FDAP income subject to withholding that is made after June 30, 2014, to a QI that has elected in accordance with this paragraph to be withheld upon, unless such withholding agent also makes an election to be withheld upon under this paragraph (a)(2)(iii)(A) or is an FFI that may not accept primary withholding responsibility for the payment. In such case, the withholding agent must withhold 30 percent of the portion of the payment that is allocable, pursuant to a withholding statement described in § 1.1471–3(c)(3)(iii)(B) provided by the QI, to recalcitrant account holders and nonparticipating FFIs. If no such allocation information is provided, the withholding agent must apply the presumption rules of § 1.1471–3(f) to determine the chapter 4 status of the payee. A QI that is an FFI and that makes the election to be withheld upon with respect to a payment of U.S. source FDAP income may not assume primary withholding responsibility under chapter 3 for that payment. Conversely, a QI that is an FFI and that does not make the election to be withheld upon with respect to a payment of U.S. source FDAP income is required to assume primary withholding responsibility under chapter 3 for that payment. The election to be withheld upon is only available with respect to a payment of U.S. source FDAP income if—

* * * * *

(v) *Withholding obligation of a foreign branch of a U.S. financial institution.* A foreign branch of a U.S. financial institution is a U.S. withholding agent and a payee that is a U.S. person, and is generally not an FFI. However, a foreign branch of a U.S. financial institution that is also a reporting Model 1 FFI is both a withholding agent and a registered deemed-compliant FFI. Additionally, a QI branch of a U.S. financial institution is both a withholding agent and either a participating FFI or a registered deemed-compliant FFI. Therefore, a foreign branch of a U.S. financial institution is not subject to withholding under chapter 4 but has an obligation to withhold under this section and § 1.1472–1 and may be liable for the tax if it fails to do so. See § 1.1471–2(a) (requirement to withhold on payments to FFIs) and § 1.1471–3(a)(3)(iii) (U.S. intermediary or agent of a foreign person). A foreign branch that is a reporting Model 1 FFI or a reporting Model 2 FFI may apply the procedures under Annex I of an applicable IGA to document the chapter 4 status of a payee of a withholdable payment that is a holder of an account maintained by the branch in the Model 1 or Model 2 IGA jurisdiction. A QI branch of a U.S. financial institution must withhold in accordance with this chapter as provided in the QI agreement in addition to meeting its obligations under either § 1.1471–4(b) and its FFI agreement or § 1.1471–5(f).

* * * * *

(4) * * *

(ii) *Exception to withholding for certain payments made prior to July 1, 2016 (transitional)*—(A) *In general.* For any withholdable payment made prior to July 1, 2016, with respect to a preexisting obligation for which a withholding agent does not have documentation indicating the payee's status as a nonparticipating FFI, the withholding agent is not required to withhold under this section and section 1471(a) unless the payee is a prima facie FFI.

(B) *Prima facie FFIs.* If the payee is a prima facie FFI, the withholding agent must treat the payee as a nonparticipating FFI beginning on January 1, 2015, until the date the withholding agent obtains documentation sufficient to establish a different chapter 4 status of the payee. A prima facie FFI means any payee if—

* * * * *

(iii) *Payments to a participating FFI.* Except to the extent provided in paragraph (a)(2)(i) of this section, a withholding agent is not required to withhold under section 1471(a) and this section on a withholdable payment made to a payee that the withholding

agent can treat as a participating FFI in accordance with § 1.1471–3(d)(4). For this purpose, a limited branch of a participating FFI is treated as a nonparticipating FFI.

* * * * *

(b) * * *

(2) * * *

(i) * * *

(A) * * *

(*1*) Any obligation outstanding on July 1, 2014;

(*2*) Any obligation that gives rise to a withholdable payment solely because the obligation is treated as giving rise to a dividend equivalent pursuant to section 871(m) and the regulations thereunder, provided that the obligation is executed on or before the date that is six months after the date on which obligations of its type are first treated as giving rise to dividend equivalents;

(*3*) Any agreement requiring a secured party to make a payment with respect to, or to repay, collateral posted to secure a grandfathered obligation. If collateral (or a pool of collateral) secures both grandfathered obligations and obligations that are not grandfathered, the collateral posted to secure the grandfathered obligations may be determined by allocating (pro rata by value) the collateral (or each item comprising the pool of collateral) to all outstanding obligations secured by the collateral (or pool of collateral) or, if the collateral cannot be allocated pro rata to all obligations, by allocating all collateral to obligations that are not grandfathered and withholding to the extent required under chapter 4; and

(*4*) Any obligation that gives rise to substitute interest (as defined in § 1.861–2(a)(7)) that arises from the payee posting a grandfathered obligation described in paragraph (b)(2)(i)(A)(*1*) of this section as collateral.

* * * * *

(ii) * * *

(A) * * *

(*4*) A life insurance contract under which the entire contract value is payable no later than upon the death of the individual(s) insured under the contract but, in the case of a life insurance contract that contains a provision that permits the substitution of a new individual as the insured under the contract, only until a substitution occurs; and

* * * * *

(B) * * *

(*2*) Lacks a stated expiration or term (for example, a savings deposit or demand deposit, a deferred annuity contract, or an annuity contract that permits a substitution of a new individual as the annuitant under the contract);

* * * * *

(iv) *Material modification.* In the case of an obligation that constitutes indebtedness for U.S. tax purposes, a material modification is any significant modification of the debt instrument as defined in § 1.1001–3(e). For life insurance contracts, a material modification includes any substitution of the insured under the contract. In all other cases, whether a modification of an obligation is material is determined based on the facts and circumstances.

* * * * *

(4) * * *

(ii) *Determination of material modification.* For purposes of paragraph (b)(2)(iv) of this section (defining material modification), a withholding agent, other than the issuer of the obligation (or an agent of the issuer), is required to treat a modification of the obligation as material only if the withholding agent has actual knowledge thereof, such as in the event the withholding agent receives a disclosure indicating that there has been or will be a material modification to such obligation. The issuer of the obligation (or an agent of the issuer) that is a withholding agent is required to treat a modification of the obligation as material if the withholding agent knows or has reason to know that a material modification has occurred with respect to the obligation.

* * * * *

(c) *Effective/applicability date.* This section applies on January 6, 2017. However, taxpayers may apply these provisions as of January 28, 2013. (For the rules that apply beginning on January 28, 2013, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2016.)

§ 1.1471–2T [Removed]

■ **Par. 6.** Section 1.1471–2T is removed.

■ **Par. 7.** Section 1.1471–3 is amended by:

■ 1. Revising paragraphs (a)(3)(iii), (a)(3)(v) and (vi), (c)(1), (c)(3)(ii)(C) and (D), (c)(3)(iii) introductory text, (c)(3)(iii)(A) introductory text, (c)(3)(iii)(A)(*5*), and (c)(3)(iii)(B)(*1*) through (*4*),

■ 2. Adding paragraph (c)(3)(iii)(B)(*5*).

■ 3. Revising paragraphs (c)(3)(iii)(H), (c)(5)(i)(D), (c)(5)(ii)(B), (c)(6)(ii)(A), (c)(6)(ii)(B)(*2*) and (*3*), (c)(6)(ii)(B)(*5*) through (*7*), (c)(6)(ii)(C)(*2*)(*iii*), (c)(6)(ii)(C)(*2*)(*x*), (c)(6)(ii)(C)(*3*) through (*5*), and (c)(6)(ii)(E)(*2*) and (*3*),

■ 4. Adding paragraph (c)(6)(ii)(E)(*4*).

■ 5. Revising paragraphs (c)(6)(iv), (c)(6)(v)(A) and (B), (c)(6)(vii), (c)(7)(i) and (ii), (c)(8)(iii), (c)(8)(v), (c)(9)(ii)(B), (c)(9)(v), (d)(1), (d)(2)(i), (d)(2)(iii), (d)(4)(i) and (ii), (d)(4)(iii) introductory text, (d)(4)(iii)(A)(*1*), (d)(4)(iv)(A), (d)(4)(iv)(C) and (D), (d)(4)(v),

■ 6. Adding paragraph (d)(4)(vi).

■ 7. Revising paragraphs (d)(5)(i) through (iii), (d)(6)(i)(F), (d)(6)(vii)(A)(*1*), (d)(7)(i), (d)(11)(viii)(A), (d)(11)(viii)(C), (d)(11)(x) through (xii), (d)(12)(iii)(A) and (B), (e)(2) and (3), (e)(4) introductory text, (e)(4)(i) through (iv), (e)(4)(v), (e)(4)(v)(B)(*1*) and (*2*), (e)(4)(vi)(B), (e)(4)(vii)(B), (e)(4)(viii), (f)(1) through (9), and (g).

The revisions and additions read as follows:

§ 1.1471–3 Identification of payee.

(a) * * *

(3) * * *

(iii) *U.S. intermediary or agent of a foreign person.* A withholding agent that makes a withholdable payment to a U.S. person and has actual knowledge that the person receiving the payment is acting as an intermediary or agent of a foreign person with respect to the payment must treat such foreign person, and not the intermediary or agent, as the payee of such payment. Notwithstanding the previous sentence, a withholding agent that makes a withholdable payment to a U.S. financial institution or a U.S. insurance broker (to the extent such withholdable payment is a payment of premiums) that is acting as an intermediary or agent with respect to the payment on behalf of one or more foreign persons may treat the U.S. financial institution or U.S. insurance broker as the payee if the withholding agent does not have reason to know that the U.S. financial institution or U.S. insurance broker will not comply with its obligations to withhold under sections 1471 and 1472.

* * * * *

(v) *Disregarded entity or limited branch.* Except as otherwise provided in paragraph (a)(3)(v) through (vii) of this section, a withholding agent that makes a withholdable payment to an entity that is disregarded for U.S. federal tax purposes under § 301.7701–2(c)(2)(i) of this chapter as an entity separate from its single owner must treat the single owner as the payee. The rules under § 1.1471–3(d)(4) and (e)(3) apply to determine the circumstances under which a withholding agent may treat a payment made to a disregarded entity owned by an FFI as made to a payee that is a participating FFI or registered deemed-compliant FFI, and not as a payment made to a payee that is a nonparticipating FFI. A withholding

agent that makes a payment to a limited branch (including an entity disregarded as a separate entity from its owner if such owner is an FFI and the disregarded entity is unable to comply with the terms of an FFI agreement with respect to accounts that it maintains) will be required to treat the payment as being made to a nonparticipating FFI.

(vi) *U.S. branch treated as a U.S. person.* A withholdable payment to a U.S. branch is a payment to a U.S. person if the U.S. branch is treated as a U.S. person (as defined in § 1.1471–1(b)(135)). In such case, the U.S. branch is treated as the payee. A U.S. branch treated as a U.S. person, however, is not treated as a U.S. person for purposes of the withholding certificate it may provide to a withholding agent for purposes of chapter 4. Accordingly, a U.S. branch treated as a U.S. person must furnish a withholding certificate on a Form W–8 to certify its chapter 4 status (and not a Form W–9, ''Request for Taxpayer Identification Number and Certification''). See also paragraph (f)(6) of this section for the rules under which a withholding agent can presume a payment to a U.S. branch constitutes income that is effectively connected with a U.S. trade or business. A U.S. branch treated as a U.S. person may not make an election to be withheld upon, as described in section 1471(b)(3) and § 1.1471–2(a)(2)(iii), for purposes of chapter 4. See § 1.1471–4(c)(2)(v) for the rule requiring a U.S. branch treated as a U.S. person to apply the due diligence rules applicable to a U.S. withholding agent. See also § 1.1474–1(i)(1) and (2) for the requirement of a U.S. branch to report information regarding certain U.S. owners of owner documented FFIs and passive NFFEs. See § 1.1471–4(d) for rules for when a U.S. branch reports as a U.S. person.

* * * * *

(c) * * *

(1) [Reserved]. For further guidance, see § 1.1471–3T(c)(1).

* * * * *

(3) * * *

(ii) * * *

(C) The person's entity classification for U.S. tax purposes;

(D) The person's chapter 4 status; and

* * * * *

(iii) *Withholding certificate of an intermediary, qualified intermediary, flow-through entity, or U.S. branch (Form W–8IMY)*—(A) *In general.* A withholding certificate of an intermediary, qualified intermediary, flow-through entity, or U.S. branch of such entity (whether or not such branch is treated as a U.S. person) is valid for purposes of chapter 4 only if it is furnished on a Form W–8IMY, an acceptable substitute form, or such other form as the IRS may prescribe, it is signed under penalties of perjury by a person with authority to sign for the person named on the form, its validity period has not expired, and it contains the following information, statements, and certifications—

* * * * *

(*5*) A GIIN, in the case of a participating FFI or a registered deemed-compliant FFI (including a QI, WP, or WT that is a participating FFI or registered deemed-compliant FFI), and an EIN in the case of a QI, WP, or WT. Additionally, if a branch (other than a U.S. branch) of a participating FFI or registered deemed-compliant FFI outside of its country of residence acts as an intermediary, a GIIN of such branch must be provided on the withholding certificate. In the case of a U.S. branch, see the rules in paragraph (c)(3)(iii)(H) of this section.

* * * * *

(B) * * *

(*1*) *In general.* A withholding statement forms an integral part of the withholding certificate and the penalties of perjury statement provided on the withholding certificate applies to the withholding statement as well. The withholding statement may be provided in any manner, and in any form, to which the person submitting the form and the withholding agent mutually agree, including electronically. A withholding statement may be provided electronically only if it meets the requirements of § 1.1441–1(e)(3)(iv)(B). The withholding statement must be updated as often as necessary for the withholding agent to meet its reporting and withholding obligations under chapter 4. A withholding agent will be liable for tax, interest, and penalties under § 1.1474–1(a) to the extent it does not follow the presumption rules of paragraph (f) of this section for any payment, or portion thereof, for which a withholding statement is required and the withholding agent does not have a valid withholding statement prior to making a payment. A withholding agent that is making a withholdable payment for which a withholding statement is also required for purposes of chapter 3 may only rely upon the withholding statement if, in addition to providing the information required by paragraph (c)(3)(iii)(B) of this section, the withholding statement also includes all of the information required for purposes of chapter 3 and specifies the chapter 4 status of each payee or pool of payees identified on the withholding statement for purposes of chapter 3.

(*2*) *Special requirements for an FFI withholding statement*—(*i*) An FFI withholding statement may include either payee-specific information or pooled information that indicates the portion of the payment allocable to a chapter 4 withholding rate pool of U.S. payees, each class of recalcitrant account holders described in § 1.1471–1(b)(20)(i), or a class of nonparticipating FFIs. In addition, an FFI withholding statement may include an allocation of a portion of the payment to a pool of account holders (other than nonqualified intermediaries and flow-through entities) for whom no reporting is required on any of Forms 1042–S, 1099, and 8966, provided that the FFI provides to the withholding agent for each account holder payee-specific information (including the payee's chapter 4 status (using the applicable status code used for filing Form 1042–S)) and any other information required for purposes of chapter 3 or 61 on the withholding statement, and the FFI provides documentation for each account holder in the pool (an *exempt payee pool*). For example, a participating FFI may provide on its withholding statement an exempt payee pool for a payment of U.S. source interest on a bank deposit not subject to withholding or reporting under chapter 4 that is allocable to a pool of foreign account holders (that is, a withholdable payment that is not reported on any of Forms 1042–S, 1099, and 8966) and provide to the withholding agent documentation for each account holder included in the pool. If payee-specific information is provided for purposes of chapter 4 it must indicate both the portion of the payment allocated to each payee and each payee's chapter 4 status (using the applicable status code used for filing Form 1042–S). A participating FFI that applies the escrow procedures described in § 1.1471–4(b)(6) for dormant accounts must also indicate the portion of the payment allocated to a chapter 4 withholding rate pool of recalcitrant account holders that hold dormant accounts for which the participating FFI (and not the withholding agent) will withhold in escrow. The withholding statement provided by a participating FFI that applies the election to backup withhold under § 1.1471–4(b)(3)(iii) must also indicate the portion of the reportable payment that is a withholdable payment allocated to each recalcitrant account holder subject to backup withholding under section 3406. See section 3406 for when backup withholding is required, including the exception to backup withholding under § 31.3406(g)-1(e).

Regardless of whether the FFI withholding statement provides information on a pooled or payee-specific basis, a withholding statement provided by an FFI other than an FFI acting as a WP, WT, or QI with respect to the account must also identify each intermediary or flow-through entity that receives the payment and such entity's chapter 4 status (using the applicable status code used for filing Form 1042–S) and GIIN (when required under paragraph (d) of this section), when applicable. An FFI withholding statement must also include any other information that the withholding agent or payor reasonably requests in order to fulfill its obligations under chapter 4, and chapters 3 and 61, if applicable.

(*ii*) An FFI withholding statement provided by a reporting Model 2 FFI or a reporting Model 1 FFI may indicate, with respect to a withholdable payment, that the payment is allocable to a chapter 4 withholding rate pool of U.S. payees, which is comprised of account holders receiving a payment that is not subject to withholding under chapter 3 or 4 or to backup withholding under section 3406 and that are, with respect to a reporting Model 2 FFI, the holders of non-consenting U.S. accounts as described in an applicable IGA when the FFI reports the accounts in one of the pools described in § 1.1471–4(d)(6) for the year in which the payment is made; or with respect to a reporting Model 1 FFI, the holders of accounts that have U.S. indicia for which appropriate documentation sufficient to treat the accounts as held by other than specified U.S. persons has not been provided pursuant to an applicable Model 1 IGA and the reporting Model 1 FFI reports the accounts as U.S. reportable accounts pursuant to the applicable Model 1 IGA for the year in which the payment is made.

(*iii*) An FFI withholding statement provided by a participating FFI or registered deemed-compliant FFI that is a non-U.S. payor (a payor other than a U.S. payor as defined in § 1.6049–5(c)(5)) may indicate, with respect to a withholdable payment, that the payment is allocable to a chapter 4 withholding rate pool of U.S. payees (in addition to the U.S. payees described in paragraph (c)(3)(iii)(B)(*2*)(*ii*) of this section), which is comprised of account holders that are not subject to withholding under chapter 3 or 4 or to backup withholding under section 3406 and that are, with respect to a participating FFI (including a reporting Model 2 FFI), account holders that hold U.S. accounts (as defined in § 1.1471–1(b)(134) and an applicable Model 2 IGA) that the FFI reports as U.S. accounts pursuant to § 1.1471–4(d)(3) or (5) for the year in which the payment is made; with respect to a registered deemed-compliant FFI (other than a reporting Model 1 FFI), account holders of U.S. accounts that the FFI reports pursuant to the conditions of its applicable deemed-compliant status under § 1.1471–5(f)(1) for the year in which the payment is made; or with respect to a reporting Model 1 FFI, account holders of U.S. accounts that the reporting Model 1 FFI reports as reportable U.S. accounts pursuant to an applicable Model 1 IGA, and which includes the U.S. TINs of such account holders, for the year in which the payment is made.

(*iv*) An FFI withholding statement provided by a participating FFI or a registered deemed-compliant FFI may include a certification that the FFI is reporting, for the year in which the payment is made, an account held by a passive NFFE with one or more substantial U.S. owners (or, with respect to a reporting Model 1 FFI or reporting Model 2 FFI, one or more controlling persons that are specified U.S. persons, as defined in an applicable IGA) as a U.S. account (excluding a non-consenting U.S. account or an account held by a recalcitrant account holder) or, with respect to a reporting Model 1 FFI, a U.S. reportable account, in accordance with the terms of the FFI agreement or an applicable IGA.

(*v*) An FFI withholding statement provided by a participating FFI or a reporting Model 1 FFI may include a certification that the FFI is reporting to the IRS for the year of the payment all of the information described in § 1.1471–4(d) or § 1.1474–1(i)(1) (as applicable) with respect to all specified U.S. persons described in § 1.1471–3(d)(6)(iv)(A)(*1*) and (*2*) with respect to an account holder or payee that the FFI has agreed to treat as an owner-documented FFI.

(*3*) *Special requirements for a chapter 4 withholding statement.* A chapter 4 withholding statement must contain the name, address, TIN (if any), entity type, and chapter 4 status (using the applicable status code used for filing Form 1042–S) of each payee, the amount allocated to each payee, a valid withholding certificate or other appropriate documentation sufficient to establish the chapter 4 status of each payee, and each intermediary or flow-through entity that receives the payment on behalf of the payee, in accordance with paragraph (d) of this section, and any other information the withholding agent reasonably requests in order to fulfill its obligations under chapter 4. Notwithstanding the prior sentence, a chapter 4 withholding statement is permitted to provide pooled allocation information with respect to payees that are treated as nonparticipating FFIs (in lieu of providing the withholding agent with documentation for each payee). A chapter 4 withholding statement may include an allocation of a portion of the payment to a pool of payees (rather than to each payee) for whom no reporting is required on any of Forms 1042–S, 1099, and 8966, provided each payee is identified on the withholding statement and documentation is provided to the withholding agent for each payee included in the pool. If the withholdable payment is a reportable amount under chapter 3, see the provisions of § 1.1441–1(e)(3)(iv)(C) for any additional information that may be required on the withholding statement (including pooled information under the alternative procedures described in § 1.1441–1(e)(3)(iv)(D), if applicable).

(*4*) *Special requirements for an exempt beneficial owner withholding statement.* An exempt beneficial owner withholding statement must include the name, address, TIN (if any), entity type, and chapter 4 status (using the applicable status code used for filing Form 1042–S) of each exempt beneficial owner on behalf of which the nonparticipating FFI is receiving the payment, the amount of the payment allocable to each exempt beneficial owner, a valid withholding certificate or other documentation sufficient to establish the chapter 4 status of each exempt beneficial owner in accordance with paragraph (d) of this section, and any other information the withholding agent reasonably requests in order to fulfill its obligations under chapter 4. The withholding statement must allocate the remainder of the payment that is not allocated to an exempt beneficial owner to the nonparticipating FFI receiving the payment. With respect to the amount of the payment allocable to each exempt beneficial owner and subject to withholding under chapter 3, see § 1.1441–1(e)(3)(iv).

(*5*) [Reserved]. For further guidance, see § 1.1471–3T(c)(3)(iii)(B)(*5*).

* * * * *

(H) *Rules applicable to a withholding certificate of a U.S. branch.* A withholding agent may reliably associate a payment with a withholding certificate of a U.S. branch of an FFI that is treated as a U.S. person for purposes of § 1.1441–1(b)(2)(iv) if, in addition to the other information required by paragraph (c)(2)(iii)(A) of this section, the certificate contains the EIN of the U.S. branch and a certification that the U.S. branch is described in paragraph

§ 1.1441–1(b)(2)(iv) and, accordingly, is required to accept primary withholding responsibility with respect to the payment for purposes of both chapters 3 and 4. A withholding agent may reliably associate a payment with a withholding certificate of a U.S. branch of an FFI that is not treated as a U.S. person and that applies the rules described in § 1.1471–4(d)(2)(iii)(C) if, in addition to the other information required by paragraph (c)(2)(iii)(A) of this section, the certificate contains the EIN of the U.S. branch and a certification that the U.S. branch applies the rules described in § 1.1471–4(d)(2)(iii)(C). However, the requirement to obtain the certification that a U.S. branch applies the rules described in § 1.1471–4(d)(2)(iii)(C) shall not apply to payments made on or before June 30, 2017.

* * * * *

(5) * * *

(i) * * *

(D) *Entity government documentation.* With respect to an entity, any documentation that substantiates that the entity is actually organized or created under the laws of a foreign country; and

* * * * *

(ii) * * *

(B) *Preexisting obligation documentary evidence.* With respect to a preexisting obligation of an entity, any classification in the withholding agent's records with respect to the payee that was determined based on documentation supplied by the payee (or other person receiving the payment) or a standardized industry coding system and that was recorded by the withholding agent consistent with its normal business practices for AML or another regulatory purpose (other than for tax purposes), to the extent permitted by paragraph (d) of this section and provided there is no U.S. indicia associated with the payee for which appropriate curing documentation has not been obtained as set forth in paragraph (e) of this section; and

* * * * *

(6) * * *

(ii) * * *

(A) *General rule.* Except as provided otherwise in paragraphs (c)(6)(ii)(B) and (C) of this section, a withholding certificate or written statement will remain valid until the last day of the third calendar year following the year in which the withholding certificate or written statement is signed. Documentary evidence is generally valid until the last day of the third calendar year following the year in which the documentary evidence is provided to the withholding agent. Nevertheless, documentary evidence that contains an expiration date may be treated as valid until that expiration date if doing so would provide a longer period of validity than the three-year period. Notwithstanding the validity periods permitted by paragraphs (c)(6)(ii)(A) through (D) of this section, a withholding certificate, written statement, and documentary evidence will cease to be valid if the withholding agent has knowledge of a change in circumstances that makes the information on the documentation incorrect. Therefore, a withholding agent is required to institute procedures to ensure that any change to the customer master files that constitutes a change in circumstances described in paragraph (c)(6)(ii)(E) of this section is identified by the withholding agent. In addition, a withholding agent is required to notify any person providing documentation of the person's obligation to notify the withholding agent of a change in circumstances.

(B) * * *

(*2*) A beneficial owner withholding certificate and documentary evidence supporting the individual's claim of foreign status when both are provided together (as defined in § 1.1441–1(e)(4)(ii)(B)(*1*)) by an individual claiming foreign status, if the withholding agent does not have a current U.S. residence or U.S. mailing address for the payee and does not have one or more current U.S. telephone numbers that are the only telephone numbers the withholding agent has for the payee;

(*3*) A beneficial owner withholding certificate that is provided by an entity described in paragraph (c)(6)(ii)(C)(*2*) of this section (other than an entity described in paragraph (c)(6)(ii)(C)(*2*)(*iii*) of this section) and documentary evidence establishing the entity's foreign status when both are received by the withholding agent before the validity period of either would otherwise expire under paragraph (c)(6)(ii)(A) of this section;

* * * * *

(*5*) A withholding certificate, written statement, or documentary evidence furnished by a foreign government, government of a U.S. territory, foreign central bank (including the Bank for International Settlements), international organization, or entity that is wholly owned by any such entities;

(*6*) Documentary evidence that is not generally renewed or amended (such as a certificate of incorporation); and

(*7*) For the validity period of a beneficial owner withholding certificate provided by an entity described in paragraph (c)(6)(ii)(C)(*2*)(*iii*) of this section, see § 1.1441–1(e)(4)(ii).

(C) * * *

(*2*) * * *

(*iii*) A section 501(c) entity described in § 1.1471–5(e)(5)(v);

* * * * *

(*x*) A sponsored FFI described in § 1.1471–5(f)(1)(i)(F);

* * * * *

(*3*) A withholding certificate or written statement of an owner-documented FFI, but not including the withholding statements, documentary evidence, and withholding certificates of its owners (unless such documentation is permitted indefinite validity under another provision);

(*4*) An owner reporting statement associated with a withholding certificate of an owner-documented FFI, provided the account balance of all accounts held by such owner-documented FFI with the withholding agent does not exceed $1,000,000 on the later of June 30, 2014, or the last day of the calendar year in which the account was opened, and the last day of each subsequent calendar year preceding the payment, applying the aggregation principles of § 1.1471–5(b)(4)(iii), and the owner-documented FFI does not have any contingent beneficiaries or designated classes with unidentified beneficiaries; and

(*5*) A withholding certificate of a passive NFFE or excepted territory NFFE, provided the account balance of all accounts held by such entity with the withholding agent does not exceed $1,000,000 on the later of June 30, 2014, or the last day of the calendar year in which the account was opened, and the last day of each subsequent calendar year preceding the payment, applying the aggregation principles of § 1.1471–5(b)(4)(iii), and the withholding agent does not know or have reason to know that the entity has any contingent beneficiaries or designated classes with unidentified beneficiaries.

* * * * *

(E) * * *

(*2*) *Obligation to notify withholding agent of a change in circumstances.* If a change in circumstances makes any information on a certificate or other documentation incorrect, then the person whose name is on the certificate or other documentation must inform the withholding agent within 30 days of the change and furnish a new certificate, a new written statement, or new documentary evidence. Notwithstanding the previous sentence, if an FFI's chapter 4 status changes solely because the jurisdiction in which the FFI is resident, organized, or located

is later treated as having an IGA in effect (including a jurisdiction that had a Model 2 IGA in effect and is later treated as having a Model 1 IGA in effect) or ceases to be treated as having an IGA in effect, in lieu of providing a new withholding certificate, the FFI may, within 30 days of such change in circumstances, provide to the withholding agent oral or written confirmation (including by email) of the change in the FFI's chapter 4 status. If an intermediary or a flow-through entity becomes aware that a certificate or other appropriate documentation it has furnished to the person from whom it collects a payment is no longer valid because of a change in the circumstances of the person who issued the certificate or furnished the other appropriate documentation, then the intermediary or flow-through entity must notify the person from whom it collects the payment of the change in circumstances within 30 days of the date that it knows or has reason to know of the change in circumstances. It must also obtain a new withholding certificate or new appropriate documentation to replace the existing certificate or documentation the validity of which has expired due to the change in circumstances.

(*3*) *Withholding agent's obligation with respect to a change in circumstances.* A certificate or other documentation becomes invalid on the date that the withholding agent holding the certificate or documentation knows or has reason to know that circumstances affecting the correctness of the certificate or documentation have changed. A withholding agent will not have reason to know of a change in circumstances with respect to an FFI's chapter 4 status that results solely because a jurisdiction is later treated as having an IGA in effect (including a jurisdiction that had a Model 2 IGA in effect and is later treated as having a Model 1 IGA in effect) until the withholding agent obtains the confirmation of a change in the FFI's chapter 4 status described in paragraph (c)(6)(ii)(E)(*2*) of this section (which will become part of the FFI's withholding certificate or other documentation retained by the withholding agent). See paragraph (c)(6)(ii)(E)(*4*) of this section for when a withholding agent has reason to know of a change in circumstances that results solely because a jurisdiction ceases to be treated as having an IGA in effect. A withholding agent may choose to treat a person as having the same chapter 4 status that it had prior to the change in circumstances until the earlier of 90 days from the date that the certificate or documentation became invalid due to the change in circumstances or the date that a new certificate or new documentation is obtained. See, however, § 1.1441–1(e)(4)(ii)(D) for requirements, including the requirement to withhold under chapter 3 or section 3406, applicable when a change in circumstances occurs for purposes of chapter 3 and the related grace period allowed under § 1.1441–1(b)(3)(iv). A withholding agent may rely on a certificate without having to inquire into possible changes of circumstances that may affect the validity of the statement, unless it knows or has reason to know that circumstances have changed. A withholding agent may require a new certificate or additional documentation at any time prior to a payment, regardless of whether the withholding agent knows or has reason to know that any information stated on the certificate or documentation has changed.

(*4*) [Reserved]. For further guidance, see § 1.1471–3T(c)(6)(ii)(E)(*4*).

* * * * *

(iv) *Electronic transmission of withholding certificate, written statement, and documentary evidence.* A withholding agent may accept a withholding certificate (including an acceptable substitute form), a written statement, or other such form as the IRS may prescribe, electronically in accordance with the requirements set forth in § 1.1441–1(e)(4)(iv).

(v) * * *

(A) *In general.* A withholding agent may substitute its own form for an official Form W–8 (or such other official form as the IRS may prescribe). A substitute form will be acceptable if it contains provisions that are substantially similar to those of the official form, it contains the same certifications relevant to the transactions as are contained on the official form and these certifications are clearly set forth, and the substitute form includes a signature-under-penalties-of-perjury statement identical to the one on the official form. The substitute form is acceptable even if it does not contain all of the provisions contained on the official form, so long as it contains those provisions that are relevant to the transaction for which it is furnished. A withholding agent may choose to provide a substitute form that does not include all of the chapter 4 statuses provided on the official version but the substitute form must include any chapter 4 status for which withholding may apply, such as the categories for a nonparticipating FFI or passive NFFE. A withholding agent that uses a substitute form must furnish instructions relevant to the substitute form only to the extent and in the manner specified in the instructions to the official form. A withholding agent may use a substitute form that is written in a language other than English and may accept a form that is filled out in a language other than English, but the withholding agent must make available an English translation of the form and its contents to the IRS upon request. A withholding agent may refuse to accept a certificate (including the official Form W–8) from a person if the certificate provided is not an acceptable substitute form provided by the withholding agent, but only if the withholding agent furnishes the person with an acceptable substitute form within five business days of receipt of an unacceptable form from the person. In that case, the substitute form is acceptable only if it contains a notice that the withholding agent has refused to accept the form submitted by the person and that the person must submit the acceptable form provided by the withholding agent in order for the person to be treated as having furnished the required withholding certificate.

(B) *Non-IRS form for individuals.* A withholding agent may also substitute its own form for an official Form W–8BEN (for individuals), regardless of whether the substitute form is titled a Form W–8. However, in addition to the name and address of the individual that is the payee or beneficial owner, the substitute form must provide all countries in which the individual is resident for tax purposes, country of birth, a tax identification number (if any) for each country of residence, the individual's date of birth, and must contain a signed and dated certification made under penalties of perjury that the information provided on the form is accurate and will be updated by the individual within 30 days of a change in circumstances that causes the form to become incorrect. Notwithstanding the previous sentence, the signed certification provided on a form need not be signed under penalties of perjury if the form is accompanied by documentary evidence that supports the individual's claim of foreign status. Such documentary evidence may be the same documentary evidence that is used to support foreign status in the case of a payee whose account has U.S. indicia as described in paragraph (e) of this section or § 1.1471–4(c)(4)(i)(A). The form may also request other information required for purposes of tax or AML due diligence in the United States or in other countries.

* * * * *

(vii) *Reliance on a prior version of a withholding certificate.* Upon the issuance by the IRS of an updated version of a withholding certificate, a withholding agent may continue to accept the prior version of the withholding certificate in accordance with the requirements of § 1.1441–1(e)(4)(viii)(C) and without regard to whether a withholdable payment associated with the certificate is subject to withholding under § 1.1441–2(a).

(7) * * *

(i) *Curing inconsequential errors on a withholding certificate.* A withholding agent may treat a withholding certificate as valid, notwithstanding that the withholding certificate contains an inconsequential error, if the withholding agent has sufficient documentation on file to supplement the information missing from the withholding certificate due to the error. In such case, the documentation relied upon to cure the inconsequential error must be conclusive. For example, a withholding certificate in which the individual submitting the form abbreviated the country of residence in an ambiguous way may be treated as valid, notwithstanding the abbreviation, if the withholding agent has government issued identification for the person from a country that reasonably matches the abbreviation. On the other hand, an ambiguous abbreviation for the country of residence that does not reasonably match the country of residence shown on the person's passport is not an inconsequential error. A failure to select an entity type on a withholding certificate is not an inconsequential error, even if the withholding agent has an organization document for the entity that provides sufficient information to determine the person's entity type, if the person was eligible to make an election under § 301.7701–3(c)(1)(i) of this chapter (that is, a check-the-box election). A failure to check a box to make a required certification on the withholding certificate or to provide a country of residence or a country under which treaty benefits are sought is not an inconsequential error. In addition, information on a withholding certificate that contradicts other information contained on the withholding certificate or in the customer master file is not an inconsequential error.

(ii) [Reserved]. For further guidance, see § 1.1471–3T(c)(7)(ii).

(8) * * *

(iii) *Shared account systems.* A withholding agent may rely on documentation furnished by a customer for an account held at another branch location of the same withholding agent or at a branch location of a member of the expanded affiliated group of the withholding agent if the withholding agent treats all accounts that share documentation as a consolidated obligation and the withholding agent and the other branch location or expanded affiliated group member share an information system, electronic or otherwise, that is described in this paragraph (c)(8)(iii). The system must allow the withholding agent to easily access data regarding the nature of the documentation, the information contained in the documentation (including a copy of the documentation itself), and the validity status of the documentation. The information system must also allow the withholding agent to easily transmit data into the system regarding any facts of which it becomes aware that may affect the reliability of the documentation. The withholding agent must be able to establish, to the extent applicable, how and when it has transmitted data regarding any facts of which it became aware that may affect the reliability of the documentation and must be able to establish that any data it has transmitted to the information system has been processed and appropriate due diligence has been exercised regarding the validity of the documentation. A withholding agent that opts to rely upon the chapter 4 status designated for the payee in the shared account system without obtaining and reviewing copies of the documentation supporting the status must be able to produce all documentation (or a notation of the documentary evidence reviewed if the withholding agent is not required to retain copies of the documentary evidence) relevant to the chapter 4 status claimed upon request by the IRS and will be liable for any underwithholding that results from any failure to assign the correct status based upon the available information.

* * * * *

(v) *Preexisting account.* A withholding agent may rely on documentation furnished by a payee for a preexisting account held at another branch location of the same withholding agent or at a branch location of a member of the expanded affiliated group of the withholding agent if the withholding agent obtains and reviews copies of such documentation supporting the chapter 4 status designated for the payee and the withholding agent has no reason to know that, at the time the documentation is obtained by the withholding agent, the documentation is unreliable or incorrect. For example, the withholding agent may not rely on documentation furnished by a payee for a preexisting account held at another branch location of the same withholding agent or at a branch location of a member of the expanded affiliated group of the withholding agent if, based on information in the withholding agent's account records, the withholding agent has reason to know that such documentation is unreliable or incorrect.

(9) * * *

(ii) * * *

(B) The third-party data provider must be in the business of providing credit reports or business reports to customers unrelated to it and must have reviewed all information it has for the entity and verified that such additional information does not conflict with the chapter 4 status claimed by the entity. For purposes of this paragraph (c)(9)(ii)(B), a customer is related to a third-party data provider if they have a relationship with each other that is described in section 267(b).

* * * * *

(v) *Reliance upon documentation for accounts acquired in merger or bulk acquisition for value.* A withholding agent that acquires an account from a predecessor or transferor in a merger or bulk acquisition of accounts for value is permitted to rely upon valid documentation (or copies of valid documentation) collected by the predecessor or transferor. In addition, a withholding agent that acquires an account in a merger or bulk acquisition of accounts for value, other than a related party transaction, from a U.S. withholding agent, a participating FFI that has completed all due diligence required under its agreement with respect to the accounts transferred, or a reporting Model 1 FFI that has completed all due diligence required pursuant to the applicable Model 1 IGA, may also rely upon the predecessor's or transferor's determination of the chapter 4 status of an account holder for a transition period of the lesser of six months from the date of the merger or until the acquirer knows that the claim of status is inaccurate or a change in circumstances occurs. At the end of the transition period, the acquirer will be permitted to rely upon the predecessor's determination as to the chapter 4 status of the account holder only if the documentation that the acquirer has for the account holder, including documentation obtained from the predecessor or transferor, supports the chapter 4 status claimed. An acquirer that discovers at the end of the transition period that the chapter 4 status assigned by the predecessor or

transferor to the account holder was incorrect and, as a result, has not withheld as it would have been required to but for its reliance upon the predecessor's determination, will be required to withhold on payments made after the transition period, if any, to the account holder equal to the amount of tax that should have been withheld during the transition period but for the erroneous classification as to the account holder's status. For purposes of this paragraph (c)(9)(v), a related party transaction is a merger or sale of accounts in which either the acquirer is in the same expanded affiliated group as the predecessor or transferor prior to or after the merger or acquisition or the predecessor or transferor (or shareholders of the predecessor or transferor) obtains a controlling interest in the acquirer or in a newly formed entity created for purposes of the merger or acquisition. See § 1.1471–4(c)(2)(ii)(B) for an additional allowance for a participating FFI to rely upon the determination made by another participating FFI as to the chapter 4 status of an account obtained as part of a merger or bulk acquisition for value.

(d) * * *

(1) *Reliance on pre-FATCA Form W–8.* To establish a payee's status as a foreign individual, foreign government, government of a U.S. territory, or international organization, a withholding agent may rely upon a pre-FATCA Form W–8 in lieu of obtaining an updated version of the withholding certificate. This reliance is only available in the case of a payee that is an international organization if such payee is described under section 7701(a)(18). To establish the chapter 4 status of a payee that is not a foreign individual, a foreign government, or an international organization, a withholding agent may, for payments made prior to January 1, 2017, rely upon a pre-FATCA Form W–8 in lieu of obtaining an updated version of the withholding certificate if the withholding agent has one or more forms of documentary evidence described in paragraphs (c)(5)(ii), as necessary, to establish the chapter 4 status of the payee and the withholding agent has obtained any additional documentation or information required for the particular chapter 4 status (such as withholding statements, certifications as to owners, or required documentation for underlying owners), as set forth under the specific payee rules in paragraphs (d)(2) through (12) of this section. See paragraph (d)(4)(ii) and (iv) of this section for specific requirements applicable when relying upon a pre-FATCA Form W–8 for a participating FFI or registered deemed-compliant FFI. This paragraph (d)(1) does not apply to nonregistering local banks, FFIs with only low-value accounts, sponsored FFIs, owner-documented FFIs, territory financial institutions that are not the beneficial owners of the payment, foreign central banks (other than a foreign central bank specifically identified as an exempt beneficial owner under a Model 1 IGA or Model 2 IGA), or international organizations not described under section 7701(a)(18).

(2) * * *

(i) *In general.* A withholding agent must treat a payee as a U.S. person, including a payee that is a foreign branch of a U.S. person (other than a branch that is treated as a QI) or is an FFI that has elected to be treated as a U.S. person for tax purposes under section 953(d), if it has a valid Form W–9 associated with the payee or if it must presume the payee is a U.S. person under the presumption rules set forth in paragraph (f) of this section. Consistent with the presumption rules in paragraph (f)(3) of this section, a withholding agent must treat a payee that has provided a valid Form W–9 as a specified U.S. person unless the Form W–9 contains a certification that the payee is other than a specified U.S. person. Notwithstanding the foregoing, a withholding agent receiving a Form W–9 indicating that the payee is other than a specified U.S. person must treat the payee as a specified U.S. person if the withholding agent knows or has reason to know that the payee's claim that it is other than a specified U.S. person is incorrect. For example, a withholding agent that receives a Form W–9 from a payee that is an individual would be required to treat the payee as a specified U.S. person regardless of whether the Form W–9 indicates that the payee is not a specified U.S. person, because an individual that is a U.S. person is not excepted from the definition of a specified U.S. person.

* * * * *

(iii) *Preexisting obligations.* As an alternative to applying the rules in paragraphs (d)(2)(i) and (ii) of this section, a withholding agent that makes a payment with respect to a preexisting obligation may treat a payee as a U.S. person if it has a notation in its files that it has previously reviewed a Form W–9 that established that the payee is a U.S. person and has retained the payee's TIN. A withholding agent, other than a participating FFI or registered deemed-compliant FFI, may also treat a payee of a payment with respect to a preexisting obligation as a U.S. person if it has previously classified the payee as a U.S. person for purposes of chapter 3 or 61 and established (through the documentation or the application of the rules in § 1.6049–4(c)(1)(ii)) that the payee is an exempt recipient for purposes of chapter 61.

* * * * *

(4) * * *

(i) *In general.* Except as otherwise provided in paragraphs (d)(4)(ii) through (iv) or paragraphs (e)(3)(i) and (ii) of this section, a withholding agent may treat a payee as a participating FFI or registered deemed-compliant FFI only if the withholding agent has a withholding certificate identifying the payee as a participating FFI, registered deemed-compliant FFI, or branch thereof (including an entity that is disregarded as an entity separate from the FFI), and the withholding certificate contains a GIIN described in paragraph (e)(3) of this section that is verified against the published IRS FFI list in the manner described in paragraph (e)(3) of this section (indicating when a withholding agent may rely upon a GIIN). For when a withholding agent may treat a payee as a registered deemed-compliant FFI that is a sponsored investment entity or sponsored controlled foreign corporation, see paragraph (d)(4)(vi) of this section. See paragraph (c)(3)(iii) of this section for additional requirements that apply to a valid withholding certificate provided by a participating FFI or registered deemed-compliant FFI that is a flow-through entity or is acting as an intermediary with respect to the payment.

(ii) *Exception for payments made prior to January 1, 2017, with respect to preexisting obligations (transitional).* For payments made prior to January 1, 2017, with respect to a preexisting obligation, a withholding agent may treat a payee as a participating FFI or registered deemed-compliant FFI, or branch thereof (including an entity that is disregarded as an entity separate from the FFI), if the payee has provided the withholding agent with a pre-FATCA Form W–8 and (either orally or in writing) its GIIN and has indicated whether it is a participating FFI or a registered deemed-compliant FFI (or whether such branch or disregarded entity is treated as a participating FFI or a registered deemed-compliant FFI), and the withholding agent has verified the GIIN of the FFI, branch, or disregarded entity, as the context requires, in the manner described in paragraph (e)(3) of this section.

(iii) *Exception for offshore obligations.* A withholding agent that makes a payment, other than a payment

of U.S. source FDAP income, with respect to an offshore obligation may treat a payee as a participating FFI or registered deemed-compliant FFI, or branch thereof (including an entity that is disregarded as an entity separate from the FFI), if the payee provides the withholding agent with its GIIN and states whether the payee is a participating FFI or a registered deemed-compliant FFI, and the withholding agent verifies the GIIN in the manner described in paragraph (e)(3) of this section. A withholding agent that makes a payment of U.S. source FDAP income with respect to an offshore obligation may treat the payee as a participating FFI or registered deemed-compliant FFI, or branch thereof (including an entity that is disregarded as an entity separate from the FFI) if—

(A) * * *

(*1*) A written statement that contains the payee's GIIN, states that the payee is the beneficial owner of the payment, and indicates whether the payee is treated as a participating FFI or a registered deemed-compliant FFI, as appropriate; and

* * * * *

(iv) * * *

(A) For payments made prior to January 1, 2015, a withholding agent may treat a payee that is an FFI or branch of an FFI (including an entity that is disregarded as an entity separate from the FFI) as a reporting Model 1 FFI if it receives a withholding certificate from the payee indicating that the payee is a reporting Model 1 FFI and the country in which the payee is a reporting Model 1 FFI, regardless of whether the certificate contains a GIIN for the payee.

* * * * *

(C) For payments made prior to January 1, 2015, with respect to an offshore obligation, a withholding agent may treat a payee as a reporting Model 1 FFI if the payee informs the withholding agent that the payee is a reporting Model 1 FFI and provides the country in which the payee is a reporting Model 1 FFI. In the case of a payment of U.S. source FDAP income, such payee must also provide a written statement that it is the beneficial owner and documentary evidence supporting the payee's claim of foreign status (as described in paragraph (c)(5)(i) of this section).

(D) For payments made on or after January 1, 2015, that do not constitute U.S. source FDAP income, the withholding agent may continue to treat a payee as a reporting Model 1 FFI if the payee provides the withholding agent with its GIIN, either orally or in writing, and the withholding agent verifies the GIIN in the manner described in paragraph (e)(3) of this section.

(v) *Reason to know.* See paragraph (e) of this section for when a withholding agent will have reason to know that a withholding certificate or written statement provided by a payee claiming status as a participating FFI or registered deemed-compliant FFI is incorrect or invalid.

(vi) *Sponsored investment entities and sponsored controlled foreign corporations*—(A) *In general.* A withholding agent may treat a payee as a sponsored investment entity or sponsored controlled foreign corporation if the withholding agent has a withholding certificate identifying the payee as a sponsored investment entity or sponsored controlled foreign corporation (as applicable) and the withholding certificate includes the GIIN of the sponsored investment entity or sponsored controlled foreign corporation entity (as applicable), which the withholding agent has verified against the published IRS FFI list in the manner described in paragraph (e)(3)(i) of this section.

(B) *Payments made prior to January 1, 2017 (transitional).* For payments made prior to January 1, 2017, a sponsored investment entity or sponsored controlled foreign corporation may provide the GIIN of its sponsoring entity on the withholding certificate, which the withholding agent must verify against the published IRS FFI list in the manner described in paragraph (e)(3)(i) of this section.

(C) *Payments made after December 31, 2016, to payees documented prior to January 1, 2017.* For a payment made after December 31, 2016, to a payee that the withholding agent has documented prior to January 1, 2017, as a sponsored investment entity or sponsored controlled foreign corporation with a valid withholding certificate that includes the GIIN of the sponsoring entity, the withholding agent must obtain and verify the GIIN of the sponsored investment entity or sponsored controlled foreign corporation against the published IRS FFI list in the manner described in paragraph (e)(3)(i) of this section by March 31, 2017. Notwithstanding the preceding sentence, a GIIN is not required for a payee that provides a valid withholding certificate prior to January 1, 2017, that identifies the payee as a sponsored FFI and includes the GIIN of the sponsoring entity if the withholding agent determines, based on information provided on the withholding certificate, that the sponsored entity is resident, organized, or located in a jurisdiction that is treated as having a Model 1 IGA in effect. A withholding agent required to obtain a GIIN of the sponsored investment entity or sponsored controlled foreign corporation under this paragraph (d)(4)(vi)(C) may obtain such GIIN by oral or written confirmation (including by email) rather than obtaining a new withholding certificate, provided that the withholding agent retains a record of the confirmation, which will become part of the withholding certificate.

(5) * * *

(i) *In general.* Except as otherwise provided in this paragraph (d)(5), a withholding agent may treat a payee as a certified deemed-compliant FFI, other than a sponsored, closely held investment vehicle, if the withholding agent has a withholding certificate that identifies the payee as a certified deemed-compliant FFI, and the withholding certificate contains a certification by the payee that it meets the requirements to qualify as the type of certified deemed-compliant FFI identified on the withholding certificate. See paragraph (c)(3)(iii) of this section for additional requirements that apply to a valid withholding certificate provided by a certified deemed-compliant FFI that is a flow-through entity or is acting as an intermediary with respect to the payment, or by a U.S. branch of a certified deemed-compliant FFI.

(ii) *Sponsored, closely held investment vehicles*—(A) *In general.* A withholding agent may treat a payee as a sponsored, closely held investment vehicle described in § 1.1471–5(f)(2)(iii) if the withholding agent can reliably associate the payment with a withholding certificate that identifies the payee as a sponsored, closely held investment vehicle and includes the sponsoring entity's GIIN, which the withholding agent has verified against the published IRS FFI list in the manner described in paragraph (e)(3) of this section. In addition to the standards of knowledge rules indicated in paragraph (e) of this section, a withholding agent will have reason to know that the payee is not a sponsored, closely held investment vehicle described in § 1.1471–5(f)(2)(iii) if its AML due diligence indicates that the payee has in excess of 20 individual investors that own direct and/or indirect interests in the payee. See paragraph (c)(3)(iii) of this section for additional requirements that apply to a valid withholding certificate provided by a sponsored, closely held investment vehicle that is a flow-through entity or is acting as an

intermediary with respect to the payment, or by a U.S. branch of such vehicle.

(B) *Offshore obligations.* A withholding agent that makes a payment with respect to an offshore obligation may treat a payee as a sponsored, closely held investment vehicle if it obtains a written statement that indicates that the payee is a sponsored, closely held investment vehicle, and provides the sponsoring entity's GIIN, which the withholding agent has verified in the manner described in paragraph (e)(3) of this section. In the case of a payment of U.S. source FDAP income, the written statement must also indicate that the payee is the beneficial owner and must be supplemented with documentary evidence supporting the payee's claim of foreign status (as described in paragraph (c)(5)(i) of this section).

(iii) *Certain investment entities that do not maintain financial accounts*—(A) *In general.* A withholding agent may treat a payee as an investment entity that does not maintain financial accounts described in § 1.1471–5(f)(2)(v) if the withholding agent can reliably associate the payment with a withholding certificate that identifies the payee as an investment entity that does not maintain financial accounts. In addition to the standards of knowledge rules indicated in paragraph (e) of this section, a withholding agent will have reason to know that the payee is not an investment entity that does not maintain financial accounts described in § 1.1471–5(f)(2)(v) if its AML due diligence documentation indicates that the payee has financial accounts.

(B) *Offshore obligations.* A withholding agent that makes a payment with respect to an offshore obligation may treat a payee as an investment advisor and investment manager described in § 1.1471–5(f)(2)(v) if it obtains a written statement that indicates that the payee is an investment advisor and investment manager. In the case of a payment of U.S. source FDAP income, the written statement must also indicate that the payee is the beneficial owner and must be supplemented with documentary evidence supporting the payee's claim of foreign status (as described in paragraph (c)(5)(i) of this section).

(6) * * *

(i) * * *

(F) [Reserved]. For further guidance, see § 1.1471–3T(d)(6)(i)(F).

* * * * *

(vii) * * *

(A) * * *

(*1*) The payment is made with respect to an offshore obligation that has a balance or value not exceeding $1,000,000 on the later of June 30, 2014, or the last day of the calendar year in which the account was opened, and the last day of each subsequent year preceding the payment, applying the aggregation principles of § 1.1471–5(b)(4);

* * * * *

(7) *Nonreporting IGA FFIs*—(i) *In general.* A withholding agent may treat a payee as a nonreporting IGA FFI described in § 1.1471–1(b)(83)(ii) (unless such FFI is treated as a registered deemed-compliant FFI under Annex II of the Model 2 IGA) or as a nonreporting IGA FFI described in § 1.1471–1(b)(83)(i), (iv), or (v) if the withholding agent has a withholding certificate identifying the payee, or the relevant branch of the payee, as a nonreporting IGA FFI. A withholding agent may treat a payee as a nonreporting IGA FFI described in § 1.1471–1(b)(83)(ii) that is treated as a registered deemed-compliant FFI under Annex II of the Model 2 IGA or as a nonreporting IGA FFI described in § 1.1471–1(b)(83)(iii) if the withholding agent has a withholding certificate identifying the payee, or the relevant branch of the payee, as a nonreporting IGA FFI, and the withholding certificate contains a GIIN for the payee that is verified against the published IRS FFI list in the manner described in paragraph (e)(3) of this section.

* * * * *

(11) * * *

(viii) * * *

(A) *Exception for payments made prior to January 1, 2017, with respect to preexisting obligations of $1,000,000 or less (transitional).* A withholding agent that makes a payment prior to January 1, 2017, with respect to a preexisting obligation with a balance or value not exceeding $1,000,000 on June 30, 2014, and December 31, 2015, applying the aggregation principles of § 1.1471–5(b)(4)(iii), may treat a payee as an excepted territory NFFE described in § 1.1472–1(c)(1)(iii) if the withholding agent—

* * * * *

(C) *Exception for preexisting offshore obligations of $1,000,000 or less.* A withholding agent that makes a payment with respect to an offshore obligation that is also a preexisting obligation with a balance or value not exceeding $1,000,000 on June 30, 2014 (or the effective date of the FFI agreement for a withholding agent that is a participating FFI) and the last day of each subsequent calendar year preceding the payment, applying the aggregation principles of § 1.1471–5(b)(4)(iii), may rely upon its review conducted for AML due diligence purposes to determine whether the owners of the payee are bona fide residents of the U.S. territory in which the payee is organized, in lieu of obtaining a written statement or documentary evidence described in paragraph (d)(11)(viii)(B) of this section. The preceding sentence applies only if the withholding agent is subject, with respect to such account, to the laws of a FATF-compliant jurisdiction and has identified the residence of the owners. The withholding agent relying upon this paragraph (d)(11)(viii)(C) must still obtain a written statement, documentary evidence (as provided in paragraph (d)(11)(viii)(B) of this section), or preexisting account documentary evidence (as described in paragraph (c)(5)(ii)(B) of this section) establishing that the payee is an entity other than a depository institution, custodial institution, or specified insurance company organized in a U.S. territory.

* * * * *

(x) *Identifying a direct reporting NFFE (other than a sponsored direct reporting NFFE)*—(A) *In general.* A withholding agent may treat a payment as having been made to a direct reporting NFFE (other than a sponsored direct reporting NFFE) if it has a withholding certificate that identifies the payee as a direct reporting NFFE and the withholding certificate contains a GIIN for the payee that is verified against the published IRS FFI list in the manner described in paragraph (e)(3)(iii) of this section (indicating when a withholding agent may rely upon a GIIN).

(B) *Exception for offshore obligations.* A withholding agent that makes a payment with respect to an offshore obligation may treat the payment as made to a direct reporting NFFE if the withholding agent has—

(*1*)(*i*) General documentary evidence (as described in paragraph (c)(5)(ii)(A) of this section) for the payee providing sufficient information to determine that the payee is a foreign entity that is not a financial institution; or

(*ii*) A written statement that the payee is a foreign entity that is not a financial institution and, for a payment of U.S. source FDAP income, documentary evidence supporting the payee's claim of foreign status (as described in paragraph (c)(5)(i) of this section), and

(*2*) Received (either orally or in writing) a GIIN from the direct reporting NFFE and has verified the GIIN in the manner described in paragraph (e)(3)(iii) of this section.

(C) *Special rule for preexisting offshore obligations.* A withholding

agent that makes a payment with respect to an offshore obligation that is also a preexisting obligation may treat the payee as a direct reporting NFFE if the withholding agent has preexisting account documentary evidence (as described in paragraph (c)(5)(ii)(B) of this section) providing sufficient information to determine that the payee is a foreign entity that is not a financial institution and it has received (either orally or in writing) a GIIN from the direct reporting NFFE and has verified the GIIN in the manner described in paragraph (e)(3)(iii) of this section.

(xi) *Identifying a sponsored direct reporting NFFE*—(A) *In general.* A withholding agent may treat a payment as having been made to a sponsored direct reporting NFFE if it has a withholding certificate that identifies the payee as a sponsored direct reporting NFFE and the withholding certificate includes the sponsored direct reporting NFFE's GIIN, which the withholding agent has verified against the published IRS FFI list in the manner described in paragraph (e)(3)(iv) of this section (indicating when a withholding agent may rely upon a GIIN).

(*1*) *Payments made prior to January 1, 2017 (transitional).* For payments prior to January 1, 2017, a sponsored direct reporting NFFE may provide the GIIN of its sponsoring entity on the withholding certificate, which the withholding agent must verify against the published IRS FFI list in the manner described in paragraph (e)(3)(iv) of this section.

(*2*) *Payments made after December 31, 2016, to payees documented prior to January 1, 2017.* For a payment made after December 31, 2016, to a payee that the withholding agent has documented prior to January 1, 2017, as a sponsored direct reporting NFFE with a valid withholding certificate that includes the GIIN of the sponsoring entity, the withholding agent must obtain and verify the GIIN of the sponsored direct reporting NFFE against the published IRS FFI list in the manner described in paragraph (e)(3)(i) of this section by March 31, 2017. A withholding agent required to obtain a GIIN of the sponsored direct reporting NFFE in the preceding sentence may obtain such GIIN by oral or written confirmation (including by email) rather than obtaining a new withholding certificate, provided that the withholding agent retains a record of the confirmation, which will become part of the withholding certificate.

(B) *Exception for offshore obligations.* A withholding agent that makes a payment with respect to an offshore obligation may treat the payment as made to a sponsored direct reporting NFFE if the withholding agent has—

(*1*) A written statement that the payee is a foreign entity that is a sponsored direct reporting NFFE and, for a payment of U.S. source FDAP income, documentary evidence supporting the payee's claim of foreign status (as described in paragraph (c)(5)(i) of this section), and

(*2*) Received (either orally or in writing) the GIIN of the sponsored direct reporting NFFE and has verified the GIIN in the manner described in paragraph (e)(3)(iv) of this section. For payments prior to January 1, 2017, such requirement may be fulfilled by receiving (either orally or in writing) the GIIN of the sponsoring entity to the extent that the sponsored direct reporting NFFE has not obtained a GIIN.

(xii) *Identification of excepted inter-affiliate FFI*—(A) *In general.* A withholding agent may treat a payee as an excepted inter-affiliate FFI described in § 1.1471–5(e)(5)(iv) if it has obtained a withholding certificate identifying the payee as such an entity.

(B) *Offshore obligations.* A withholding agent that makes a payment with respect to an offshore obligation may treat the payment as made to an excepted inter-affiliate FFI described in § 1.1471–5(e)(5)(iv) if the withholding agent obtains a written statement in which the payee certifies that it is a foreign entity operating as an excepted inter-affiliate FFI and that it is a member of an expanded affiliated group of participating FFIs or registered deemed-compliant FFIs. In the case of a payment of U.S. source FDAP income, the written statement must also indicate that the payee is the beneficial owner and must be supplemented with documentary evidence supporting the payee's claim of foreign status (as described in paragraph (c)(5)(i) of this section).

(C) *Reason to know.* A withholding agent that is not a member of the payee's expanded affiliated group has reason to know that an entity is not an excepted inter-affiliate FFI if it makes any payments (other than a payment of bank deposit interest) to such entity.

(12) * * *

(iii) * * *

(A) *In general.* A passive NFFE will be required to provide to the withholding agent either a written certification (contained on a withholding certificate or in a written statement) that it does not have any substantial U.S. owners or the name, address, and TIN of each substantial U.S. owner of the NFFE, to avoid being withheld upon under § 1.1472–1(b).

(B) *Exception for preexisting obligations of $1,000,000 or less (transitional).* A withholding agent that makes a payment prior to January 1, 2017, with respect to a preexisting obligation with a balance or value not exceeding $1,000,000 on June 30, 2014, and December 31, 2015, applying the aggregation principles of § 1.1471–5(b)(4)(iii), may rely upon its review conducted for AML due diligence purposes to identify any substantial U.S. owners of the payee in lieu of obtaining the certification or information required in paragraph (d)(12)(iii)(A) of this section if the withholding agent is subject, with respect to such obligation, to the laws of a FATF-compliant jurisdiction and has identified the residence of any controlling persons (within the meaning of the withholding agent's AML due diligence rules). A withholding agent that makes a payment with respect to an offshore obligation that is also a preexisting obligation with a balance or value not exceeding $1,000,000 on June 30, 2014, (or the effective date of the FFI agreement for a withholding agent that is a participating FFI) and the last day of each subsequent calendar year preceding the payment, applying the aggregation principles of § 1.1471–5(b)(4)(iii), may rely upon its review conducted for AML due diligence purposes to identify any substantial U.S. owners of the payee in lieu of obtaining the certification or information required in paragraph (d)(12)(iii)(A) of this section if the withholding agent is subject, with respect to such obligation, to the laws of a FATF-compliant jurisdiction and has identified the residence of any controlling persons (within the meaning of the withholding agent's AML due diligence rules).

(e) * * *

(2) *Notification by the IRS.* A withholding agent that has received notification by the IRS that a claim of status as a U.S. person, a participating FFI, a deemed-compliant FFI, or other entity entitled to a reduced rate of withholding under section 1471 or 1472 is incorrect knows that such a claim is incorrect beginning on the date that is 30 days after the date the notice is received.

(3) *GIIN verification*—(i) *In general.* A withholding agent that has received a payee's claim of status as a participating FFI or registered deemed-compliant FFI, and that is required under paragraph (d)(4) of this section to confirm that the FFI or branch thereof (including an entity that is disregarded as an entity separate from the FFI) claiming status as a participating FFI or registered deemed-compliant FFI has a GIIN that appears on the published IRS FFI list, has reason to know that such payee is

not such a financial institution if the payee's name (including a name reasonably similar to the name the withholding agent has on file for the payee) and GIIN do not appear on the most recently published IRS FFI list within 90 days of the date that the claim is made. For purposes of this paragraph (e)(3)(i), the GIIN that the withholding agent must confirm is, with respect to a payee that is a participating FFI or registered deemed-compliant FFI, the GIIN assigned to the FFI identifying its country of residence for tax purposes (or place of organization if the FFI has no country of residence) or, with respect to a payment that is made to a branch (including a disregarded entity) of a participating FFI or registered deemed-compliant FFI located outside of the FFI's country of residence or organization, the GIIN of the branch (or disregarded entity) receiving the payment. The withholding agent will have reason to know that a withholdable payment is made to a branch (including a disregarded entity) of a participating or registered deemed-compliant FFI that is not itself a participating FFI or registered deemed-compliant FFI when the withholding agent is directed to make the payment to an address in a jurisdiction other than that of the participating FFI or registered deemed-compliant FFI (or branch (including a disregarded entity) of such FFI) that is identified as the FFI (or branch (including a disregarded entity) of such FFI) that is supposed to receive the payment and for which the FFI's GIIN is not confirmed as described in the preceding sentence. The preceding sentence does not apply to an FFI that is an investment entity. If an FFI (other than an investment entity) directs the withholding agent to make the payment to an account held by the FFI and maintained by another financial institution, the FFI must provide to the withholding agent a statement in writing that the FFI is not directing the payment to any branch of such FFI that is not a participating FFI or a registered deemed-compliant FFI. An FFI whose registration with the IRS as a participating FFI or a registered deemed-compliant FFI is in process but has not yet received a GIIN may provide a withholding agent with a Form W–8 claiming the chapter 4 status it applied for and writing ''applied for'' in the box for the GIIN. In such case, the withholding agent will have 90 days from the date it receives the Form W–8 to obtain a GIIN and to verify the accuracy of the GIIN against the published IRS FFI list before it has reason to know that the payee is not a participating FFI or registered deemed-compliant FFI. If an FFI is removed from the published IRS FFI list, the withholding agent knows that such FFI is not a participating FFI or registered deemed-compliant FFI on the earlier of the date that the withholding agent discovers that the FFI has been removed from the list or the date that is one year from the date the FFI's GIIN was actually removed from the list.

(ii) *Special rules for reporting Model 1 FFIs.* Prior to January 1, 2015, a withholding agent that receives an FFI's claim of status as a reporting Model 1 FFI will not be required to confirm that the FFI has a GIIN that appears on the published IRS FFI list. A withholding agent has reason to know that the FFI is not a reporting Model 1 FFI if the withholding agent does not have a permanent residence address for the FFI, or an address of the relevant branch of the FFI, located in the country in which the FFI claims to be a reporting Model 1 FFI, or the withholding agent is making a payment to a branch of the FFI at an address in a country that does not have in effect a Model 1 IGA.

(iii) *Special rules for direct reporting NFFEs.* A withholding agent that has received a payee's claim of status as a direct reporting NFFE and that is required under paragraph (d)(11)(x) of this section to confirm that the entity claiming status as a direct reporting NFFE has a GIIN that appears on the published IRS FFI list, has reason to know that such payee is not such a NFFE if the payee's name (including a name reasonably similar to the name the withholding agent has on file for the payee) and GIIN do not appear on the most recently published IRS FFI list within 90 days of the date that the claim is made. A payee whose registration with the IRS as a direct reporting NFFE is in process but has not yet received a GIIN may provide a withholding agent with a Form W–8 claiming the chapter 4 status it applied for and writing ''applied for'' in the box for the GIIN. In such case, the withholding agent will have 90 days from the date it receives the Form W–8 to verify the accuracy of the GIIN against the published IRS FFI list before it has reason to know that the payee is not a direct reporting NFFE. If a direct reporting NFFE is removed from the published IRS FFI list, the withholding agent knows that such NFFE is not a direct reporting NFFE on the earlier of the date that the withholding agent discovers that the NFFE has been removed from the list or the date that is one year from the date the NFFE's GIIN was actually removed from the list.

(iv) *Special rules for sponsored direct reporting NFFEs and sponsoring entities*—(A) *Sponsored direct reporting NFFEs.* A withholding agent that has received a payee's claim of status as a sponsored direct reporting NFFE and that is required under paragraph (d)(11)(xi) of this section to confirm that the entity claiming status as a sponsored direct reporting NFFE has a GIIN that appears on the published IRS FFI list, has reason to know that such payee is not such a NFFE if its name (including a name reasonably similar to the name the withholding agent has on file for the payee) and GIIN do not appear on the most recently published IRS FFI list within 90 days of the date that the claim is made. A sponsored direct reporting NFFE whose registration with the IRS as a sponsored direct reporting NFFE is in process but has not yet received a GIIN may provide a withholding agent with a Form W–8 claiming the chapter 4 status it applied for and writing ''applied for'' in the box for the GIIN. In such case, the withholding agent will have 90 days from the date it receives the Form W–8 to verify the accuracy of the GIIN against the published IRS FFI list before it has reason to know that the payee is not a sponsored direct reporting NFFE. If a sponsored direct reporting NFFE is removed from the published IRS FFI list, the withholding agent knows that such NFFE is not a sponsored direct reporting NFFE on the earlier of the date that the withholding agent discovers that the sponsored entity has been removed from the list or the date that is one year from the date the sponsored entity's GIIN was actually removed from the list.

(B) *Sponsoring entities (transitional).* For payments made prior to January 1, 2017, a withholding agent that has received a payee's claim of status as a sponsored direct reporting NFFE has reason to know that such payee is not such a NFFE if the name of its sponsoring entity (including a name reasonably similar to the name the withholding agent has on file for the sponsoring entity) and the GIIN of its sponsoring entity do not appear on the most recently published IRS FFI list within 90 days of the date that the claim is made. A sponsoring entity whose registration with the IRS is in process but has not yet received a GIIN may provide a withholding agent with a Form W–8 claiming the chapter 4 status it applied for and writing ''applied for'' in the box for the GIIN. In such case, the withholding agent will have 90 days from the date it receives the Form W–8 to verify the accuracy of the GIIN against the published IRS FFI list before

it has reason to know that the payee is not a sponsored direct reporting NFFE. If the sponsoring entity of the NFFE is removed from the published IRS FFI list, the withholding agent knows that such NFFE is not a sponsored direct reporting NFFE on the earlier of the date that the withholding agent discovers that the sponsoring entity has been removed from the list or the date that is one year from the date the sponsoring entity's GIIN was actually removed from the list.

(4) *Reason to know.* A withholding agent has reason to know that a claim of chapter 4 status is unreliable or incorrect if its knowledge of relevant facts or statements contained in the withholding certificate or other documentation is such that a reasonably prudent person in the position of the withholding agent would question the claim being made. For an obligation other than a preexisting obligation, a withholding agent has reason to know that a person's claim of chapter 4 status is unreliable or incorrect if any information contained in its account opening files or other customer account files, including documentation collected for AML due diligence purposes, conflicts with the chapter 4 status being claimed. A withholding agent will not, however, have reason to know that a person's claim of chapter 4 status is unreliable or incorrect based on documentation collected for AML due diligence purposes until the date that is 30 days after the obligation is created. In addition to the specific standards of knowledge set forth in this paragraph (e) regarding a person's claim of chapter 4 status, a withholding agent is also required to apply any specific standards of knowledge applicable to the chapter 4 status claimed as set forth in paragraph (d) of this section. A withholding agent that has obtained documentation to reliably associate a payment to a foreign person under paragraph (c) of this section has reason to know that the person's claim of foreign status is unreliable or incorrect only to the extent provided in this paragraph (e)(4). See also § 1.1441–1(e)(4)(ii)(D) for requirements that apply when a change in circumstances occurs for purposes of chapter 3 and the related grace period allowed under § 1.1441–1(b)(3)(iv). The limits on reason to know for multiple obligations held by the same person set forth in § 1.1441–7(b)(11) shall apply by substituting the term *chapter 4 status* for the term *foreign status.* See § 1.1471–3(e)(4)(vii) for the limits on reason to know with respect to a preexisting obligation.

(i) *Reason to know regarding an entity's chapter 4 status.* A withholding agent has reason to know that a withholding certificate, written statement, or documentary evidence provided by or on behalf of an entity is unreliable or incorrect if there is information on the face of the documentation or in the withholding agent's account files that conflicts with the entity's claim regarding its chapter 4 status. For example, a withholding agent has reason to know that an entity's claim that it is an excepted NFFE is unreliable or incorrect if the withholding agent has obtained a financial statement or credit report for AML purposes that indicates that the entity is engaged in business as a financial institution. See also paragraph (e)(4) of this section for the 30-day period before a withholding agent has reason to know a claim is unreliable or incorrect based on AML information. Further, a withholding agent that has classified an entity as engaged in a particular type of business based on its records, such as through the use of a standardized industry coding system, AML or other regulatory purpose that requires the withholding agent to periodically monitor and periodically update the business classification based on the withholding agent's records, the withholding agent has reason to know that the chapter 4 status claimed by the entity is unreliable or incorrect only if the entity's claim conflicts with the withholding agent's classification of the entity's business type.

(ii) *Reason to know applicable to withholding certificates*—(A) *In general.* A withholding agent has reason to know that a withholding certificate provided by a person is unreliable or incorrect if the withholding certificate is incomplete with respect to any item on the certificate that is relevant to the claims made by the person, the withholding certificate contains any information that is inconsistent with the person's claim, the withholding agent has other account information that is inconsistent with the person's claim, or the withholding certificate lacks information necessary to establish entitlement to an exemption from withholding for chapter 4 purposes. Except as otherwise provided in this paragraph (e)(4)(ii)(A), a withholding agent that is a financial institution or other entity described in § 1.1441–7(b)(3) and that has obtained a withholding certificate to reliably associate a payment to a foreign person under paragraph (c) of this section has reason to know that the person's claim of foreign status is unreliable or incorrect only if there are U.S. indicia, as described in § 1.1441–7(b)(5), associated with the person and for which appropriate documentation sufficient to cure the U.S. indicia has not been obtained in accordance with § 1.1441–7(b) within 90 days of when the U.S. indicia was first identified by the withholding agent. See also § 1.1441–1(e)(4)(ii)(D) for requirements that apply when a change in circumstances occurs for purposes of chapter 3 and the related grace period allowed under § 1.1441–1(b)(3)(iv). A withholding agent that relies on an agent to review and maintain a withholding certificate is considered to know or have reason to know the facts within the knowledge of the agent.

(B) *Withholding certificate provided by an FFI.* A withholding agent that obtains a withholding certificate to reliably associate a payment to a participating FFI, a registered deemed-compliant FFI, a sponsoring entity, or a sponsored FFI does not need to apply the standards of knowledge described in § 1.1441–7(b)(5) if it has confirmed the FFI's GIIN on the current published IRS FFI list, in the manner described under paragraph (e)(3) of this section, within 90 days of receipt of the withholding certificate.

(iii) *Reason to know applicable to written statements.* A withholding agent must apply the standards of knowledge applicable to withholding certificates, as set forth in paragraph (e)(4)(ii) of this section, to determine whether it has reason to know that a written statement is unreliable or incorrect in terms of establishing a person's claim of foreign status. The rules under paragraph (e)(4)(ii) shall be applied by substituting the term *written statement* for the term *withholding certificate.*

(iv) *Reason to know applicable to documentary evidence*—(A) *In general.* A withholding agent may not treat documentary evidence provided by a person as valid if the documentary evidence does not reasonably establish the identity of the person presenting the documentary evidence. For example, documentary evidence is not valid if it is provided in person by an individual and the photograph or signature on the documentary evidence does not match the appearance or signature of the person presenting the document. A withholding agent may not treat documentary evidence as valid if the documentary evidence contains information that is inconsistent with the person's claim as to its chapter 4 status, the withholding agent has other account information that is inconsistent with the person's chapter 4 status, or the documentary evidence lacks information necessary to establish the person's chapter 4 status. Additionally,

a withholding agent that is a financial institution under § 1.1471–5(e), or other entity as described in § 1.1441–7(b)(3) that has obtained documentary evidence to reliably associate a payment to a foreign person under paragraph (c) of this section has reason to know that the person's claim of foreign status is unreliable or incorrect only if there are U.S. indicia, as described in § 1.1441–7(b)(8), associated with the person and appropriate documentation sufficient to cure the U.S. indicia has not been obtained in accordance with § 1.1441–7(b) within 90 days of when the U.S. indicia was first identified by the withholding agent. See also § 1.1441–1(e)(4)(ii)(D) for requirements when a change in circumstances occurs for purposes of chapter 3 and the related grace period allowed under § 1.1441–1(b)(3)(iv).

(B) *Standards of knowledge applicable to certain types of documentary evidence*—(*1*) *Financial statement.* A withholding agent that obtains a financial statement for purposes of establishing that a foreign payee meets a certain asset threshold has reason to know that the chapter 4 status claimed is unreliable or incorrect only if the total assets shown on the financial statement for the payee, and if relevant the payee's expanded affiliated group, are not within the permissible thresholds, or the footnotes to the financial statement indicate that the payee is not a foreign entity or is not a type of FFI eligible for the chapter 4 status claimed. A withholding agent that obtains a financial statement for purposes of establishing that the payee is an active NFFE will be required to review the balance sheet and income statement to determine whether the payee meets the income and asset thresholds set forth in § 1.1472–1(c)(1)(iv) and the footnotes of the financial statement for an indication that the payee is not a foreign entity or is a financial institution. A withholding agent that obtains a financial statement for purposes of establishing a chapter 4 status for a payee that does not require the payee to meet an asset or income threshold will be required to review only the footnotes to the financial statement to determine whether the financial statement supports the claim of chapter 4 status. A withholding agent that is not relying upon a financial statement to establish the chapter 4 status of the payee (for example because it has other documentation that establishes the payee's chapter 4 status) is not required to independently evaluate the financial statement solely because the withholding agent also has collected the financial statement in the course of its account opening or other procedures.

(*2*) *Organizational documents.* A withholding agent that obtains organizational documents for a payee solely for the purpose of supporting the chapter 4 status claimed by the entity will only be required to review the document sufficiently to establish that the entity is a foreign person and that the purposes for which the entity was formed and its basic activities appear to be of a type consistent with the chapter 4 status claimed, unless otherwise specified in paragraph (d) of this section. A withholding agent that obtains organizational documents for the purpose of establishing that an entity has a particular chapter 4 status will only be required to review the document to the extent needed to establish that the entity is a foreign person, that the requirements applicable to the particular chapter 4 status are met, and that the document was executed, but will not be required to review the remainder of the document.

(v) *Specific standards of knowledge applicable when only documentary evidence is a code or classification described in paragraph (c)(5)(ii)(B) of this section.* A withholding agent may not rely upon a classification described in paragraph (c)(5)(ii)(B) of this section or a standardized industry coding system to treat an entity as having a foreign status if there are U.S. indicia described in paragraph (e)(4)(v)(A) of this section associated with the entity, unless such U.S. indicia are cured in the manner set forth in paragraph (e)(4)(v)(B) of this section.

* * * * *

(B) * * *

(*1*) If there are U.S. indicia described in paragraphs (e)(4)(v)(A)(*1*) through (*4*) of this section associated with the entity, the withholding agent may treat the entity as a foreign person only if the withholding agent obtains a withholding certificate for the entity and one form of documentary evidence, described in paragraph (c)(5) of this section, that establishes the entity's status as a foreign person (such as a certificate of incorporation).

(*2*) If there are U.S. indicia described in paragraphs (e)(4)(v)(A)(*1*) through (*4*) of this section associated with the entity and the withholding agent is making a payment with respect to an offshore obligation, the withholding agent may also treat the entity as a foreign person if the withholding agent obtains a withholding certificate for the entity and the withholding agent treats the entity as foreign for purposes of foreign tax reporting. A withholding agent will treat an entity as foreign for purposes of foreign tax reporting only if the withholding agent classifies the entity as a resident of the country in which the obligation is maintained, the withholding agent is required to report a payment made to the entity annually on a tax information statement that is filed with the tax authority of the country in which the account is maintained as part of that country's resident reporting requirements, and that country has a tax information exchange agreement or income tax treaty in effect with the United States.

* * * * *

(vi) * * *

(B) *Limits on reason to know with respect to documentation received from participating FFIs and registered deemed-compliant FFIs that are intermediaries or flow-through entities.* A withholding agent that receives documentation from a participating FFI or registered deemed-compliant FFI that is not the payee must apply the requirements of paragraph (e)(4)(vi)(A) of this section, except that the withholding agent may rely upon the chapter 4 status provided by the participating FFI or registered deemed-compliant FFI in the withholding statement, including a chapter 4 status determined under the requirements of (and documentation or information that is publicly available that determines the chapter 4 status of the payee permitted under) an applicable IGA for an account holder, provided that the withholding agent has the information necessary to report on Form 1042–S, unless the withholding agent has information that conflicts with the chapter 4 status provided. See § 1.1441–1(e)(3)(iv)(C)(*2*)(*iv*) (requiring that a nonqualified intermediary withholding statement for a reportable amount that is a withholdable payment include the recipient code for chapter 4 purposes used for filing Form 1042–S for an entity payee). If underlying documentation is provided for the payee and information in the documentation or in the withholding agent's records conflicts with the chapter 4 status claimed by the payee, the withholding agent has reason to know that the chapter 4 status claimed is unreliable or incorrect. A withholding agent is not, however, required to verify information contained in documentation provided by an intermediary or flow-through entity that is a participating FFI or registered deemed-compliant FFI that is not facially incorrect and is not required to obtain supporting documentation for the payee in addition to a withholding

certificate unless the withholding agent obtains such documentation for purposes of chapter 3 or 61 or unless the withholding agent knows that the review conducted by the participating FFI or registered deemed-compliant FFI for purposes of chapter 4 was not adequate. For example, a withholding agent that receives a withholding statement from a participating FFI that is an intermediary stating that the payee is a registered deemed-compliant FFI is only required to determine that any withholding certificate provided for the payee contains a GIIN and that the GIIN does not appear to be facially invalid (for example, because it does not contain the correct amount of digits), but is not subject to the requirements set forth in paragraph (e)(3) of this section. Similarly, a withholding agent that receives from a participating FFI that is a partnership a withholding statement claiming that the payee is an active NFFE has reason to know that the claim is unreliable or incorrect if it receives a withholding statement that contains a U.S. address for the payee unless the partnership also provides a copy of documentation sufficient to cure the U.S. indicia in the manner set forth in this paragraph (e) or the withholding statement indicates that appropriate documentation sufficient to cure the U.S. indicia in the manner set forth in this paragraph (e) has been obtained and provides details of such documentation, such as the type of documentation and an identification number of the person contained in the document.

(vii) * * *

(B) *Reason to know there are U.S. indicia associated with preexisting obligations.* With respect to a preexisting obligation, a withholding agent may apply the limits on reason to know described in § 1.1441–7(b)(3)(ii) for a person that the withholding agent has previously documented for purposes of chapter 3 or 61. A withholding agent that applies the limits on reason to know described in § 1.1441–7(b)(3)(ii) must, however, review for U.S. indicia any additional documentation upon which the withholding agent is relying to determine the chapter 4 status of the person, if any.

* * * * *

(viii) *Reasonable explanation supporting claim of foreign status.* A reasonable explanation supporting a claim of foreign status for an individual has the meaning described in § 1.1441–7(b)(12).

* * * * *

(f) * * *

(1) *In general.* A withholding agent that cannot, prior to the payment, reliably associate (within the meaning of paragraph (c) of this section) the payment with valid documentation may rely on the presumptions of this paragraph (f) to determine the status of the payee (or other person receiving the payment) as a U.S. or foreign person and such person's other relevant characteristics (for example, as a nonparticipating FFI). Paragraph (f)(2) of this section provides the presumption rules with respect to classification as an individual or entity. Paragraph (f)(3) of this section provides the presumption rules to determine a payee's U.S. or foreign status. Paragraph (f)(4) of this section provides the presumption rules with respect to an entity's chapter 4 status. Paragraph (f)(5) of this section provides the presumption rules with respect to an intermediary or flow-through entity. Paragraph (f)(6) of this section provides the presumption rules with respect to effectively connected income paid to a U.S. branch of a payee. Paragraph (f)(7) of this section provides the presumption rules that apply to a payment made to joint payees. Paragraph (f)(8) of this section provides rules for how a payee may rebut the presumptions described in this paragraph (f). Paragraph (f)(9) of this section provides the consequences to a withholding agent that fails to withhold in accordance with the presumptions set forth in this paragraph (f) or that has actual knowledge or reason to know facts that are contrary to the presumptions set forth in this paragraph (f).

(2) *Presumptions of classification as an individual or entity and entity as the beneficial owner.* A withholding agent that cannot reliably associate a payment with a valid withholding certificate, or that has received valid documentary evidence (as described in paragraph (c)(5) of this section), but cannot determine a payee's status as an individual or an entity from the documentary evidence, must apply the presumption rules of § 1.1441–1(b)(3)(ii) to determine the payee's classification as an individual, trust, partnership, corporation, intermediary, or flow-through entity. Additionally, a withholding agent that receives valid documentary evidence with respect to an entity must apply the rules under § 1.1441–1(b)(3)(ii) to determine when it may treat such entity as a beneficial owner.

(3) *Presumptions of U.S. or foreign status.* If a withholding agent cannot reliably associate a payment with a valid withholding certificate or valid documentary evidence from which it is possible to determine the payee's U.S. or foreign status, it must apply the presumption rules of § 1.1441–1(b)(3)(iii) to determine the U.S. or foreign status of the payee (substituting the term *withholdable payment* for the term *payment*). In the case of a payment that a withholding agent can reliably associate with valid documentation that indicates the payment is made to a U.S. person but does not indicate whether the person is a specified U.S. person, the payment will be presumed made to a specified U.S. person unless the withholding agent can apply the presumption rules of § 1.6049–4(c)(1)(ii)(B), (C), (D), (E), (I), (J), (K), (L), or (N), to presume that the person is other than a specified U.S. person, or the person's name reasonably indicates that the person is a bank (for example because it contains the word Bank or a foreign equivalent).

(4) *Presumption of chapter 4 status for a foreign entity.* If a withholding agent cannot reliably associate a valid withholding certificate or valid documentary evidence sufficient to determine the chapter 4 status of the entity receiving payment under paragraph (d) of this section (for example, as a participating FFI, nonparticipating FFI, or NFFE), it must presume that the entity is a nonparticipating FFI.

(5) *Presumption of chapter 4 status of payee with respect to a payment to an intermediary or flow-through entity.* If a withholding agent makes a payment to a foreign flow-through entity or intermediary, including a payment that it is required to treat as made to such an entity under paragraphs (f)(2) and (3) of this section, and cannot reliably associate such payment with valid documentation under paragraph (c) of this section, the withholding agent must presume that the payment is made to a nonparticipating FFI.

(6) *Presumption of effectively connected income for payments to certain U.S. branches.* A withholding agent that makes a payment to a U.S. branch described in this paragraph (f)(6) may presume, in the absence of documentation indicating otherwise, that the U.S. branch is the payee of a payment that is effectively connected with the conduct of a trade or business in the United States if the withholding agent has obtained an EIN from the U.S. branch (either orally or in writing). A U.S. branch is described in this paragraph (f)(6) if it is a U.S. branch of a foreign bank subject to regulatory supervision by the Federal Reserve Board or a U.S. branch of a foreign insurance company required to file an annual statement on a form approved by

the National Association of Insurance Commissioners with the Insurance Department of a State, a Territory, or the District of Columbia. A payment is treated as made to a U.S. branch of a foreign bank or foreign insurance company if the payment is credited to an account maintained in the United States in the name of a U.S. branch of the foreign person, or the payment is made to an address in the United States where the U.S. branch is located and the name of the U.S. branch appears on documents (in written or electronic form) associated with the payment (for example, the check mailed or letter addressed to the branch).

(7) *Joint payees*—(i) *In general.* If a withholding agent makes a payment to joint payees and cannot reliably associate the payment with valid documentation from each payee but all of the joint payees appear to be individuals, then the payment is presumed made to an unidentified U.S. person. If any joint payee does not appear, by its name and other information contained in the account file, to be an individual, then the entire payment will be treated as made to a nonparticipating FFI. However, if one of the joint payees provides a Form W–9 in accordance with the procedures described in §§ 31.3406(d)–1 through 31.3406(d)–5 of this chapter, the payment shall be treated as made to that payee.

(ii) *Exception for offshore obligations.* If a withholding agent makes a payment outside the United States with respect to an offshore obligation held by joint payees and cannot reliably associate a payment with valid documentation from each payee but all of the joint payees appear to be individuals, then the payment is presumed made to an unknown foreign individual if the payment with respect to the offshore obligation is made outside the United States (as described in § 1.6049–5(e)).

(8) *Rebuttal of presumptions.* A payee may rebut the presumptions described in paragraphs (f)(2) through (7) of this section by providing reliable documentation to the withholding agent or, if applicable, to the IRS.

(9) *Effect of reliance on presumptions and of actual knowledge or reason to know otherwise*—(i) *In general.* Except as otherwise provided in this paragraph (f)(9), a withholding agent that withholds on a payment under section 1471 or 1472 in accordance with the presumptions set forth in this paragraph (f) shall not be liable for withholding under this section even if it is later established that the payee has a chapter 4 status other than the status presumed. A withholding agent that fails to report and withhold in accordance with the presumptions described in paragraphs (f)(2) through (7) of this section with respect to a payment that it cannot reliably associate with valid documentation shall be liable for tax, interest, and penalties. See § 1.1474–1(a) for the extent of a withholding agent's liability for failing to withhold in accordance with the presumptions described in this paragraph (f).

(ii) *Actual knowledge or reason to know that amount of withholding is greater than is required under the presumptions or that reporting of the payment is required.* Notwithstanding the provisions of paragraph (f)(9)(i) of this section, a withholding agent that knows or has reason to know that the status or characteristics of the person are other than what is presumed under this paragraph (f) may not rely on the presumptions described in this paragraph (f) to the extent that, if it determined the status of the person based on such knowledge or reason to know, it would be required to withhold (under this section or another withholding provision of the Code) an amount greater than would be the case if it relied on the presumptions described in this paragraph (f). In such a case, the withholding agent must rely on its knowledge or reason to know rather than on the presumptions set forth in this paragraph (f). Failure to do so shall result in liability for tax, interest, and penalties to the extent described in § 1.1474–1(a).

(g) *Effective/applicability date.* This section applies on January 6, 2017. However, taxpayers may apply these provisions as of January 28, 2013. A taxpayer may apply paragraph (c)(6)(iv) of this section to all of its open tax years. (For the rules that apply beginning on January 28, 2013, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2016.)

■ **Par. 8.** Section 1.1471–3T is revised to read as follows:

§ 1.1471–3T Identification of payee (temporary).

(a) through (a)(3)(vii) [Reserved]. For further guidance, see § 1.1471–3(a) through (a)(3)(vii).

(b) through (b)(4) [Reserved]. For further guidance, see § 1.1471–3(b) through (b)(4).

(c) [Reserved]. For further guidance, see § 1.1471–3(c).

(1) *In general.* A withholding agent can reliably associate a withholdable payment with valid documentation if, prior to the payment, it has obtained (either directly from the payee or through its agent) valid documentation appropriate to the payee's chapter 4 status as described in paragraph (d) of this section, it can reliably determine how much of the payment relates to the valid documentation, and it does not know or have reason to know that any of the information, certifications, or statements in, or associated with, the documentation are unreliable or incorrect. Thus, a withholding agent cannot reliably associate a withholdable payment with valid documentation provided by a payee to the extent such documentation appears unreliable or incorrect with respect to the claims made, or to the extent that information required to allocate all or a portion of the payment to each payee is unreliable or incorrect. A withholding agent may rely on information and certifications contained in withholding certificates or other documentation without having to inquire into the truthfulness of the information or certifications, unless it knows or has reason to know that the information or certifications are untrue. A withholding agent may rely upon the same documentation for purposes of both chapters 3 and 4 provided the documentation is sufficient to meet the requirements of each chapter. Alternatively, a withholding agent may elect to rely upon the presumption rules of paragraph (f) of this section in lieu of obtaining documentation from the payee. A withholding certificate will be considered provided by a payee if a withholding agent obtains the certificate from a third party repository (rather than directly from the payee or through its agent) and the requirements in § 1.1441–1(e)(4)(iv)(E) are satisfied. A withholding certificate obtained from a third party repository must still be reviewed by the withholding agent in the same manner as any other documentation to determine whether it may be relied upon for chapter 4 purposes. A withholding agent may rely on an electronic signature on a withholding certificate if the requirements in § 1.1441–1(e)(4)(i)(B) are satisfied.

(2) [Reserved]. For further guidance, see § 1.1471–3(c)(2).

(3) [Reserved]. For further guidance, see § 1.1471–3(c)(3).

(i) through (ii) [Reserved]. For further guidance, see § 1.1471–3(c)(3)(i) through (ii).

(iii) [Reserved]. For further guidance, see § 1.1471–3(c)(3)(iii).

(A) [Reserved]. For further guidance, see § 1.1471–3(c)(3)(iii)(A).

(B) [Reserved]. For further guidance, see § 1.1471–3(c)(3)(iii)(B).

(*1*) through (*4*) [Reserved]. For further guidance, see § 1.1471–3(c)(3)(iii)(B)(*1*) through (*4*).

(*5*) *Alternative withholding statement.* A withholding agent that is making a withholdable payment to a nonqualified intermediary for which a withholding statement is required under chapters 3 and 4 may accept a withholding statement that meets the requirements for an alternative withholding statement described in § 1.1441–1(e)(3)(iv)(C)(*3*).

(C) through (H) [Reserved]. For further guidance, see § 1.1471–3(c)(3)(iii)(C) through (H).

(iv) through (v) [Reserved]. For further guidance, see § 1.1471–3(c)(3)(iv) through (v).

(4) through (5) [Reserved]. For further guidance, see § 1.1471–3(c)(4) through (5).

(6) [Reserved]. For further guidance, see § 1.1471–3(c)(6).

(i) [Reserved]. For further guidance, see § 1.1471–3(c)(6)(i).

(ii) [Reserved]. For further guidance, see § 1.1471–3(c)(6)(ii).

(A) through (D) [Reserved]. For further guidance, see § 1.1471–3(c)(6)(ii)(A) through (D).

(E) [Reserved]. For further guidance, see § 1.1471–3(c)(6)(ii)(E).

(*1*) through (*3*) [Reserved]. For further guidance, see § 1.1471–3(c)(6)(ii)(E)(*1*) through (*3*).

(*4*) *Withholding agent's reason to know of a change in circumstances due to a jurisdiction ceasing to be treated as having an IGA in effect.* A withholding agent will have reason to know of a change in circumstances with respect to an FFI's chapter 4 status that results solely because the jurisdiction in which the FFI is resident, organized, or located ceases to be treated as having an IGA in effect on the date that the jurisdiction ceases to be treated as having an IGA in effect.

(iii) through (vii) [Reserved]. For further guidance, see § 1.1471–3(c)(6)(iii) through (vii).

(7) [Reserved]. For further guidance, see § 1.1471–3(c)(7).

(i) [Reserved]. For further guidance, see § 1.1471–3(c)(7)(i).

(ii) *Documentation received after the time of payment.* Proof that withholding was not required under the provisions of chapter 4 and the regulations thereunder also may be established after the date of payment by the withholding agent on the basis of a valid withholding certificate and/or other appropriate documentation that was furnished after the date of payment but that was effective as of the date of payment. A withholding certificate furnished after the date of payment will be considered effective as of the date of the payment if the certificate contains a signed affidavit (either at the bottom of the form or on an attached page) that states that the information and representations contained on the certificate were accurate as of the time of the payment. A certificate obtained within 30 days after the date of the payment will not be considered to be unreliable solely because it does not contain an affidavit. However, in the case of a withholding certificate of an individual received more than a year after the date of payment, the withholding agent will be required to obtain, in addition to the withholding certificate and affidavit, documentary evidence described in paragraph (c)(5)(i) of this section that supports the individual's claim of foreign status. In the case of a withholding certificate of an entity received more than a year after the date of payment, the withholding agent will be required to obtain, in addition to the withholding certificate and affidavit, documentary evidence specified in paragraph (c)(5)(ii) of this section that supports the chapter 4 status claimed. If documentation other than a withholding certificate is submitted from a payee more than a year after the date of payment, the withholding agent will be required to also obtain from the payee a withholding certificate and affidavit supporting the chapter 4 status claimed as of the date of the payment. See, however, § 1.1441–1(b)(7)(ii) for special rules that apply when a withholding certificate is received after the date of the payment to claim that income is effectively connected with the conduct of a U.S. trade or business (as applied for purposes of this paragraph (c)(7)(ii) to a claim to establish that the payment is not a withholdable payment under § 1.1473–1(a)(4)(ii) rather than to claim an exemption described in § 1.1441–4(a)(1)).

(8) through (9) [Reserved]. For further guidance, see § 1.1471–3(c)(8) through (c)(9)(v).

(d) [Reserved]. For further guidance, see § 1.1471–3(d).

(1) through (5) [Reserved]. For further guidance, see § 1.1471–3(d)(1) through (5).

(6) [Reserved]. For further guidance, see § 1.1471–3(d)(6).

(i) [Reserved]. For further guidance, see § 1.1471–3(d)(6)(i).

(A) through (E) [Reserved]. For further guidance, see § 1.1471–3(d)(6)(i)(A) through (E).

(F) The withholding agent does not know or have reason to know that the payee is a member of an expanded affiliated group with any FFI that is a depository institution, custodial institution, or specified insurance company, or that the FFI has any specified U.S. persons that own an equity interest in the FFI or a debt interest (other than a debt interest that is not a financial account or that has a balance or value not exceeding $50,000) in the FFI other than those identified on the FFI owner reporting statement described in paragraph (d)(6)(iv) of this section.

(ii) through (vii) [Reserved]. For further guidance, see § 1.1471–3(d)(6)(ii) through (d)(6)(vii)(B).

(7) through (12) [Reserved]. For further guidance, see § 1.1471–3(d)(7) through (12)(iii)(B).

(e) through (g) [Reserved]. For further guidance, see § 1.1471–3(e) through (g).

(h) *Expiration date.* The applicability of this section expires on December 30, 2019.

■ **Par. 9.** Section 1.1471–4 is amended by:

■ 1. Revising paragraphs (a)(3) and (4), (b)(1) through (4), (b)(6) and (7), (c)(1), (c)(2)(ii)(B)(*2*)(*iii*), (c)(2)(v), (c)(3)(ii), (c)(3)(iii)(A), (c)(5)(iv)(B)(*2*)(*vi*), (c)(5)(iv)(E), (c)(7), (d)(1), (d)(2)(i), (d)(2)(ii)(A), (d)(2)(ii)(B) introductory text, (d)(2)(ii)(B)(*2*), and (d)(2)(ii)(D) through (F).

■ 2. Adding paragraph (d)(2)(ii)(G).

■ 3. Revising paragraphs (d)(2)(iii)(A), (d)(2)(iii)(B) introductory text, (d)(2)(iii)(C) and (E), (d)(3)(iii) introductory text, (d)(3)(iii)(F), (d)(3)(vii), (d)(4)(i), (d)(4)(iv)(C), (d)(4)(iv)(D) introductory text, (d)(5)(i)(A) and (B), (d)(5)(ii)(B) introductory text, (d)(5)(v) through (vii), (d)(6)(vi), (d)(7)(i), (d)(7)(ii)(A) introductory text, (d)(7)(ii)(A)(*1*), (d)(7)(iii), (d)(7)(iv)(A) and (B), (d)(8), (d)(9) *Example 1* through *Example 3,* (d)(9) *Example 5,* (d)(9) *Example 7,* (e)(1), (e)(2)(ii), (e)(2)(iv)(D), and (e)(2)(v),

■ 4. Adding paragraph (e)(2)(vi).

■ 5. Revising paragraphs (e)(3)(iii)(A) and (C), (e)(3)(iv),

■ 6. Adding paragraphs (e)(3)(v) and (vi).

■ 7. Revising paragraphs (e)(4), (f)(1), (f)(3)(i), (f)(4)(i) and (ii), (g)(1) introductory text, (g)(1)(ii), (g)(2), and (j).

The revisions and additions read as follows:

§ 1.1471–4 FFI agreement.

(a) * * *

(3) *Reporting.* A participating FFI is required to report the information described in paragraph (d) of this section annually with respect to U.S. accounts under section 1471(c) and accounts held by recalcitrant account holders. A participating FFI must also comply with the filing requirements described in § 1.1474–1(c) and (d) to report payments that are chapter 4 reportable amounts paid to recalcitrant

account holders and nonparticipating FFIs (including the transitional reporting of foreign reportable amounts paid to nonparticipating FFIs for calendar years 2015 and 2016 described in § 1.1471–4(d)(2)(ii)(F)). A participating FFI that is unable to obtain a waiver, if required by foreign law, to report an account as required under paragraph (d) of this section must close or transfer such account within a reasonable period of time as described in paragraph (i) of this section.

(4) *Expanded affiliated group.* Except as otherwise provided in Model 1 IGA or Model 2 IGA, in order for any FFI that is a member of an expanded affiliated group to be a participating FFI, each FFI that is a member of the expanded affiliated group must be a participating FFI, deemed-compliant FFI, or exempt beneficial owner as described in paragraph (e) of this section. For a limited period described in paragraph (e)(2) or (3) of this section, however, a branch of an FFI or an FFI that is a member of an expanded affiliated group and is unable under foreign law to satisfy the requirements of this section may instead obtain status as a limited branch of a participating FFI or limited FFI if the branch or FFI meets the requirements set forth in paragraph (e)(2) or (3) of this section (as applicable).

* * * * *

(b) * * *

(1) *In general.* Except as otherwise provided in a Model 2 IGA, a participating FFI is required to deduct and withhold a tax equal to 30 percent of any withholdable payment made by such participating FFI to an account held by a recalcitrant account holder or to a nonparticipating FFI after June 30, 2014, to the extent required under paragraph (b)(3) of this section. See paragraph (b)(2) of this section for rules for a participating FFI to identify the payee of a payment in order to determine whether withholding is required under this paragraph (b). See paragraph (b)(4) of this section for the extent of a participating FFI's requirement to deduct and withhold tax on a foreign passthru payment made by such participating FFI to an account held by a recalcitrant account holder or to a nonparticipating FFI. See paragraph (b)(5) of this section for the rules for withholding on payments to limited branches and limited FFIs. See paragraph (b)(6) for the special allowance to set aside in escrow amounts withheld with respect to dormant accounts. See paragraph (b)(7) of this section for the withholding requirements of certain U.S. branches of FFIs. See § 1.1471–2 for the exceptions to and special rules for withholding and the exclusion from the definitions of the terms *withholdable payment* and *foreign passthru payment* that applies to any payment made under a grandfathered obligation or the gross proceeds from the disposition of such an obligation. See § 1.1474–1(d)(4)(iii) for the requirement of participating FFIs to report payments that are chapter 4 reportable amounts. See § 1.1474–6 for the coordination of withholding on payments under this paragraph (b) with the other withholding provisions under the Code.

(2) *Withholding determination.* Except as otherwise provided under § 1.1471–2 and, with respect to certain preexisting accounts, under paragraph (c) of this section, a participating FFI is required to determine whether withholding applies at the time a payment is made by reliably associating the payment with valid documentation described in paragraph (c) of this section for the payee of the payment. For a payment made to an account, if the account is held by one or more individuals, the payee is each individual account holder. For a payment made to an account held by an entity, except as otherwise provided in § 1.1471–3(a)(3), the payee is the account holder. If the participating FFI makes a withholdable payment to a payee that is an entity and the payment is made with respect to an obligation that is not an account, except as otherwise provided in § 1.1471–3(a)(3), the payee is the person to whom the payment is made. See § 1.1473–1(a) to determine when a payment is made in the case of a withholdable payment. If a participating FFI cannot reliably associate a payment (or any portion of a payment) with valid documentation, the rules described in paragraph (c) of this section shall apply to determine the chapter 4 status of the account holder (and payee if other than the account holder). Notwithstanding the foregoing, a participating FFI may establish after the date of payment that withholding was not required to the extent permitted under § 1.1471–3(c)(7) or may apply the procedures provided in § 1.1474–2 when overwithholding occurs.

(3) *Satisfaction of withholding requirements*—(i) *In general.* A participating FFI that complies with the withholding obligations of this paragraph (b) with respect to accounts held by recalcitrant account holders and payees that are nonparticipating FFIs shall be deemed to satisfy its withholding obligations under sections 1471(a) and 1472 with respect to such account holders and payees.

(ii) *Withholding not required.* A participating FFI that is an NQI, NWP, NWT, or that is a QI that elects under section 1471(b)(3) not to assume withholding responsibility for a payment and that provides its withholding agent with the information necessary to allocate all or a portion of the payment to each payee as part of a withholding certificate described in § 1.1471–3(c)(3)(iii) will generally not be required to withhold under paragraph (b)(1) of this section. See § 1.1471–2(a)(2)(ii), however, for the circumstances under which a participating FFI that is an NQI, NWP, or NWT has a residual withholding responsibility. See also § 1.1471–3(c)(9)(iii)(B) for the circumstances under which a participating FFI that is a broker has a residual withholding responsibility as an intermediary of the payment and may also be liable for any underwithholding that occurs. See §§ 1.1471–2(a) and 1.1472–1(a)(2)(i) and the QI, WP, or WT agreement for the withholding requirements of a participating FFI that is a QI, WP, or WT for purposes of chapter 4.

(iii) *Election to withhold under section 3406.* A participating FFI may elect to satisfy its withholding obligation under paragraph (b)(1) of this section with respect to recalcitrant account holders that are also U.S. non-exempt recipients subject to backup withholding under section 3406 receiving withholdable payments, to the extent that the payments also constitute reportable payments, by applying withholding under section 3406 at the backup withholding rate to such withholdable payments. A participating FFI may make the election described in this paragraph only if it complies with the information reporting rules under chapter 61 with respect to payments to which backup withholding applies. Nothing in this paragraph relieves a participating FFI of its requirement to backup withhold under section 3406 with respect to reportable payments that are not also withholdable payments. See § 1.1474–6(f) for the general rule that satisfying withholding requirements under chapter 4 will satisfy backup withholding requirements under section 3406 for a payment that is both a withholdable payment and a reportable payment.

(4) *Foreign passthru payments.* A participating FFI is not required to deduct and withhold tax on a foreign passthru payment made by such participating FFI to an account held by a recalcitrant account holder or to a nonparticipating FFI before the later of January 1, 2019, or the date of publication in the **Federal Register** of

final regulations defining the term *foreign passthru payment.*

* * * * *

(6) *Special rule for dormant accounts.* A participating FFI that makes a withholdable payment not otherwise subject to withholding under chapter 3 or backup withholding under section 3406 to a recalcitrant account holder of a dormant account that it maintains must withhold on the account for purposes of chapter 4. However, the participating FFI may, in lieu of depositing the tax withheld, set aside the amount withheld in escrow until the date that the account ceases to be a dormant account. In such case, the tax withheld becomes due 90 days following the date that the account ceases to be a dormant account if the account holder does not provide the documentation required under paragraph (c) of this section or becomes refundable to the account holder if the account holder provides the documentation required under paragraph (c) of this section establishing that withholding does not apply. A participating FFI that maintains a dormant account of a recalcitrant account holder and that elects to escrow withheld tax pursuant to this paragraph (b)(6) may not delegate the responsibility to escrow withheld tax to the withholding agent from which it is receiving payment. Once a dormant account escheats irrevocably to a foreign government under the relevant laws in the jurisdiction in which the participating FFI (or branch thereof) operates, the participating FFI is no longer required to deposit with the IRS the amount held in escrow with respect to the account. See paragraph (d)(6)(ii) of this section for the definition of dormant account.

(7) *Withholding requirements for U.S. branches of FFIs treated as U.S. persons.* A U.S. branch of an FFI treated as a U.S. person must satisfy its backup withholding obligations under section 3406(a) with respect to accounts held at the U.S. branch by account holders that are payees treated as other than exempt recipients under chapter 61. See §§ 1.1441–1(b)(2)(iv)(C), 1.1471–2(a), and 1.1472–1(a) for additional withholding obligations for a U.S. branch of an FFI treated as a U.S. person. See paragraph (d)(2)(iii)(B) of this section for the reporting requirements applicable to U.S. branches of FFIs that are treated as U.S. persons.

* * * * *

(c) * * *

(1) *Scope of paragraph.* Except to the extent that a participating FFI relies on the due diligence procedures set forth in an applicable Model 2 IGA, a participating FFI must follow this paragraph (c) to identify and document the chapter 4 status of each holder of an account maintained by the participating FFI to determine if the account is a U.S. account, non-U.S. account, or an account held by a recalcitrant account holder or nonparticipating FFI. Paragraph (c)(2) of this section provides the general rules for identification and documentation of account holders and payees, and paragraph (c)(2)(v) provides documentation requirements for certain U.S. branches of FFIs. Paragraph (c)(3) of this section provides the rules for documenting entity accounts and payees. Paragraph (c)(4) of this section provides the general rules for documenting individual accounts other than preexisting accounts. Paragraph (c)(5) of this section provides the identification and documentation procedure for preexisting individual accounts. Paragraph (c)(6) of this section provides examples illustrating the application of the documentation exceptions for entity accounts and individual accounts. Paragraph (c)(7) of this section outlines the certification requirement relating to the due diligence procedures of this paragraph (c) with respect to preexisting accounts within the specified periods of time.

(2) * * *

(ii) * * *

(B) * * *

(*2*) * * *

(*iii*) [Reserved]. For further guidance, see § 1.1471–4T(c)(2)(ii)(B)(*2*)(*iii*).

* * * * *

(v) *Documentation rules for U.S. branches of FFIs that are treated as U.S. persons.* A U.S. branch of an FFI that is treated as a U.S. person shall apply the due diligence requirements of § 1.1471–3 to determine the chapter 4 status of account holders and payees that are entities and shall apply the documentation requirements of chapter 3 or 61 (as applicable) with respect to individual account holders. See paragraph (b)(7) of this section for withholding rules and paragraph (d)(2)(iii)(B) of this section for reporting rules applicable to such U.S. branches.

* * * * *

(3) * * *

(ii) *Timeframe for applying identification and documentation procedure for entity accounts and payees.* For preexisting entity accounts (including entity accounts that are opened on or after July 1, 2014, and before January 1, 2015, that the FFI treats as preexisting obligations under § 1.1471–1(b)(104)(i)), a participating FFI must perform the requisite identification and documentation procedures within six months of the effective date of the FFI agreement for any account holder that is a prima facie FFI, as defined in § 1.1471–2(a)(4)(ii)(B), and within two years of the effective date of the FFI agreement for all other entity accounts, except as otherwise provided in paragraph (c)(3)(iii) of this section. For accounts that are not preexisting accounts, the participating FFI must perform the requisite identification and documentation procedures by the earlier of the date a withholdable payment or a foreign passthru payment is made with respect to the account or within 90 days of the date the participating FFI opens the account. Notwithstanding the foregoing sentences of this paragraph (c)(3)(ii), with respect to a preexisting obligation issued in nonregistered (bearer) form by an investment entity, the investment entity is required to perform the requisite identification and documentation procedures at the time a payment is collected by the beneficial owner of the payment (including a beneficial owner that collects the payment through an intermediary or agent). If the participating FFI cannot obtain all the documentation described in § 1.1471–3(d) or if the participating FFI knows or has reason to know that the documentation provided for an entity account is unreliable or incorrect (by applying the standards of knowledge applicable to entities in § 1.1471–3(e) as modified by paragraph (c)(2)(ii)), the participating FFI shall apply the presumption rules of § 1.1471–3(f) (as applicable to entities) to determine the chapter 4 status of the account holder. In the case of an account held by a passive NFFE that provides the documentation described in § 1.1471–3(d)(12) to establish its status as a passive NFFE but fails to provide the information regarding its owners, see § 1.1471–5(g)(2)(iv) for the requirement to treat the account as held by a recalcitrant account holder.

(iii) * * *

(A) *Accounts to which this exception applies.* Unless the participating FFI elects otherwise pursuant to paragraph (c)(3)(iii)(C) of this section, a participating FFI is not required to perform the identification and documentation procedure contained in this paragraph (c)(3) with respect to a preexisting entity account the aggregate balance or value of which is $250,000 or less if no holder of such account that has previously been documented by the FFI as a U.S. person for purposes of chapter 3 or 61 is a specified U.S. person. For purposes of applying this

exception, the account balance must be determined as of the effective date of the FFI agreement and the aggregation rules of paragraph (c)(3)(iii)(B) of this section shall apply. An account that meets this exception will cease to meet this exception as of the end of any subsequent calendar year in which the account balance or value exceeds $1,000,000, applying the aggregation rules of paragraph (c)(3)(iii)(B) of this section, or as of the date on which there is another change in circumstances with respect to the account or any account aggregated with the account. The exception to the identification and documentation procedure described in this paragraph (c)(3)(iii)(A) does not apply to an entity account opened on or after July 1, 2014, and before January 1, 2015, that the FFI treats as a preexisting account under § 1.1471–1(b)(104)(i).

* * * * *

(5) * * *

(iv) * * *

(B) * * *

(*2*) * * *

(*vi*) *Standing instructions to pay amounts.* If information required to be reviewed with respect to the account contains standing instructions to pay amounts from the account to an account maintained in the United States for an account holder, the participating FFI must retain a record of a withholding certificate and either a form of documentary evidence described in § 1.1471–3(c)(5)(i)(A) through (C) or a written reasonable explanation (as defined in § 1.1441–7(b)(12)) establishing the account holder's status as a foreign person.

* * * * *

(E) *Exception for preexisting individual accounts previously documented as held by foreign individuals.* A participating FFI that has previously obtained documentation from an account holder to establish the account holder's status as a foreign individual in order to meet its obligations under its QI, WP, or WT agreement with the IRS, or to fulfill its reporting obligations as a U.S. payor under chapter 61, is not required to perform the electronic search described in paragraph (c)(5)(iv)(C) of this section or the enhanced review described in paragraph (c)(5)(iv)(D)(*3*) of this section for such account. Additionally, a participating FFI with a U.S. payor as its paying agent is not required to perform the electronic search described in paragraph (c)(5)(iv)(C) of this section or the enhanced review described in paragraph (c)(5)(iv)(D)(*3*) of this section for an account for which its paying agent that is a U.S. payor has previously obtained documentation to establish the account holder's status as a foreign individual under chapter 61. The participating FFI is required, however, to perform the relationship manager inquiry described in paragraph (c)(5)(iv)(D)(*2*) of this section if the account is a high-value account described in paragraph (c)(5)(iv)(D)(*1*) of this section. For purposes of this paragraph (c)(5)(iv)(E), a participating FFI has documented an account holder's foreign status under chapter 61 if the participating FFI (or its paying agent that is a U.S. payor) has retained a record of the documentation required under chapter 61 to establish the foreign status of an individual and the account received a reportable payment as defined under section 3406(b) in any prior year that was properly reported in that year. In the case of a participating FFI that is a QI, WP, or WT, the participating FFI has documented an account holder's foreign status under its QI, WP, or WT agreement (as applicable) if the participating FFI has met the relevant documentation and reporting requirements of its agreement with respect to an account holder that received a reportable amount in any year in which its agreement was in effect.

* * * * *

(7) *Certifications of responsible officer.* In order for a participating FFI to comply with the requirements of an FFI agreement with respect to its identification procedures for preexisting accounts, a responsible officer of the participating FFI must certify to the IRS regarding the participating FFI's compliance with the diligence requirements of this paragraph (c). The responsible officer must certify that the participating FFI has completed the review of all high-value accounts as required under paragraphs (c)(5)(iv)(D) and (E) of this section and treats any account holder of an account for which the participating FFI has not retained a record of any required documentation as a recalcitrant account holder as required under this section and § 1.1471–5(g). The responsible officer must also certify that the participating FFI has completed the account identification procedures and documentation requirements of this paragraph (c) for all other preexisting accounts or, if it has not retained a record of the documentation required under this paragraph (c) with respect to an account, treats such account in accordance with the requirements of this section and § 1.1471–5(g) or § 1.1471–3(f) (as applicable). The responsible officer must also certify to the best of the responsible officer's knowledge after conducting a reasonable inquiry, that the participating FFI did not have any formal or informal practices or procedures in place from August 6, 2011, through the date that is two years after the effective date of the FFI's FFI agreement to assist account holders in the avoidance of chapter 4. A reasonable inquiry for purposes of this paragraph (c)(7) is a review of the participating FFI's procedures and a written inquiry, such as email requests to relevant lines of business, that requires responses from relevant customer on-boarding and management personnel as to whether they engaged in any such practices during that period. Practices or procedures that assist account holders in the avoidance of chapter 4 include, for example, suggesting that account holders split up accounts to avoid classification as a high-value account; suggesting that account holders of U.S. accounts close, transfer, or withdraw from their account to avoid reporting; intentional failures to disclose a known U.S. account; suggesting that an account holder remove U.S. indicia from its account information; or facilitating the manipulation of account balances or values to avoid thresholds. If the responsible officer is unable to make any of the certifications described in this paragraph (c)(7), the responsible officer must make a qualified certification to the IRS stating that such certification cannot be made and that corrective actions will be taken by the responsible officer. The certifications described in this paragraph (c)(7) must be submitted to the IRS by the due date of the FFI's first certification of compliance required under paragraph (f)(3) of this section.

(d) * * *

(1) *Scope of paragraph.* This paragraph (d) provides rules addressing the information reporting requirements applicable to participating FFIs with respect to U.S. accounts, accounts held by owner-documented FFIs, and recalcitrant account holders. Paragraph (d)(2) of this section describes the accounts subject to reporting under this paragraph (d), and specifies the participating FFI that is responsible for reporting an account or account holder. Paragraph (d)(3) of this section describes the information required to be reported and the manner of reporting by a participating FFI under section 1471(c)(1) with respect to a U.S. account or an account held by an owner-documented FFI. Paragraph (d)(4) of this section provides definitions of terms applicable to paragraph (d)(3). Paragraph (d)(5) of this section describes the conditions for a participating FFI to

elect to report its U.S. accounts and accounts held by owner-documented FFIs under section 1471(c)(2) and the information required to be reported under such election. Paragraph (d)(6) of this section provides rules for a participating FFI to report its recalcitrant account holders. Paragraph (d)(7) of this section provides special transitional reporting rules applicable to reports due in 2015 and 2016. Paragraph (d)(8) of this section provides the reporting requirements of a participating FFI that is a QI, WP, or WT with respect to U.S. accounts. See chapter 61 for reporting requirements that may apply to a payor that is a participating FFI or registered deemed-compliant FFI with respect to payees. See § 301.1474–1(a) of this chapter for the requirement for a financial institution to file the information required under this paragraph (d) on magnetic media.

(2) * * *

(i) *Accounts subject to reporting.* Subject to the rules of paragraph (d)(7) of this section, a participating FFI shall report by the time and in the manner prescribed in paragraph (d)(3)(vi) of this section, the information described in paragraph (d)(3) of this section with respect to accounts maintained at any time during each calendar year for which the participating FFI is responsible for reporting under paragraph (d)(2)(ii) of this section and that it is required to treat as U.S. accounts or accounts held by owner-documented FFIs, including accounts that are identified as U.S. accounts by the end of such calendar year pursuant to a change in circumstances during such year as described in paragraph (c)(2)(iii) of this section. Alternatively, a participating FFI may elect to report under paragraph (d)(5) of this section with respect to such accounts for each calendar year. With respect to accounts held by recalcitrant account holders, a participating FFI is required to report with respect to each calendar year under paragraph (d)(6) of this section and not under paragraph (d)(3) or (5) of this section. For separate reporting requirements of participating FFIs with respect to foreign reportable amounts and for transitional rules for participating FFIs to report certain foreign reportable amounts paid to accounts held by nonparticipating FFIs, see § 1.1471–4(d)(2)(ii)(F).

(ii) * * *

(A) *In general.* Except as otherwise provided in paragraphs (d)(2)(ii)(B) through (G) of this section, the participating FFI that maintains the account is responsible for reporting the account in accordance with the requirements of paragraph (d)(2)(iii), (d)(3), or (d)(5) of this section (as applicable) for each calendar year. Except as otherwise provided in paragraph (d)(2)(ii)(C) of this section, a participating FFI is responsible for reporting accounts held by recalcitrant account holders that it maintains in accordance with the requirements of paragraph (d)(6) of this section. A participating FFI is not required to report the information required under paragraph (d)(6) of this section with respect to an account held by a recalcitrant account holder of another participating FFI even if that other participating FFI holds the account as an intermediary on behalf of such account holder and regardless of whether the participating FFI is required to report payments made to the recalcitrant account holder of such other FFI under § 1.1474–1(d)(4)(iii).

(B) *Special reporting of account holders of territory financial institutions.* In the case of an account held by a territory financial institution that is a flow-through entity or acting as an intermediary with respect to a withholdable payment—

* * * * *

(*2*) If the territory financial institution does not agree to be treated as a U.S. person with respect to a withholdable payment, the participating FFI must report with respect to each specified U.S. person or substantial U.S. owner of an entity that is treated as a passive NFFE with respect to which the territory financial institution acts as an intermediary or is a flow-through entity and provides the participating FFI with the information and documentation required under § 1.1471–3(c)(3)(iii)(G). The participating FFI shall be treated as having satisfied these reporting requirements if it reports with respect to each such specified U.S. person or substantial U.S. owner of a passive NFFE either—

(*i*) The information required by chapter 61 and described in paragraph (d)(5)(ii) or (d)(5)(iii) of this section (except account number); or

(*ii*) The information described in paragraph (d)(3)(ii), (d)(3)(iii), or (d)(3)(iv) of this section (except account number and account balance or value).

* * * * *

(D) *Special reporting of accounts held by owner-documented FFIs.* A participating FFI that maintains an account held by an FFI that it has agreed to treat as an owner-documented FFI under § 1.1471–3(d)(6) shall report the information described in paragraph (d)(3)(iv) or (d)(5)(iii) of this section with respect to each specified U.S. person identified in § 1.1471–3(d)(6)(iv)(A)(*1*) and (*2*). See § 1.1474–1(i) for the reporting obligations of a participating FFI with respect to a payee of an obligation other than an account that it has agreed to treat as an owner-documented FFI.

(E) *Requirement to identify the GIIN of a branch that maintains an account.* A participating FFI may report under paragraph (d)(3) or (d)(5) of this section either with respect to all of its U.S. accounts and recalcitrant accounts, or separately with respect to any clearly identified group of accounts (such as by line of business or the location of where the account is maintained). A participating FFI shall include the GIIN assigned to the participating FFI or its branches to identify the jurisdiction of the FFI or branch that maintains the accounts subject to reporting under paragraph (d)(3) or (d)(5) of this section. Additionally, a participating FFI shall file with the IRS the information required to be reported on accounts that it maintains in accordance with the forms and their accompanying instructions provided by the IRS. For the definition of a branch that applies for purposes of this paragraph (d), see paragraph (e)(2)(ii) of this section.

(F) *Reporting by participating FFIs (including QIs, WPs, WTs, and certain U.S. branches not treated as U.S. persons) for accounts of nonparticipating FFIs (transitional).* Except as otherwise provided in the instructions to Form 8966, ''FATCA Report'' or in this paragraph (d)(2)(ii)(F), if a participating FFI (including a QI, WP, WT, or U.S. branch of a participating FFI that is not treated as a U.S. person) maintains an account for a nonparticipating FFI (including a limited branch and limited FFI treated as a nonparticipating FFI), the participating FFI must report on Form 8966 the name and address of the nonparticipating FFI, and the aggregate amount of foreign source payments, as described in paragraph (d)(4)(iv) of this section, paid to or with respect to each such account (foreign reportable amount) for each of the calendar years 2015 and 2016. If, however, the participating FFI is prohibited under domestic law from reporting on a specific payee basis without consent from the nonparticipating FFI account holder and the participating FFI has not been able to obtain such consent, the participating FFI may instead report the aggregate number of accounts held by such non-consenting nonparticipating FFIs and the aggregate amount of foreign reportable amounts paid with respect to such accounts, as described in paragraph (d)(4)(iv) of this section, during the calendar year. A

participating FFI may, in lieu of reporting only foreign reportable amounts, report all income, gross proceeds, and redemptions (irrespective of the source) paid to the nonparticipating FFI's account by the participating FFI during the calendar year. With respect to calendar year 2015, however, a participating FFI is not required to report gross proceeds described in paragraph (d)(4)(iv)(B)(*3*) of this section paid to an account held by a nonparticipating FFI. In addition, the participating FFI must retain the account statements related to such nonparticipating FFI accounts. See paragraphs (d)(6)(iv), through (vii) of this section for rules relating to reporting on recalcitrant account holders. Form 8966 shall be filed electronically with the IRS on or before March 31 of the year following the end of the calendar year to which the form relates.

(G) [Reserved]. For further guidance, see § 1.1471–4T(d)(2)(ii)(G).

(iii) * * *

(A) *Special reporting rule for U.S. payors other than U.S. branches.* Participating FFIs that are U.S. payors (other than U.S. branches) shall be treated as having satisfied the chapter 4 reporting requirements described in paragraph (d)(2)(i) of this section with respect to accounts that the participating FFI is required to treat as U.S. accounts, or accounts held by owner-documented FFIs, if the participating FFI reports with respect to each such account either—

(*1*) The information required by chapter 61 and described in paragraph (d)(5)(ii) or (d)(5)(iii) of this section; or

(*2*) The information described in paragraph (d)(3)(ii), (d)(3)(iii), or (d)(3)(iv) of this section. However, such participating FFI that is required to report on such accounts under chapter 61 is not relieved of that obligation.

(B) *Special reporting rules for U.S. branches treated as U.S. persons.* A U.S. branch treated as a U.S. person (as defined in § 1.1471–1(b)(135)) shall be treated as having satisfied the reporting requirements described in paragraph (d)(2)(i) of this section if it reports under—

* * * * *

(C) *Rules for U.S. branches of FFIs not treated as U.S. persons.* A U.S. branch of an FFI that is not treated as a U.S. person shall apply the due diligence rules in paragraph (c)(2) of this section to document its accounts and payees, and shall report its U.S. accounts and accounts held by owner-documented FFIs under paragraph (d)(3), (d)(5), or (d)(6) of this section, as if the U.S. branch were a participating FFI. In addition, the U.S. branch shall apply the withholding requirements in paragraph (b) of this section as if the U.S. branch were a participating FFI.

(3) * * *

(ii) * * *

(E) Such other information as is otherwise required to be reported under this paragraph (d)(3) or in the form described in paragraph (d)(3)(v) of this section and its accompanying instructions.

(iii) *Accounts held by U.S. owned foreign entities.* With respect to each U.S. account described in paragraph (d)(3)(i) of this section that is held by a passive NFFE that is a U.S. owned foreign entity, a participating FFI is required to report under this paragraph (d)(3)(iii)—

* * * * *

(F) Such other information as is otherwise required to be reported under this paragraph (d)(3) or in the form described in paragraph (d)(3)(v) of this section and its accompanying instructions.

* * * * *

(vii) *Extensions in filing.* The IRS shall grant an automatic 90-day extension of time in which to file Form 8966. Form 8809–I, ''Application for Extension of Time to File FATCA Form 8966,'' (or such other form as the IRS may prescribe) must be used to request such extension of time and must be filed no later than the due date of Form 8966. Under certain hardship conditions, the IRS may grant an additional 90-day extension. A request for extension due to hardship must contain a statement of the reasons for requesting the extension and such other information as the forms or instructions may require.

(4) * * *

(i) *Address.* The address to be reported with respect to an account held by a specified U.S. person is the residence address recorded by the participating FFI for the account holder or, if no residence address is associated with the account holder, the address for the account used for mailing or for other purposes by the participating FFI. In the case of an account held by a passive NFFE that is a U.S. owned foreign entity, the address to be reported is the address of each substantial U.S. owner of such entity. In the case of an account held by an owner-documented FFI, the address to be reported is the address of each specified U.S. person identified in § 1.1471–3(d)(6)(iv)(A)(*1*) and (*2*).

* * * * *

(iv) * * *

(C) [Reserved]. For further guidance, see § 1.1471–4T(d)(4)(iv)(C).

(D) [Reserved]. For further guidance, see § 1.1471–4T(d)(4)(iv)(D).

* * * * *

(5) * * *

(i) * * *

(A) *Election under section 1471(c)(2).* Except as otherwise provided in this paragraph (d)(5), a participating FFI may elect under section 1471(c)(2) and this paragraph (d)(5) to report under sections 6041, 6042, 6045, and 6049, as appropriate, with respect to any account required to be reported under this paragraph (d). Such reporting must be done as if such participating FFI were a U.S. payor and each holder of an account that is a specified U.S. person, passive NFFE that is a U.S. owned foreign entity, or owner-documented FFI were a payee who is an individual and citizen of the United States. If a participating FFI makes such an election, the FFI is required to report the information required under this paragraph (d)(5) with respect to each such U.S. account or account held by an owner-documented FFI, regardless of whether the account holder of such account qualifies as a recipient exempt from reporting by a payor or middleman under sections 6041, 6042, 6045, or 6049, including the reporting of payments made to such account of amounts that are subject to reporting under any of these sections. A participating FFI that elects to report an account under the election described in this paragraph (d)(5) is required to report the information described in paragraph (d)(5)(ii) or (iii) of this section for a calendar year regardless of whether a reportable payment was made to the U.S. account during the calendar year. A participating FFI that reports an account under the election described in this paragraph (d)(5) is not required to report the information described in paragraph (d)(3) of this section with respect to the account. The election under section 1471(c)(2) described in this paragraph (d)(5)(i)(A) does not apply to cash value insurance contracts or annuity contracts that are financial accounts described in § 1.1471–5(b)(1)(iv). See paragraph (d)(5)(i)(B) of this section for an election to report cash value insurance contracts or annuity contracts that are U.S. accounts held by specified U.S. persons in a manner similar to section 6047(d).

(B) *Election to report in a manner similar to section 6047(d).* Except as otherwise provided in this paragraph (d)(5), a participating FFI may elect to report with respect to any of its cash value insurance contracts or annuity contracts that are U.S. accounts held by specified U.S. persons under section

6047(d), modified as follows. The amount to be reported is any amount paid under the contract during such reporting period as if such participating FFI were a U.S. payor. Each holder of a U.S. account that is a specified U.S. person is treated for purposes of reporting under this paragraph (d)(5)(i)(B) as a contract holder or payee who is an individual and citizen of the United States.

(ii) * * *

(B) In the case of an account holder that is a U.S. owned foreign entity that is a passive NFFE—

* * * * *

(v) *Time and manner of making the election.* A participating FFI (or one or more branches of the participating FFI) may make the election described in this paragraph (d)(5) by reporting the information described in this paragraph (d)(5) on the form described in paragraph (d)(5)(vii) of this section on the next reporting date following the end of the calendar year for which the election is made. A participating FFI may make an election under this paragraph (d)(5) either with respect to all of its U.S. accounts and recalcitrant accounts or, separately, with respect to any clearly identified group of accounts (such as by line of business or the location where the account is maintained).

(vi) *Revocation of election.* A participating FFI may revoke the election described in paragraph (d)(5)(i) of this section (as a whole or with regard to any clearly identified group of accounts) by reporting the information described in paragraph (d)(3) of this section beginning on the first reporting date with respect to the calendar year that follows the calendar year for which it last reports an account under this paragraph (d)(5).

(vii) *Filing of information under election.* In the case of an account holder that is a specified U.S. person, the information required to be reported under the election described in this paragraph (d)(5) shall be filed with the IRS and issued to the account holder in the time and manner prescribed in sections 6041, 6042, 6045, 6047(d), and 6049 and in accordance with the forms referenced therein and their accompanying instructions provided by the IRS for reporting under each of these sections. If the account holder is a passive NFFE that is a U.S. owned foreign entity or owner-documented FFI, however, the information required to be reported under the election described in this paragraph (d)(5) shall be filed on Form 8966 in accordance with its requirements and its accompanying instructions.

(6) * * *

(vi) *Extensions in filing.* The IRS shall grant an automatic 90-day extension of time in which to file Form 8966. Form 8809–I, ''Application for Extension of Time to File FATCA Form 8966,'' (or such other form as the IRS may prescribe) must be used to request such extension of time and must be filed no later than the due date of Form 8966. Under certain hardship conditions, the IRS may grant an additional 90-day extension. A request for extension due to hardship must contain a statement of the reasons for requesting the extension and such other information as the forms or instructions may require.

* * * * *

(7) *Special reporting rules with respect to the 2014 and 2015 calendar years*—(i) *In general.* If the effective date of the FFI agreement of a participating FFI is on or before December 31, 2015, the participating FFI is required to report U.S. accounts and accounts held by owner-documented FFIs that it maintained (or that it is otherwise required to report under paragraph (d)(2)(ii) of this section) during the 2014 and 2015 calendar years in accordance with paragraph (d)(7)(ii) or (iii) of this section.

(ii) * * *

(A) *Reporting with respect to the 2014 calendar year.* With respect to accounts maintained during the 2014 calendar year—

(*1*) The name, address, and TIN of each specified U.S. person who is an account holder and, in the case of any account holder that is a passive NFFE that is a U.S. owned foreign entity or that is an owner-documented FFI, the name of such entity and the name, address, and TIN of each substantial U.S. owner of such NFFE or, in the case of an owner-documented FFI, of each specified U.S. person identified in § 1.1471–3(d)(6)(iv)(A)(*1*) and (*2*);

* * * * *

(iii) *Participating FFIs that report under § 1.1471–4(d)(5).* A participating FFI that elects to report under paragraph (d)(5) of this section may report only the information described in paragraphs (d)(7)(ii)(A)(*1*) and (*3*) of this section for its 2014 calendar year. With respect to its 2015 calendar year, a participating FFI is required to report all of the information required to be reported under paragraphs (d)(5)(i) through (iii) of this section but may exclude from such reporting amounts reportable under section 6045.

(iv) * * *

(A) *In general.* Except as provided in paragraph (d)(7)(iv)(B) of this section, reporting under paragraph (d)(7)(ii) of this section shall be made on Form 8966 (or such other form as the IRS may prescribe), in the manner described in paragraph (d)(3)(vi) of this section. Reporting under paragraph (d)(7)(iii) of this section shall be made in accordance with paragraph (d)(5)(vii) of this section.

(B) *Special determination date and timing for reporting with respect to the 2014 calendar year.* With respect to the 2014 calendar year, a participating FFI must report under paragraph (d)(3) or (5) of this section on all accounts that are identified and documented under paragraph (c) of this section as U.S. accounts or accounts held by owner-documented FFIs as of December 31, 2014, (or as of the date an account is closed if the account is closed prior to December 31, 2014) if such account was outstanding on or after the effective date of the participating FFI's FFI agreement. Reporting for the 2014 calendar year shall be filed with the IRS on or before March 31, 2015. However, a U.S. payor (including a U.S. branch treated as a U.S. person (as defined in § 1.1471–1(b)(135))) that reports in accordance with paragraph (d)(2)(iii) of this section may report all or a portion of its U.S. accounts and accounts held by owner-documented FFIs in accordance with the dates otherwise applicable to reporting under chapter 61 with respect to the 2014 calendar year.

(8) *Reporting requirements of QIs, WPs, and WTs.* In general, the reporting requirements with respect to the U.S. accounts maintained by a participating FFI that is a QI, WP, or WT will be consistent with the reporting requirements with respect to such accounts of a participating FFI that is not a QI, WP, or WT. See the QI, WP, or WT agreement for the coordination of the chapter 4 reporting obligations of a participating FFI that also is a QI, WP, or WT.

(9) * * *

Example 1. Financial institution required to report U.S. account. PFFI1, a participating FFI, issues shares of stock that are financial accounts under § 1.1471–5(b). Such shares are held in custody by PFFI2, another participating FFI, on behalf of U, a specified U.S. person that holds an account with PFFI2. The shares of PFFI1 held by PFFI2 will not be subject to reporting by PFFI1 if PFFI1 may treat PFFI2 as a participating FFI under § 1.1471–3(d)(4). See paragraph (d)(2)(ii)(A) of this section.

Example 2. Financial institution required to report U.S. account. U, a specified U.S. person, holds shares in PFFI1, a participating FFI that invests in other financial institutions (a fund of funds). The shares of PFFI1 are financial accounts under § 1.1471–5(b)(3)(iii). PFFI1 holds shares that are also financial accounts under § 1.1471–5(b)(3)(iii) in PFFI2, another participating FFI. The shares of

PFFI2 held by PFFI1 are not subject to reporting by PFFI2, if PFFI2 may treat PFFI1 as a participating FFI under § 1.1471–3(d)(4). See paragraph (d)(2)(ii)(A) of this section.

Example 3. U.S. owned foreign entity. FC, a passive NFFE, holds a custodial account with PFFI1, a participating FFI. U, a specified U.S. person, owns 3% of the only class of stock of FC. Q, another specified U.S. person, owns 12% of the only class of stock of FC. U is not a substantial U.S. owner of FC. See § 1.1473–1(b). Q is a substantial U.S. owner of FC and FC identifies her as such to PFFI1. PFFI1 does not elect to report under paragraph (d)(5) of this section. PFFI1 must complete and file the reporting form described in paragraph (d)(3)(v) of this section and report the information described in paragraph (d)(3)(iii) with respect to both FC and Q. See paragraph (d)(3)(ii) of this section.

* * * * *

Example 5. Owner-documented FFI. DC, an owner-documented FFI under § 1.1471–3(d)(6), holds a custodial account with PFFI1, a participating FFI. U, a specified U.S. person, owns 3% of the only class of stock of DC. Q, another specified U.S. person, owns 12% of the only class of stock of DC. Both U and Q are persons identified in § 1.1471–3(d)(6)(iv)(A)(*1*) and DC identifies U and Q to PFFI1 and otherwise provides to PFFI1 all of the information required to be reported with respect to DC. PFFI1 must complete and file a form described in paragraph (d)(3)(v) of this section with regard to U and Q. See paragraph (d)(3)(iii) of this section.

* * * * *

Example 7. Sponsored FFI. DC2 is an FFI that has agreed to have a sponsoring entity, PFFI1, fulfill DC2's chapter 4 responsibilities under § 1.1471–5(f)(2)(iii). U, a specified U.S. person, holds an equity interest in DC2 that is a financial account under § 1.1471–5(b)(3)(iii). PFFI1 must complete and file a form described in paragraph (d)(3)(v) of this section with regard to U's account on behalf of DC2. See paragraph (d)(2)(ii)(C) of this section.

(e) * * *

(1) *In general.* Except as otherwise provided in this paragraph (e)(1) or paragraphs (e)(2) and (e)(3) of this section, each FFI that is a member of an expanded affiliated group must have the chapter 4 status of a participating FFI, deemed-compliant FFI, or exempt beneficial owner as a condition for any member of such group to obtain the status of a participating FFI or registered deemed-compliant FFI. Accordingly, except as otherwise provided in paragraph (e)(3)(v) of this section, each FFI other than a certified deemed-compliant FFI or exempt beneficial owner in an expanded affiliated group must submit a registration form to the IRS in such manner as the IRS may prescribe requesting an FFI agreement, registered deemed-compliant status, or limited FFI status as a condition for any member to become a participating FFI or registered deemed-compliant FFI. Except as provided in paragraph (e)(2) of this section, each FFI other than a certified deemed-compliant FFI or exempt beneficial owner that is a member of such group must also agree to all of the requirements for the status for which it applies with respect to all accounts maintained at all of its branches, offices, and divisions. For the withholding requirements of a participating FFI with respect to its limited branches and its affiliates that are limited FFIs, see paragraph (b)(5) of this section. Notwithstanding the foregoing, an FFI (or branch thereof) that is treated as a participating FFI or a deemed-compliant FFI pursuant to a Model 1 IGA or Model 2 IGA will maintain such status provided that it meets the terms for such status pursuant to such agreement.

(2) * * *

(ii) *Branch defined.* The term *branch* has the meaning set forth in § 1.1471–1(b)(10).

* * * * *

(iv) * * *

(D) Except as otherwise provided in paragraph (e)(2)(vi) of this section, agree that each such branch will not open accounts that it is required to treat as U.S. accounts or accounts held by nonparticipating FFIs, including accounts transferred from any branch of the FFI or from any member of its expanded affiliated group; and

* * * * *

(v) *Term of limited branch status (transitional).* An FFI that becomes a participating FFI with one or more limited branches will cease to be a participating FFI after December 31, 2016, unless otherwise provided pursuant to Model 1 IGA or Model 2 IGA. A branch will cease to be a limited branch as of the beginning of the third calendar quarter following the date on which the branch is no longer prohibited from complying with the requirements of a participating FFI as described in this section. In such case, a participating FFI will retain its status as a participating FFI if it notifies the IRS by the date such branch ceases to be a limited branch that it will comply with the requirements of an FFI agreement with respect to such branch, or if otherwise provided pursuant to a Model 1 IGA or Model 2 IGA.

(vi) *Exception from restriction on opening U.S. accounts and accounts held by nonparticipating FFIs.* Notwithstanding the requirements of paragraph (e)(2)(iv)(D) of this section, a branch may open U.S. accounts for persons resident in the same jurisdiction in which such branch is located or operating and accounts for nonparticipating FFIs that are resident in the same jurisdiction provided that—

(A) The branch does not solicit U.S. accounts or accounts for nonparticipating FFIs from persons not resident in the same jurisdiction in which such branch is located or operating; and

(B) The branch is not used by the FFI or any FFI in its expanded affiliated group to circumvent the obligations of such FFI under section 1471.

(3) * * *

(iii) * * *

(A) Except as otherwise provided in paragraph (e)(3)(v) of this section, register as part of its expanded affiliated group's FFI agreement process for limited FFI status;

* * * * *

(C) Except as otherwise provided in paragraph (e)(3)(vi) of this section, agree as part of such registration that it will not open accounts that it is required to treat as U.S. accounts or accounts held by nonparticipating FFIs, including accounts transferred from any member of its expanded affiliated group; and

* * * * *

(iv) *Period for limited FFI status (transitional).* A limited FFI will cease to be a limited FFI after December 31, 2016. An FFI will also cease to be a limited FFI when it becomes a participating FFI or deemed-compliant FFI, or as of the beginning of the third calendar quarter following the date on which the FFI is no longer prohibited from complying with the requirements of a participating FFI as described in this section. In such case, participating FFIs and deemed-compliant FFIs that are members of the same expanded affiliated group will retain their status if, by the date that an FFI ceases to be a limited FFI, such FFI enters into an FFI agreement or becomes a registered deemed-compliant FFI, unless otherwise provided pursuant to an applicable Model 1 IGA or Model 2 IGA.

(v) *Exception from registration requirement*—(A) *Conditions for exception.* An FFI that seeks to become a limited FFI is excepted from the registration requirement of paragraph (e)(3)(iii)(A) of this section provided that—

(*1*) The FFI is prohibited under local law from registering as a limited FFI;

(*2*) A member of the FFI's expanded affiliated group that is a U.S. financial institution or an FFI seeking status as (or that is) a participating FFI or reporting Model 1 FFI registers as a lead FI (defined in the Instructions for Form 8957, ''Foreign Account Tax Compliance Act (FATCA) Registration'') with respect to the limited FFI; and

(*3*) The lead FI identifies the limited FFI on the lead FI's FATCA registration. However, if the limited FFI is prohibited under applicable law from being identified by its legal name on the FATCA registration Web site, the lead FI may use the term *Limited FFI* in place of the limited FFI's name and indicate the limited FFI's jurisdiction of residence or organization.

(B) *Confirmation requirements of lead FI.* By identifying a limited FFI on the FATCA registration Web site pursuant to paragraph (e)(3)(v)(A)(*2*) of this section, the lead FI is confirming that—

(*1*) The limited FFI has represented to the lead FI that it will meet the conditions for limited FFI status described in paragraph (e)(3)(iii) of this section;

(*2*) The limited FFI has agreed to notify the lead FI within 30 days of the date that such FFI ceases to meet the requirements of a limited FFI or the date that such FFI can comply with the requirements of a participating FFI or deemed-compliant FFI (and will separately register for that status); and

(*3*) The lead FI, if it receives a notification described in paragraph (e)(3)(v)(B)(*2*) of this section or otherwise knows that the limited FFI has not complied with the conditions for limited FFI status or can comply with the requirements of a participating FFI or deemed-compliant FFI, will, within 90 days of such notification or acquiring such knowledge, remove the FFI from the lead FI's registration on the FATCA registration Web site and maintain a record of the date on which the FFI ceased to be a limited FFI and (if applicable) the circumstances of the limited FFI's non-compliance, which will be available to the IRS upon request.

(vi) *Exception from restriction on opening U.S. accounts and accounts held by nonparticipating FFIs.* Notwithstanding paragraph (e)(3)(iii)(C) of this section, a limited FFI may open U.S. accounts for persons resident in the same jurisdiction in which such FFI is resident or organized and accounts for nonparticipating FFIs that are resident in the same jurisdiction provided that—

(A) Such FFI does not solicit U.S. accounts or accounts for nonparticipating FFIs from persons not resident in the same jurisdiction in which the FFI is resident or organized; and

(B) The FFI is not used by another FFI in the FFI's expanded affiliated group to circumvent the obligations of such other FFI under section 1471.

(4) *Special rule for QIs.* An FFI that has in effect a QI agreement with the IRS will be allowed to become a limited FFI notwithstanding that none of the FFIs in the expanded affiliated group of which the FFI is a member can comply with the requirements of a participating FFI as described in this section if the FFI that is a QI meets the conditions of a limited FFI under paragraph (e)(3)(iii) of this section.

(f) * * *

(1) *In general.* This paragraph (f) describes the requirement for a participating FFI to establish and implement a compliance program for satisfying its requirements under this section. Paragraph (f)(2) of this section provides the requirement for a participating FFI to establish a compliance program and the option for a group of FFIs to adopt a consolidated compliance program. Paragraph (f)(3) of this section describes the periodic certification that the participating FFI must make to the IRS regarding the participating FFI's compliance with the requirements of an FFI agreement. Paragraph (f)(4) describes IRS information requests related to compliance with an FFI agreement.

* * * * *

(3) * * *

(i) *In general.* In addition to the certifications required under paragraph (c)(7) of this section, on or before July 1 of the calendar year following the end of each certification period, the responsible officer must make the certification described in either paragraph (f)(3)(ii) or (iii) of this section on the form and in the manner prescribed by the IRS. The first certification period begins on the effective date of the FFI agreement and ends at the close of the third full calendar year following the effective date of the FFI agreement. Each subsequent certification period is the three calendar year period following the previous certification period, unless the FFI agreement provides for a different period. The responsible officer must either certify that the participating FFI maintains effective internal controls or, if the participating FFI has identified an event of default (defined in paragraph (g) of this section) or a material failure (defined in paragraph (f)(3)(iv) of this section) that it has not corrected as of the date of the certification, must make the qualified certification described in paragraph (f)(3)(iii) of this section.

* * * * *

(4) * * *

(i) *General inquiries.* The IRS, based upon the information reporting forms described in paragraphs (d)(3)(v), (d)(5)(vii), or (d)(6)(iv) of this section filed with the IRS (or the absence of such reporting) for each calendar year, may request additional information with respect to the information reported (or required to be reported) on the forms or may request the account statements described in paragraph (d)(4)(v) of this section, or confirmation that the FFI has no accounts that it was required to report. The IRS may also request any additional information to determine an FFI's compliance with its FFI agreement and to assist the IRS with its review of account holder compliance with tax reporting requirements.

(ii) *Inquiries regarding substantial non-compliance.* If, based on the information reporting forms described in paragraphs (d)(3)(v), (d)(5)(vii), or (d)(6)(iv) of this section filed with the IRS for each calendar year, the certifications made by the responsible officer described in paragraph (f)(3) of this section, or any other information related to the participating FFI's compliance with its FFI agreement, the IRS determines in its discretion that the participating FFI may not have substantially complied with the requirements of its FFI agreement, the IRS may request from the responsible officer (or designee) information necessary to verify the participating FFI's compliance with the FFI agreement. The IRS may request, for example, a description or copy of the participating FFI's policies and procedures for fulfilling the requirements of the FFI agreement, a description of the participating FFI's procedures for conducting its periodic review, or a copy of any written reports documenting the findings of such review in order to evaluate the sufficiency of the participating FFI's compliance program and review of such program. The IRS may also request the performance of specified review procedures by a person (including an external auditor or third-party consultant) that the IRS identifies as competent to perform such procedures given the facts and circumstances surrounding the FFI's potential failure to comply with the FFI agreement. The IRS may make these requests to a sponsoring entity with respect to any sponsored FFI.

(g) * * *

(1) *Defined.* An event of default occurs if a participating FFI fails to perform material obligations required with respect to the due diligence, verification, withholding, or reporting requirements of the FFI agreement or if the IRS determines that the participating FFI has failed to substantially comply with the requirements of the FFI agreement. An event of default also

includes the occurrence of the following—

* * * * *

(ii) Failure to significantly reduce, over a period of time, the number of account holders or payees that the participating FFI is required to treat as recalcitrant account holders or nonparticipating FFIs, as a result of the participating FFI failing to comply with the due diligence procedures for the identification and documentation of account holders and payees, as set forth in paragraph (c) of this section;

* * * * *

(2) *Notice of event of default.* Following an event of default known by or disclosed to the IRS, the IRS will deliver to the participating FFI a notice of default specifying the event of default. The IRS will request that the participating FFI remediate the event of default within a specified time period. The participating FFI must respond to the notice of default and provide information responsive to an IRS request for information or state the reasons why the participating FFI does not agree that an event of default has occurred. Taking into account the terms of any applicable Model 2 IGA, if the participating FFI does not provide a response within the specified time period, the IRS may, at its sole discretion, deliver a notice of termination that terminates the FFI's participating FFI status. A participating FFI may request, within a reasonable period of time, reconsideration of a notice of default or notice of termination by written request to the IRS.

* * * * *

(j) *Effective/applicability date*—(1) *In general.* This section applies on January 6, 2017. However, taxpayers may apply these provisions as of January 28, 2013. (For the rules that apply beginning on January 28, 2013, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2016.)

(2) [Reserved]. For further guidance, see § 1.1471–4T(j)(2).

■ **Par. 10.** Section 1.1471–4T is revised to read as follows:

§ 1.1471–4T FFI agreement (temporary).

(a) through (b) [Reserved]. For further guidance, see § 1.1471–4(a) through (b)(7).

(c) [Reserved]. For further guidance, see § 1.1471–4(c).

(1) through (2) [Reserved]. For further guidance, see § 1.1471–4(c)(1) through (2).

(i) [Reserved]. For further guidance, see § 1.1471–4(c)(2)(i).

(ii) [Reserved]. For further guidance, see § 1.1471–4(c)(2)(ii).

(A) [Reserved]. For further guidance, see § 1.1471–4(c)(2)(ii)(A).

(B) [Reserved]. For further guidance, see § 1.1471–4(c)(2)(ii)(B).

(*1*) [Reserved]. For further guidance, see § 1.1471–4(c)(2)(ii)(B)(*1*).

(*2*) [Reserved]. For further guidance, see § 1.1471–4(c)(2)(ii)(B)(*2*).

(*i*) through (*ii*) [Reserved]. For further guidance, see § 1.1471–4(c)(2)(ii)(B)(*2*)(*i*) through (*ii*).

(*iii*) In the case of a transferor FI that is a participating FFI or a registered deemed-compliant FFI (or a U.S. branch of either such entity that is not treated as a U.S. person) or that is a deemed-compliant FFI that applies the requisite due diligence rules of this paragraph (c) as a condition of its status, the transferor FI provides a written representation to the transferee FFI acquiring the accounts that the transferor FI has applied the due diligence procedures of this paragraph (c) with respect to the transferred accounts and, in the case of a transferor FI that is a participating FFI, has complied with the requirements of paragraph (f)(2) of this section; and

(*iv*) [Reserved]. For further guidance, see § 1.1471–4(c)(2)(ii)(B)(*2*)(*iv*).

(iii) through (v) [Reserved]. For further guidance, see § 1.1471–4(c)(2)(iii) through (v).

(3) through (7) [Reserved]. For further guidance, see § 1.1471–4(c)(3) through (7).

(d) [Reserved]. For further guidance, see § 1.1471–4(d).

(1) [Reserved]. For further guidance, see § 1.1471–4(d)(1).

(2) [Reserved]. For further guidance, see § 1.1471–4(d)(2).

(i) [Reserved]. For further guidance, see § 1.1471–4(d)(2)(i).

(ii) [Reserved]. For further guidance, see § 1.1471–4(d)(2)(ii).

(A) through (F) [Reserved]. For further guidance, see § 1.1471–4(d)(2)(ii)(A) through (F).

(G) *Combined reporting on Form 8966 following merger or bulk acquisition.* If a participating FFI (successor) acquires accounts of another participating FFI (predecessor) in a merger or bulk acquisition of accounts, the successor may assume the predecessor's obligations to report the acquired accounts under paragraph (d) of this section with respect the calendar year in which the merger or acquisition occurs (acquisition year), provided that the requirements in paragraphs (d)(2)(ii)(G)(*1*) through (*6*) of this section are satisfied. If the requirements of paragraphs (d)(2)(ii)(G)(*1*) through (*6*) of this section are not satisfied, both the predecessor and the successor are required to report the acquired accounts for the portion of the acquisition year that it maintains the account.

(*1*) The successor must acquire substantially all of the accounts maintained by the predecessor, or substantially all of the accounts maintained at a branch of the predecessor, in a merger or bulk acquisition of accounts for value.

(*2*) The successor must agree to report the acquired accounts for the acquisition year on Form 8966 to the extent required in § 1.1471–4(d)(3) or (d)(5).

(*3*) The successor may not elect to report under section 1471(c)(2) and § 1.1471–4(d)(5) with respect to any acquired account that is a U.S. account for the acquisition year.

(*4*) The successor must notify the IRS on the form and in the manner prescribed by the IRS that Form 8966 is being filed on a combined basis.

(iii) [Reserved]. For further guidance, see § 1.1471–4(d)(2)(iii) through (d)(2)(iii)(C).

(3) [Reserved]. For further guidance, see § 1.1471–4(d)(3) through (d)(3)(vii).

(4) [Reserved]. For further guidance, see § 1.1471–4(d)(4).

(i) through (iii) [Reserved]. For further guidance, see § 1.1471–4(d)(4)(i) through (iii).

(iv) [Reserved]. For further guidance, see § 1.1471–4(d)(4)(iv).

(A) through (B) [Reserved]. For further guidance, see § 1.1471–4(d)(4)(iv)(A) through (B).

(C) *Other accounts.* In the case of an account described in § 1.1471–5(b)(1)(iii) (relating to a debt or equity interest other than an interest as a partner in a partnership) or § 1.1471–5(b)(1)(iv) (relating to cash value insurance contracts and annuity contracts), the payments made during the calendar year with respect to such account are the gross amounts paid or credited to the account holder during the calendar year including payments in redemption (in whole or part) of the account. In the case of an account that is a partner's interest in a partnership, the payments made during the calendar year with respect to such account are the amount of the partner's distributive share of the partnership's income or loss for the calendar year, without regard to whether any such amount is distributed to the partner during the year, and any guaranteed payments for the use of capital. The payments required to be reported under this paragraph (d)(4)(iv)(C) with respect to a partner may be determined based on the partnership's tax returns or, if the tax returns are unavailable by the due date for filing Form 8966, the partnership's

financial statements or any other reasonable method used by the partnership for calculating the partner's share of partnership income by such date.

(D) *Transfers and closings of deposit, custodial, insurance, and annuity financial accounts.* In the case of an account closed or transferred in its entirety during a calendar year that is a depository account, custodial account, or a cash value insurance contract or annuity contract, the payments made with respect to the account shall be—

(*1*) through (*2*) [Reserved]. For further guidance, see § 1.1471–4(d)(4)(iv)(D)(*1*) through (*2*).

(E) through (F) [Reserved]. For further guidance, see § 1.1471–4(d)(4)(iv)(E) through (F).

(v) [Reserved]. For further guidance, see § 1.1471–4(d)(4)(v).

(5) through (9) [Reserved]. For further guidance, see § 1.1471–4(d)(5) through (d)(9), *Example 7.*

(e) through (i) [Reserved]. For further guidance, see § 1.1471–4(e) through (i).

(j) [Reserved]. For further guidance, see § 1.1471–4(j).

(1) [Reserved]. For further guidance, see § 1.1471–4(j)(1).

(2) *Special applicability date.* Paragraph (d)(4)(iv)(C) of this section applies beginning with reporting with respect to calendar year 2017.

(k) *Expiration date.* The applicability of this section expires on December 30, 2019.

■ **Par. 11.** Section 1.1471–5 is amended by revising paragraphs (a)(3)(i), (a)(4)(i), (b)(1)(iii)(B)(*2*), (b)(3)(iv), (b)(3)(v)(A), (b)(3)(v)(B)(*1*) and (*2*), (b)(3)(vi), (c), (d), (e)(1)(v)(A), (e)(3)(ii), (e)(4)(v) *Example 7* and *Example 8,* (e)(5)(i)(A)(*3*), (e)(5)(i)(B) through (C), (e)(5)(i)(D)(*1*)(*iv*) and (*v*), (e)(5)(iv)(B), (f), (f)(1)(i)(A)(*6*) and (*7*), (f)(1)(i)(B)(*1*), (f)(1)(i)(B)(*3*), (f)(1)(i)(C)(*2*), (f)(1)(i)(D)(*4*) through (*6*), (f)(1)(i)(D)(*7*) introductory text, (f)(1)(i)(D)(*8*), (f)(1)(i)(E), (f)(1)(i)(F)(*1*)(*i*) and (*ii*), (f)(1)(i)(F)(*3*)(*i*), (f)(1)(i)(F)(*3*)(*iii*), (f)(1)(i)(F)(*3*)(*v*) through (*viii*), (f)(1)(i)(F)(*5*), (f)(1)(ii)(B), (f)(2) introductory text, (f)(2)(i)(B), (f)(2)(iii) through (v), (f)(4)(i), (g)(1), (g)(3)(i)(D), and (i) through (l) to read as follows:

§ 1.1471–5 Definitions applicable to section 1471.

(a) * * *

(3) * * *

(i) *In general.* Except as otherwise provided in this paragraph (a)(3), the account holder is the person listed or identified as the holder or owner of the account with the FFI that maintains the account, regardless of whether such person is a flow-through entity. Thus, for example, except as otherwise provided in paragraph (a)(3)(ii) of this section, if a trust (including a simple or grantor trust) or an estate is listed as the holder or owner of a financial account, the trust or estate is the account holder, rather than its owners or beneficiaries. Similarly, except as otherwise provided in this paragraph (a)(3), if a partnership is listed as the holder or owner of a financial account, the partnership is the account holder, rather than the partners in the partnership. In the case of an account held by an entity that is disregarded for U.S. federal tax purposes under § 301.7701–2(c)(2)(i) of this chapter, the account shall be treated as held by the person owning such entity. With respect to an account held by an exempt beneficial owner, such account is treated as held by an exempt beneficial owner only when all payments made to such account would be treated as made to an exempt beneficial owner. See § 1.1471–6(h) for when a payment derived from certain commercial activities is not treated as made to an exempt beneficial owner.

* * * * *

(4) * * *

(i) *Exception for certain individual accounts of participating FFIs.* Unless a participating FFI elects under paragraph (a)(4)(ii) of this section not to apply this paragraph (a)(4)(i), the term *U.S. account* shall not include any depository account maintained by such financial institution during a calendar year if the account is held solely by one or more individuals and, with respect to each holder of such account, the aggregate balance or value of all depository accounts held by each such individual does not exceed $50,000 as of the end of the calendar year or on the date the account is closed. For rules for determining the account balance or value, see paragraphs (a)(3)(iii) and (b)(4) of this section.

* * * * *

(b) * * *

(1) * * *

(iii) * * *

(B) * * *

(*2*) The return earned on the interest is determined, directly or indirectly, primarily by reference to one or more investment entities described in paragraph (e)(4)(i)(B) or (C) of this section or one or more passive NFFEs that are members of the entity's expanded affiliated group (as determined under paragraph (b)(3)(vi) of this section);

* * * * *

(3) * * *

(iv) *Regularly traded on an established securities market.* To determine if debt or equity interests described in paragraph (b)(1)(iii) of this section are regularly traded, the principles of § 1.1472–1(c)(1)(i)(A)(*2*)(*i*) and (*ii*) shall apply with respect to the interests, and the principles of § 1.1472–1(c)(1)(i)(B)(*1*) shall apply for this purpose in the case of an initial public offering of such interests. See § 1.1472–1(c)(1)(i)(C) for the definition of an established securities market. For purposes of paragraph (b)(1)(iii) of this section, an interest is not regularly traded on an established securities market if the holder of the interest (excluding a financial institution acting as an intermediary) is registered on the books of the investment entity. The preceding sentence shall not apply to the extent a holder's interest is registered prior to July 1, 2014, on the books of the investment entity.

(v) * * *

(A) *Equity interest.* The value of an equity interest is determined, directly or indirectly, primarily by reference to assets that give rise (or could give rise) to withholdable payments if the return earned on such interest (including upon a sale, exchange, or redemption) is determined primarily by reference to profits or assets of a U.S. person or equity interests in a U.S. person.

(B) * * *

(*1*) Debt is convertible into equity interests in a U.S. person; or

(*2*) The return earned on such interest (including upon a sale, exchange, or redemption) is determined primarily by reference to profits or assets of a U.S. person or equity interests in a U.S. person.

(vi) *Return earned on the interest (including upon a sale, exchange, or redemption) determined, directly or indirectly, primarily by reference to one or more investment entities or passive NFFEs*—(A) *Equity interest.* The return earned on an equity interest is determined, directly or indirectly, primarily by reference to one or more investment entities described in paragraph (e)(4)(i)(B) or (C) of this section or passive NFFEs that are members of the entity's expanded affiliated group if the return on such interest (including upon a sale, exchange, or redemption) is determined primarily by reference to profits or assets of, or equity interests in, one or more investment entities described in paragraph (e)(4)(i)(B) or (C) of this section or passive NFFEs that are members of the entity's expanded affiliated group.

(B) *Debt interest.* The return earned on a debt interest is determined, directly or indirectly, primarily by reference to one or more investment entities described in paragraph (e)(4)(i)(B) or (C) of this

section or passive NFFEs that are members of the entity's expanded affiliated group if—

(*1*) Debt is convertible into equity interests in one or more investment entities described in paragraph (e)(4)(i)(B) or (C) of this section or passive NFFEs that are members of the entity's expanded affiliated group; or

(*2*) The return on such interest (including upon a sale, exchange, or redemption) is determined primarily by reference to profits or assets of, or equity interests in, one or more investment entities described in paragraph (e)(4)(i)(B) or (C) of this section or passive NFFEs that are members of the entity's expanded affiliated group.

* * * * *

(c) *U.S. owned foreign entity.* The term *U.S. owned foreign entity* means any foreign entity that has one or more substantial U.S. owners (as defined in § 1.1473–1(b)). See § 1.1473–1(e) for the definition of foreign entity for purposes of chapter 4. For the requirements applicable to determining direct and indirect ownership in an entity, see § 1.1473–1(b)(2).

(d) *Definition of FFI.* The term *FFI* means, with respect to any entity that is not resident in, or organized under the laws of, as applicable, a country that has in effect a Model 1 IGA or Model 2 IGA, any financial institution (as defined in paragraph (e) of this section) that is a foreign entity. The term *FFI* also means, with respect to any entity that is resident in, or organized under the laws of, as applicable, a country that has in effect a Model 1 IGA or Model 2 IGA, any entity that is treated as a FATCA Partner Financial Institution pursuant to such Model 1 IGA or Model 2 IGA. See, however, § 1.1471–2(a)(2)(v) for when certain branches of U.S. financial institutions may be treated as FFIs. A territory financial institution is not an FFI under this paragraph (d).

(e) * * *

(1) * * *

(v) * * *

(A) Is part of an expanded affiliated group that includes a depository institution, custodial institution, specified insurance company, or investment entity described in paragraphs (e)(4)(i)(B) or (C) of this section; or

* * * * *

(3) * * *

(ii) *Income attributable to holding financial assets and related financial services.* For purposes of this paragraph (e)(3), the term *income attributable to holding financial assets and related financial services* means custody, account maintenance, and transfer fees; commissions and fees earned from executing and pricing securities transactions; income earned from extending credit to customers with respect to financial assets held in custody by the entity (or acquired through such extension of credit); income earned on the bid-ask spread of financial assets; fees for providing financial advice with respect to financial assets held in (or potentially to be held in) custody by the entity; and fees for clearance and settlement services.

* * * * *

(4) * * *

(v) * * *

Example 7. Individual introducing broker. IB, an individual introducing broker, primarily conducts a business of providing advice to clients, has discretionary authority to manage clients' assets, and uses the services of a foreign entity to conduct and execute trades on behalf of clients. IB provides services as an investment advisor and manager to Entity, a foreign corporation. Entity has earned 50% or more of its gross income for the past three years from investing, reinvesting, or trading in financial assets. Because IB is an individual, notwithstanding that IB primarily conducts certain investment-related activities, IB is not an investment entity under paragraph (e)(4)(i)(A) of this section. Further, Entity is not an investment entity under paragraph (e)(4)(i)(B) of this section because Entity is managed by IB, an individual.

Example 8. Entity introducing broker. IB, a foreign entity introducing broker, primarily conducts a business of providing advice to clients, has discretionary authority to manage clients' assets, and uses the services of a foreign entity to conduct and execute trades on behalf of clients. IB provides its services as an investment advisor and manager to Entity, a foreign corporation. Entity has earned 50% or more of its gross income for the past three years from investing, reinvesting, or trading in financial assets. Because IB is an entity that primarily conducts certain investment-related activities, IB is an investment entity under paragraph (e)(4)(i)(A) of this section. Further, Entity is an investment entity under paragraph (e)(4)(i)(B) of this section because it is managed by IB, an investment entity that performs certain of the activities described in paragraph (e)(4)(i)(A) of this section on behalf of Entity.

(5) * * *

(i) * * *

(A) * * *

(*3*) The entity does not hold itself out as, and was not formed in connection with or availed of by, an arrangement or investment vehicle that is a private equity fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle established with an investment strategy to acquire or fund companies and to treat the interests in those companies as capital assets held for investment purposes. For purposes of determining whether an entity was formed in connection with or availed of by such an arrangement or investment vehicle, any entity that existed at least six months prior to its acquisition by such arrangement or investment vehicle and that, prior to the acquisition, regularly conducted activities described in paragraph (e)(5)(i)(C), (D), or (E) of this section will not be considered to have been formed in connection with or availed of by the arrangement or investment vehicle, in the absence of other facts suggesting the existence of an investment strategy described in the prior sentence.

(B) *Nonfinancial group.* An expanded affiliated group defined in paragraph (i)(2) of this section is a nonfinancial group if, taking into account the application of this section—

(*1*) For the three-year period (or the period during which the expanded affiliated group has been in existence, if shorter) ending on December 31 (or the end of the fiscal year of one or more members of the group) of the year preceding the year in which the determination is made, no more than 25 percent of the gross income of the expanded affiliated group (excluding income derived by any member that is an entity described in paragraph (e)(5)(ii) or (iii) of this section, income derived from transactions between members of the expanded affiliated group, and interest income on notes issued by customers to a member of the expanded affiliated group that is a captive finance company to finance the customer's purchase of inventory or goods that are manufactured by a member of the expanded affiliated group) consists of passive income (as defined in § 1.1472–1(c)(1)(iv)); no more than five percent of the gross income of the expanded affiliated group is derived by members of the expanded affiliated group that are FFIs (excluding income derived from transactions between members of the expanded affiliated group or by any member of the expanded affiliated group that is a certified deemed-compliant FFI); and no more than 25 percent of the value of assets held by the expanded affiliated group (excluding assets held by a member that is an entity described in paragraph (e)(5)(ii) or (iii) of this section, assets resulting from transactions between related members of the expanded affiliated group, and receivables that are notes issued by customers to a member of the expanded affiliated group that is a captive finance company to finance the customer's purchase of inventory or goods that are manufactured by a member of the

expanded affiliated group) are assets that produce or are held for the production of passive income; and

(*2*) Any member of the expanded affiliated group that is an FFI is a participating FFI, deemed-compliant FFI, or an exempt beneficial owner. However, an acquisition by a member of the expanded affiliated group of an FFI that is not a participating FFI, deemed-compliant FFI, or an exempt beneficial owner, or a change in the chapter 4 status of a member of the expanded affiliated group, will not cause a nonfinancial group to cease to be a nonfinancial group until 90 days after the acquisition or change in chapter 4 status.

(C) *Holding company.* For purposes of this paragraph (e)(5)(i), an entity is a holding company if its primary activity consists of holding (directly or indirectly) all or part of the outstanding stock of one or more members of its expanded affiliated group. A partnership or any other non-corporate entity shall be treated as a holding company if substantially all the activities of such partnership (or other entity) consist of holding more than 50 percent of the voting power and value of the stock of one or more common parent corporation(s) of one or more expanded affiliated group(s). If a partnership or other non-corporate entity owns more than 50 percent of the voting power and value of the stock of more than one common parent corporation of an expanded affiliated group, each common parent corporation's expanded affiliated group will be treated as a separate expanded affiliated group for purposes of applying the rules of this section unless a non-corporate entity is treated as the common parent entity of the expanded affiliated group in accordance with § 1.1471–5(i)(10).

(D) * * *

(*1*) * * *

(*iv*) Managing the working capital of the expanded affiliated group (or any member thereof) such as by pooling the cash balances of affiliates (including both positive and deficit cash balances) or by investing or trading in financial assets solely for the account and risk of such entity or any member of its expanded affiliated group; or

(*v*) Acting as a financing vehicle for the expanded affiliated group (or any member thereof).

* * * * *

(iv) * * *

(B) The entity does not hold an account (other than depository accounts in the country in which the entity is operating to pay for expenses in that country) with or receive payments from any withholding agent other than a member of its expanded affiliated group;

* * * * *

(f) *Deemed-compliant FFIs.* The term *deemed-compliant FFI* includes a registered deemed-compliant FFI (as defined in paragraph (f)(1) of this section), a certified deemed-compliant FFI (as defined in paragraph (f)(2) of this section), a nonreporting IGA FFI (as defined in § 1.1471–1(b)(83)), and, to the extent provided in paragraph (f)(3) of this section, an owner-documented FFI. A deemed-compliant FFI will be treated pursuant to section 1471(b)(2) as having met the requirements of section 1471(b). A deemed-compliant FFI that complies with the due diligence and withholding requirements applicable to such entity as provided in this paragraph (f) will also be deemed to have met its withholding obligations under sections 1471(a) and 1472(a). For this purpose, an intermediary or flow-through entity that has a residual withholding obligation under § 1.1471–2(a)(2)(ii) must fulfill such obligation to be considered a deemed-compliant FFI.

(1) * * *

(i) * * *

(A) * * *

(*6*) By the later of June 30, 2014, or the date it registers as a deemed-compliant FFI, the FFI implements policies and procedures, consistent with those set forth for a participating FFI under § 1.1471–4(c), to monitor whether the FFI opens or maintains an account for a specified U.S. person who is not a resident of the country in which the FFI is incorporated or organized (including a U.S. person that was a resident when the account was opened but subsequently ceases to be a resident), an entity controlled or beneficially owned (as determined under the FFI's AML due diligence) by one or more specified U.S. persons that are not residents of the country in which the FFI is incorporated or organized, or a nonparticipating FFI. Such policies and procedures must provide that if any such account is discovered, the FFI will close such account, transfer such account to a participating FFI, reporting Model 1 FFI, or U.S. financial institution, or withhold and report on such account as would be required under § 1.1471–4(b) and (d) if the FFI were a participating FFI.

(*7*) With respect to each preexisting account held by a nonresident of the country in which the FFI is organized or held by an entity, the FFI reviews those accounts in accordance with the procedures described in § 1.1471–4(c) applicable to preexisting accounts to identify any U.S. account or account held by a nonparticipating FFI, and certifies to the IRS that it did not identify any such account as a result of its review, that it has closed any such accounts that were identified or transferred them to a participating FFI, reporting Model 1 FFI, or U.S. financial institution, or that it agrees to withhold and report on such accounts as would be required under § 1.1471–4(b) and (d) if it were a participating FFI. Such certification must be submitted by the due date of the FFI's first certification of compliance required under paragraph (f)(1)(ii)(B) of this section.

* * * * *

(B) * * *

(*1*) By the later of June 30, 2014, or the date it registers with the IRS pursuant to paragraph (f)(1)(ii) of this section, the FFI implements policies and procedures to ensure that within six months of opening a U.S. account or an account held by a recalcitrant account holder or a nonparticipating FFI, the FFI either transfers such account to an affiliate that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution, closes the account, or becomes a participating FFI.

* * * * *

(*3*) By the later of June 30, 2014, or the date it registers with the IRS pursuant to paragraph (f)(1)(ii) of this section, the FFI implements policies and procedures to ensure that it identifies any account that becomes a U.S. account or an account held by a recalcitrant account holder or a nonparticipating FFI due to a change in circumstances. Within six months of the date on which the FFI first has knowledge or reason to know of the change in the account holder's chapter 4 status, the FFI transfers any such account to an affiliate that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution, closes the account, or becomes a participating FFI.

(C) * * *

(*2*) Each holder of record of direct debt interests in the FFI in excess of $50,000, of any direct equity interests in the FFI (for example the holders of its units or global certificates), and of any other account holder of the FFI is a participating FFI, a registered deemed-compliant FFI, a retirement plan described in § 1.1471–6(f), a non-profit organization described in paragraph (e)(5)(vi) of this section, a U.S. person that is not a specified U.S. person, a nonreporting IGA FFI, or an exempt beneficial owner. Notwithstanding the prior sentence, an FFI will not be prohibited from qualifying as a qualified collective investment vehicle solely because it has issued interests in bearer

form provided that the FFI ceased issuing interests in such form after December 31, 2012, retires all such interests upon surrender, and establishes policies and procedures to redeem or immobilize all such interests prior to January 1, 2017, and that prior to payment the FFI documents the account holder in accordance with the procedures set forth in § 1.1471–4(c) applicable to accounts other than preexisting accounts and agrees to withhold and report on such accounts as would be required under § 1.1471–4(b) and (d) if it were a participating FFI. For purposes of this paragraph (f)(1)(i)(C), an FFI may disregard equity interests owned by specified U.S. persons acquired with seed capital within the meaning of paragraph (i)(4) of this section if the specified U.S. person is described in paragraph (i)(3)(i) and (ii) of this section (substituting the term *U.S. person* for the terms *FFI* and *member*), and the specified U.S. person neither has held, nor intends to hold, such interest for more than three years.

* * * * *

(D) * * *

(*4*) The FFI ensures that by the later of December 31, 2014, or six months after the date the FFI registers as a deemed-compliant FFI, each agreement that governs the distribution of its debt or equity interests prohibits sales and other transfers of debt or equity interests in the FFI (other than interests that are both distributed by and held through a participating FFI) to specified U.S. persons, nonparticipating FFIs, or passive NFFEs with one or more substantial U.S. owners. In addition, by that date, the FFI's prospectus and all marketing materials must indicate that sales and other transfers of interests in the FFI to specified U.S. persons, nonparticipating FFIs, or passive NFFEs with one or more substantial U.S. owners are prohibited unless such interests are both distributed by and held through a participating FFI.

(*5*) The FFI ensures that by the later of December 31, 2014, or six months after the date the FFI registers as a deemed-compliant FFI, each agreement entered into by the FFI that governs the distribution of its debt or equity interests requires the distributor to notify the FFI of a change in the distributor's chapter 4 status within 90 days of the change. The FFI must, with respect to any distributor that ceases to qualify as a distributor identified in paragraph (f)(1)(i)(D)(*3*) of this section, terminate its distribution agreement with the distributor, or cause the distribution agreement to be terminated, within 90 days of the notification of the distributor's change in status and, with respect to all debt and equity interests of the FFI issued through that distributor, redeem those interests, convert those interests to direct holdings in the fund, or cause those interests to be transferred to another distributor identified in paragraph (f)(1)(i)(D)(*3*) of this section within six months of the distributor's change in status.

(*6*) With respect to any of the FFI's preexisting direct accounts that are held by the beneficial owner of the interest in the FFI, the FFI reviews those accounts in accordance with the procedures (and time frames) described in § 1.1471–4(c) applicable to preexisting accounts to identify any U.S. account or account held by a nonparticipating FFI. Notwithstanding the previous sentence, the FFI will not be required to review the account of any individual investor that purchased its interest at a time when all of the FFI's distribution agreements and its prospectus contained an explicit prohibition of the issuance and/or sale of shares to U.S. entities and U.S. resident individuals. An FFI will not be required to review the account of any investor that purchased its interest in bearer form until the time of payment, but at such time will be required to document the account in accordance with procedures set forth in § 1.1471–4(c) applicable to accounts other than preexisting accounts. The FFI is required to certify to the IRS either that it did not identify any U.S. account or account held by a nonparticipating FFI as a result of its review or, if any such accounts were identified, that the FFI will either redeem such accounts, transfer such accounts to an affiliate or other FFI that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution, or withhold and report on such accounts as would be required under § 1.1471–4(b) and (d) if it were a participating FFI. Such certification must be submitted to the IRS by the due date of the FFI's first certification of compliance required under paragraph (f)(1)(ii)(B) of this section.

(*7*) By the later of June 30, 2014, or the date that it registers as a deemed-compliant FFI, the FFI implements the policies and procedures described in § 1.1471–4(c) to ensure that it either—

* * * * *

(*8*) For an FFI that is part of an expanded affiliated group, all other FFIs in the expanded affiliated group are participating FFIs, registered deemed-compliant FFIs, sponsored FFIs described in paragraph (f)(1)(i)(F)(*1*) or (*2*) of this section, nonreporting IGA FFIs, or exempt beneficial owners.

(E) *Qualified credit card issuers and servicers.* An FFI is described in this paragraph (f)(1)(i)(E) if the FFI meets the following requirements.

(*1*) The FFI is an FFI solely because it is an issuer or servicer of credit cards that accepts deposits, on its own behalf or, in the case of a servicer, on behalf of a credit card issuer, only when a customer makes a payment in excess of a balance due with respect to the credit card account and the overpayment is not immediately returned to the customer.

(*2*) By the later of June 30, 2014, or the date it registers as a deemed-compliant FFI, the FFI implements policies and procedures to either prevent a customer deposit in excess of $50,000 or to ensure that any customer deposit in excess of $50,000 is refunded to the customer within 60 days. For this purpose, a customer deposit does not refer to credit balances to the extent of disputed charges but does include credit balances resulting from merchandise returns.

(F) * * *

(*1*) * * *

(*i*) It is an investment entity that is not a QI, WP (except to the extent permitted in the WP agreement), or WT; and

(*ii*) An entity, other than a nonparticipating FFI, has agreed with the FFI to act as a sponsoring entity for the FFI.

* * * * *

(*3*) * * *

(*i*) Is authorized to act on behalf of the FFI (such as a fund manager, trustee, corporate director, or managing partner) to fulfill all due diligence, withholding, and reporting responsibilities that the FFI would have assumed if it were a participating FFI;

* * * * *

(*iii*) Has registered the FFI with the IRS by the later of January 1, 2017, or the date that the FFI identifies itself as qualifying under this paragraph (f)(1)(i)(F);

* * * * *

(*v*) Identifies the FFI in all reporting completed on the FFI's behalf to the extent required under §§ 1.1471–4(d)(2)(ii)(C) and 1.1474–1;

(*vi*) Performs the verification procedures required under § 1.1471–4(f) on behalf of the FFI, including the certification required under § 1.1471–4(f)(3);

(*vii*) Performs the verification procedures required under paragraphs (j) and (k) of this section; and

(*viii*) Has not had its status as a sponsoring entity revoked.

* * * * *

(*5*) A sponsoring entity is not liable for any failure to comply with the obligations contained in paragraph (f)(1)(i)(F)(*3*) of this section unless the sponsoring entity is a withholding agent that is separately liable for the failure to withhold on or report with respect to a payment made by the sponsoring entity on behalf of the sponsored FFI. A sponsored FFI will remain liable for any failure of its sponsoring entity to comply with the obligations contained in paragraph (f)(1)(i)(F)(*3*) of this section that the sponsoring entity has agreed to undertake on behalf of the FFI, even if the sponsoring entity is also a withholding agent and is itself separately liable for the failure to withhold on or report with respect to a payment made by the sponsoring entity on behalf of the sponsored FFI. The same tax, interest, or penalties, however, shall not be collected more than once.

(ii) * * *

(B) Have its responsible officer certify, on or before July 1 of the calendar year following the end of each certification period, that all of the requirements for the deemed-compliant status claimed by the FFI have been satisfied during the certification period. The responsible officer may certify collectively for the FFI's expanded affiliated group that all of the requirements for the deemed-compliant status claimed by each member of the expanded affiliated group that is a registered deemed-compliant FFI (other than a member that is a reporting Model 1 FFI or deemed-compliant FFI under an applicable Model 1 IGA) have been satisfied. The certification must be made on the form and in the manner prescribed by the IRS. The first certification period begins on the later of the date the FFI registers as a deemed-compliant FFI and is issued a GIIN, or June 30, 2014, and ends at the close of the third full calendar year following that date. Each subsequent certification period is the three calendar year period following the previous certification period.

* * * * *

(2) *Certified deemed-compliant FFIs.* A certified deemed-compliant FFI means an FFI described in any of paragraphs (f)(2)(i) through (v) of this section that has certified as to its status as a deemed-compliant FFI by providing a withholding agent with the documentation described in § 1.1471–3(d)(5) applicable to the relevant deemed-compliant category. A certified deemed-compliant FFI is not required to register with the IRS.

(i) * * *

(B) The FFI's business consists primarily of receiving deposits from and making loans to, with respect to a bank, retail customers that are unrelated to such bank and, with respect to a credit union or similar cooperative credit organization, members, provided that no such member has a greater than 5 percent interest in such credit union or cooperative credit organization. For purposes of this paragraph (f)(2)(i)(B), a customer is related to a bank if the customer and the bank have a relationship described in section 267(b). For purposes of determining whether a member has a greater than 5 percent interest in a credit union or cooperative credit organization, the member must aggregate the ownership or beneficial interests in the credit union or cooperative credit organization that are owned or held by a related member. A member of a credit union or cooperative credit organization is related to another member if the relationship of such members is described in section 267(b).

* * * * *

(iii) *Sponsored, closely held investment vehicles.* Subject to the provisions of paragraph (f)(2)(iii)(E) of this section, an FFI is described in this paragraph (f)(2)(iii) if it meets the requirements described in paragraphs (f)(2)(iii)(A) through (D) of this section.

(A) The FFI is an FFI solely because it is an investment entity and is not a QI, WP, or WT.

(B) A participating FFI, reporting Model 1 FFI, or U.S. financial institution agrees to fulfill all due diligence, withholding, and reporting responsibilities that the FFI would have assumed if it were a participating FFI.

(C) Twenty or fewer individuals own all of the debt and equity interests in the FFI (disregarding debt interests owned by U.S. financial institutions, participating FFIs, registered deemed-compliant FFIs, and certified deemed-compliant FFIs and equity interests owned by an entity if that entity owns 100 percent of the equity interests in the FFI and is itself a sponsored FFI under this paragraph (f)(2)(iii).

(D) The sponsoring entity complies with the following requirements—

(*1*) The sponsoring entity has registered with the IRS as a sponsoring entity;

(*2*) The sponsoring entity agrees to perform, on behalf of the FFI, all due diligence, withholding, reporting, and other requirements that the FFI would have been required to perform if it were a participating FFI and retains documentation collected with respect to the FFI for a period of six years;

(*3*) The sponsoring entity identifies the FFI in all reporting completed on the FFI's behalf to the extent required under §§ 1.1471–4(d)(2)(ii)(C) and 1.1474–1;

(*4*) The sponsoring entity performs the verification procedures required under § 1.1471–4(f) on behalf of the FFI, including the certification required under § 1.1471–4(f)(3);

(*5*) The sponsoring entity performs the verification procedures required under paragraphs (j) and (k) of this section; and

(*6*) The sponsoring entity has not had its status as a sponsor revoked.

(E) The IRS may revoke a sponsoring entity's status as a sponsoring entity with respect to all sponsored FFIs if there is a material failure by the sponsoring entity to comply with its obligations under paragraph (f)(2)(iii)(D) of this section with respect to any sponsored FFI. A sponsoring entity is not liable for any failure to comply with the obligations contained in paragraph (f)(2)(iii)(D) of this section unless the sponsoring entity is a withholding agent that is separately liable for the failure to withhold on or report with respect to a payment made by the sponsoring entity on behalf of the sponsored FFI. A sponsored FFI will remain liable for any failure of its sponsoring entity to comply with the obligations contained in paragraph (f)(2)(iii)(D) of this section that the sponsoring entity has agreed to undertake on behalf of the FFI, even if the sponsoring entity is also a withholding agent and is itself separately liable for the failure to withhold on or report with respect to a payment made by the sponsoring entity on behalf of the sponsored FFI. The same tax, interest, or penalties, however, shall not be collected more than once.

(iv) *Limited life debt investment entities (transitional).* An FFI is described in this paragraph (f)(2)(iv) if the FFI is the beneficial owner of the payment (or of payments made with respect to the account) and the FFI meets the following requirements.

(A) The FFI is an investment entity that issued one or more classes of debt or equity interests to investors pursuant to a trust indenture or similar agreement and all of such interests were issued on or before January 17, 2013.

(B) The FFI was in existence as of January 17, 2013, and has entered into a trust indenture or similar agreement that requires the FFI to pay to investors holding substantially all of the interests in the FFI, no later than a set date or period following the maturity of the last asset held by the FFI, all amounts that such investors are entitled to receive from the FFI.

(C) The FFI was formed and operated for the purpose of purchasing or

acquiring specific types of debt instruments or interests therein and holding those assets subject to reinvestment only under prescribed circumstances to maturity.

(D) Substantially all of the assets of the FFI consist of debt instruments or interests therein (including assets acquired pursuant to a foreclosure, restructuring, workout, or similar event with respect to a debt instrument).

(E) All payments made to the investors of the FFI (other than holders of a de minimis interest) are either cleared through a clearing organization or custodial institution that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution or made through a transfer agent that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution.

(F) The FFI's trustee or fiduciary is not authorized through a fiduciary duty or otherwise to fulfill the obligations of a participating FFI under § 1.1471–4 and no other person has the authority to fulfill the obligations of a participating FFI under § 1.1471–4 on behalf of the FFI.

(v) *Certain investment entities that do not maintain financial accounts.* An FFI is described in this paragraph (f)(2)(v) if the FFI meets the following requirements.

(A) The FFI is a financial institution solely because it is described in paragraph (e)(4)(i)(A) of this section.

(B) The FFI does not maintain financial accounts.

* * * * *

(4) * * *

(i) The distributor provides investment services to at least 30 customers unrelated to each other and fewer than half of the distributor's customers are related to each other. For purposes of this paragraph (f)(4)(i), customers are related to each other if they have a relationship with each other described in section 267(b).

* * * * *

(g) * * *

(1) *Scope.* This paragraph (g) provides rules for determining when an account holder of a participating FFI or registered deemed-compliant FFI is a recalcitrant account holder. Paragraph (g)(2) of this section defines the term recalcitrant account holder. Paragraphs (g)(3) and (4) of this section provide timing rules for when an account holder will begin to be treated as a recalcitrant account holder by a participating FFI and when an account holder will cease to be treated as a recalcitrant account holder by such institution. For rules for determining the holder of an account, see paragraph (a)(3) of this section. For the withholding requirements of an FFI with respect to its recalcitrant account holders, see paragraph (f) of this section and § 1.1471–4(b). For the reporting requirements of an FFI with respect to its recalcitrant account holders, see § 1.1471–4(d)(6), and, for the reporting required with respect to payments made to such account holders, see § 1.1474–1(d)(4)(iii). A U.S. branch treated as a U.S. person shall apply the presumption rules of § 1.1471–3(f) (for foreign entity account holders) and chapter 3 or 61 (for individual payees) to determine the status of a payee if it cannot reliably associate a payment made to the payee with valid documentation and does not apply this paragraph (g).

(3) * * *

(i) * * *

(D) *Preexisting accounts that become high-value accounts.* With respect to a calendar year beginning after December 31, 2015, an account holder that is described in paragraph (g)(2) of this section and that holds a preexisting account that a participating FFI identifies as a high-value account pursuant to § 1.1471–4(c)(5)(iv)(D) will be treated as a recalcitrant account holder beginning on the earlier of the date a withholdable payment is made to the account following end of the calendar year in which the account is identified as a high-value account or the date that is six months after the calendar year end.

* * * * *

(i) *Expanded affiliated group*—(1) *Scope of paragraph.* This paragraph (i) defines the term *expanded affiliated group* for purposes of chapter 4. For the requirements of a participating FFI with respect to members of its expanded affiliated group that are FFIs, see § 1.1471–4(e).

(2) *Expanded affiliated group defined.* Except as otherwise provided in this paragraph (i), an expanded affiliated group is defined in accordance with the principles of section 1504(a) to mean one or more chains of members connected through ownership by a common parent entity if the common parent entity directly owns stock or other equity interests meeting the requirements of paragraph (i)(4) of this section in at least one of the other members (for purposes of this paragraph (i), the constructive ownership rules of section 318 do not apply). Generally, only a corporation shall be treated as the common parent entity of an expanded affiliated group, unless the taxpayer elects to follow the approach described in paragraph (i)(10) of this section.

(3) *Member of an expanded affiliated group.* The term *member of an expanded affiliated group* means a corporation or any entity other than a corporation (such as a partnership or trust) with respect to which the ownership requirements of paragraph (i)(4) of this section are met, regardless of whether such entity is a U.S. person or a foreign person, but excluding corporations described in paragraphs (1), (4), (6), (7), or (8) of section 1504(b).

(4) *Ownership test.* The ownership requirements of this paragraph (i)(4) are met if—

(i) *Corporations.* For purposes of paragraph (i)(2) of this section, a corporation (except the common parent entity) will be considered owned by another member entity or by the common parent entity if more than 50 percent of the total voting power of the stock of such corporation and more than 50 percent of the total value of the stock of such corporation is owned directly by one or more other members of the group (including the common parent entity).

(A) *Stock not to include certain preferred stock.* For purposes of this paragraph (i)(4), the term *stock* does not include any stock which is described in section 1504(a)(4).

(B) *Valuation.* For purposes of section 1471(e) and this section, all shares of stock within a single class are considered to have the same value in determining the ownership percentage. Thus, control premiums and minority blockage discounts within a single class are not taken into account.

(ii) *Partnerships.* For purposes of paragraph (i)(2) of this section, a partnership will be considered owned by another member entity (including the common parent entity) if more than 50 percent (by value) of the capital or profits interest in the partnership is owned directly by one or more other members of the group (including the common parent entity).

(iii) *Trusts.* For purposes of paragraph (i)(2) of this section, a trust will be considered owned by another member entity or by the common parent entity if more than 50 percent (by value) of the beneficial interest in such trust is owned directly by one or more other members of the group (including the common parent entity). A beneficial interest in a trust includes an interest held by an entity treated as a grantor or other owner of the trust under sections 671 through 679 and a beneficial trust interest.

(5) *Treatment of warrants, options, and obligations convertible into equity for determining ownership.* For purposes of paragraph (i)(4) of this section, ownership of warrants, options, obligations convertible into the equity of a corporation or entity other than a

corporation, and other similar interests is not considered for purposes of determining whether an entity is a member of an expanded affiliated group, except as follows:

(i) Ownership of a warrant, option, obligation convertible into stock, or other similar instrument creating an interest in a corporation will be considered for purposes of paragraph (i)(4) of this section to the extent that the common parent or member of the expanded affiliated group that holds such instrument also maintains voting rights with respect to such corporation. However, interests described in § 1.1504–4(d)(2) will not be treated as options.

(ii) Ownership of a warrant, option, obligation convertible into an equity interest, or other similar instrument creating an interest in a corporation or entity other than a corporation will be considered for purposes of paragraph (i)(4) of this section to the extent that such instrument is reasonably certain to be exercised, based on all of the facts and circumstances and in accordance with the principles set forth in § 1.1504–4(g).

(6) *Exception for FFIs holding certain capital investments.* Notwithstanding paragraphs (i)(2) and (i)(4) of this section, an investment entity will not be considered a member of an expanded affiliated group as a result of a contribution of seed capital by a member of such expanded affiliated group if—

(i) The member that owns the investment entity is an FFI that is in the business of providing seed capital to form investment entities, the interests in which it intends to sell to investors that do not have a relationship with each other described in section 267(b);

(ii) The investment entity is created in the ordinary course of such other FFI's business described in paragraph (i)(6)(i) of this section;

(iii) As of the date the FFI acquired the equity interest, any equity interest in the investment entity in excess of 50 percent of the total value of the stock of the investment entity is intended to be held by such other FFI (including ownership by other members of such other FFI's expanded affiliated group) for no more than three years from the date on which such other FFI first acquired an equity interest in the investment entity; and

(iv) In the case of an equity interest that has been held by such other FFI for over three years from the date referenced in paragraph (i)(6)(iii) of this section, the aggregate value of the equity interest held by such other FFI and the equity interests held by other members of its expanded affiliated group is 50 percent or less of the total value of the stock of the investment entity.

(7) *Seed capital.* For purposes of this paragraph (i), the term *seed capital* means an initial capital contribution made to an investment entity that is intended as a temporary investment and is deemed by the manager of the entity to be necessary or appropriate for the establishment of the entity, such as for the purpose of establishing a track record of investment performance for such entity, achieving economies of scale for diversified investment, avoiding an artificially high expense to return ratio, or similar purposes.

(8) *Anti-abuse rule.* A change in ownership, voting rights, or the form of an entity that results in an entity meeting or not meeting the ownership requirements described in paragraph (i)(4) of this section will be disregarded for purposes of determining whether an entity is a member of an expanded affiliated group if the change is pursuant to a plan a principal purpose of which is to avoid reporting or withholding that would otherwise be required under any chapter 4 provision. For purposes of this paragraph (i)(8), a change in voting rights includes a separation of voting rights and value.

(9) *Exception for limited life debt investment entities.* Notwithstanding paragraphs (i)(2) and (4) of this section, an entity that meets the requirements of paragraph (f)(2)(iv) of this section, including the requirements to have been in existence as of January 17, 2013, and to have issued interests in the entity on or before January 17, 2013, will not be considered a member of an expanded affiliated group as a result of any member of such expanded affiliated group owning interests in such entity.

(10) *Partnerships, trusts, and other non-corporate entities.* For purposes of determining the composition of an expanded affiliated group, an entity other than a corporation may elect to be treated as the common parent entity. Taxpayers following this approach may not, in a later year, follow the rule described in paragraph (i)(2) of this section without the approval of the Commissioner. See also paragraph (e)(5)(i)(C) of this section.

(j) *Sponsoring entity verification.* [Reserved]

(k) *Sponsoring entity event of default.* [Reserved]

(l) *Effective/applicability date.* This section applies on January 6, 2017. However, taxpayers may apply these provisions as of January 28, 2013. (For the rules that apply beginning on January 28, 2013, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2016.)

§ 1.1471–5T [Removed]

■ **Par. 12.** Section 1.1471–5T is removed.

■ **Par. 13.** Section 1.1471–6 is amended by revising paragraphs (d)(1) and (4), (f)(2)(iii)(B) and (C), (f)(3)(ii) and (iii), (f)(5) and (6), (g), (h)(2), and (i) to read as follows:

§ 1.1471–6 Payments beneficially owned by exempt beneficial owners.

* * * * *

(d) * * *

(1) *In general.* Solely for purposes of this section and except as provided in paragraph (h) of this section, the term *foreign central bank of issue* means an institution that is by law or government sanction the principal authority, other than the government itself, issuing instruments intended to circulate as currency. Such an institution is generally the custodian of the banking reserves of the country under whose law it is organized.

* * * * *

(4) *Income on certain transactions.* Solely for purposes of determining whether an entity is an exempt beneficial owner of a payment under this paragraph (d), a foreign central bank of issue is a beneficial owner with respect to income earned on cash and securities, including cash and securities held as collateral or securities held in connection with a securities lending transaction, held by the foreign central bank of issue in the ordinary course of its operations as a central bank of issue.

* * * * *

(f) * * *

(2) * * *

(iii) * * *

(B) The fund receives at least 50 percent of its total contributions (other than transfers of assets from accounts described in § 1.1471–5(b)(2)(i)(A) (referring to retirement and pension accounts), from retirement and pension accounts described in an applicable Model 1 or Model 2 IGA, or from other retirement funds described in this paragraph (f) or in an applicable Model 1 or Model 2 IGA) from the sponsoring employers;

(C) Distributions or withdrawals from the fund are allowed only upon the occurrence of specified events related to retirement, disability, or death (except rollover distributions to accounts described in § 1.1471–5(b)(2)(i)(A) (referring to retirement and pension accounts), to retirement and pension accounts described in an applicable Model 1 or Model 2 IGA, or to other

retirement funds described in this paragraph (f) or in an applicable Model 1 or Model 2 IGA), or penalties apply to distributions or withdrawals made before such specified events; or

* * * * *

(3) * * *

(ii) The fund is sponsored by one or more employers and each of these employers are not investment entities or passive NFFEs;

(iii) Employee and employer contributions to the fund (other than transfers of assets from other retirement plans described in paragraph (f)(1) of this section, from accounts described in § 1.1471–5(b)(2)(i)(A) (referring to retirement and pension accounts), or retirement and pension accounts described in an applicable Model 1 or Model 2 IGA) are limited by reference to earned income and compensation of the employee, respectively;

* * * * *

(5) *Investment vehicles exclusively for retirement funds.* A fund established exclusively to earn income for the benefit of one or more retirement funds described in paragraphs (f)(1) through (5) of this section or in an applicable Model 1 or Model 2 IGA, accounts described in § 1.1471–5(b)(2)(i)(A) (referring to retirement and pension accounts), or retirement and pension accounts described in an applicable Model 1 or Model 2 IGA.

(6) *Pension fund of an exempt beneficial owner.* A fund established and sponsored by an exempt beneficial owner described in paragraph (b), (c), (d), or (e) of this section or an exempt beneficial owner (other than a fund that qualifies as an exempt beneficial owner) described in an applicable Model 1 or Model 2 IGA to provide retirement, disability, or death benefits to beneficiaries or participants that are current or former employees of the exempt beneficial owner (or persons designated by such employees), or that are not current or former employees, but the benefits provided to such beneficiaries or participants are in consideration of personal services performed for the exempt beneficial owner.

* * * * *

(g) *Entities wholly owned by exempt beneficial owners.* A person is described in this paragraph (g) if it is an FFI solely because it is an investment entity, each direct holder of an equity interest in the investment entity is an exempt beneficial owner described in paragraph (b), (c), (d), (e), (f), or (g) of this section or an exempt beneficial owner described in an applicable Model 1 or Model 2 IGA, and each direct holder of a debt interest in the investment entity is either a depository institution (with respect to a loan made to such entity), an exempt beneficial owner described in paragraph (b), (c), (d), (e), (f), or (g) of this section, or an exempt beneficial owner described in an applicable Model 1 or Model 2 IGA.

(h) * * *

(2) *Limitation.* Paragraph (h)(1) of this section will not apply to treat an exempt beneficial owner as engaged in a commercial financial activity if—

(i) The entity undertakes commercial financial activity described in paragraph (h)(1) of this section solely for or at the direction of other exempt beneficial owners and such commercial financial activity is consistent with the purposes of the entity;

(ii) The entity has no outstanding debt that would be a financial account under § 1.1471–5(b)(1)(iii); and

(iii) The entity otherwise maintains financial accounts only for exempt beneficial owners, or, in the case of a foreign central bank of issue as described in paragraph (d), the entity only maintains financial accounts that are depository accounts for current or former employees of the entity (and the spouses and children of such employees) or financial accounts for exempt beneficial owners.

(i) *Effective/applicability date.* This section applies on January 6, 2017. However, taxpayers may apply these provisions as of January 28, 2013. (For the rules that apply beginning on January 28, 2013, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2016.)

§ 1.1471–6T [Removed]

■ **Par. 14.** Section 1.1471–6T is removed.

■ **Par. 15.** Section 1.1472–1 is amended by revising paragraphs (a), (b)(1) introductory text, (b)(2), (c)(1) introductory text, (c)(1)(i) introductory text, (c)(1)(ii) and (iii), (c)(1)(iv) introductory text, (c)(1)(iv)(C), (c)(1)(v) through (vii), (c)(2) through (5), (d)(1) and (2), and (f) through (h) to read as follows:

§ 1.1472–1 Withholding on NFFEs.

(a) *In general.* This section provides rules that a withholding agent must apply to determine its obligations to withhold under section 1472 on withholdable payments made to a payee that is a NFFE. A participating FFI that complies with its withholding obligations under § 1.1471–4(b) will be deemed to satisfy its obligations under section 1472 with respect to withholdable payments made to NFFEs that are account holders. The rules of this section will apply, however, in the case of a participating FFI acting as a withholding agent with respect to a payment made to a NFFE that is not an account holder (for example, a payment with respect to a contract that does not constitute a financial account). See § 1.1473–1(a)(4)(vi), however, for rules excepting from the definition of withholdable payment certain payments of U.S. source FDAP income made prior to January 1, 2017, with respect to an offshore obligation and § 1.1471–2(b) for rules excepting from the definition of withholdable payment a grandfathered obligation. See also § 1.1471–2(a)(2)(ii), (iv), (v), and (vi) for special rules of withholding that apply for purposes of this section and § 1.1471–2(a)(5) for withholding requirements if the source or character of a payment is unknown. The following entities are deemed to satisfy their withholding obligations under section 1472: Exempt beneficial owners; section 501(c) entities described in § 1.1471–5(e)(5)(v); and nonprofit organizations described in § 1.1471–5(e)(5)(vi). See § 1.1471–5(f) for when a deemed-compliant FFI is deemed to satisfy its withholding obligations with respect to payments made to NFFEs that are account holders under section 1472.

(b) * * *

(1) *In general.* Except as otherwise provided in paragraph (b)(2) of this section (providing transitional relief) or paragraph (c)(1) or (2) of this section (providing exceptions for payments to an excepted NFFE or an exempt beneficial owner), § 1.1471–2(a)(4)(i) (providing an exception to withholding if the withholding agent lacks control, custody, or knowledge), § 1.1471–2(a)(4)(vii) (providing an exception to withholding for payments made to an account held with or equity interests traded through a clearing organization with FATCA-compliant membership), or § 1.1471–2(a)(4)(viii) (providing an exception to withholding for payments to certain excepted accounts), a withholding agent must withhold 30 percent of any withholdable payment made after June 30, 2014, to a payee that is a NFFE unless—

* * * * *

(2) *Transitional relief.* For any withholdable payment made prior to July 1, 2016, with respect to a preexisting obligation to a payee that is not a prima facie FFI and for which a withholding agent does not have documentation indicating the payee's status as a passive NFFE when the NFFE has failed to provide the owner certification as required under § 1.1471–

3(d)(12)(iii), the withholding agent is not required to withhold under this section or report under § 1.1474–1(i)(2) (describing the reporting obligations of withholding agents with respect to NFFEs).

(c) * * *

(1) *Payments to an excepted NFFE.* A withholding agent is not required to withhold under section 1472(a) and paragraph (b) of this section on a withholdable payment (or portion thereof) if the withholding agent can treat the payment as made to a payee that is an excepted NFFE. For purposes of this paragraph, the term *excepted NFFE* means a payee that the withholding agent may treat as a NFFE that is a QI, WP, or WT. Additionally, the term *excepted NFFE* means, with respect to the payment, a NFFE described in paragraphs (c)(1)(i) through (vii) of this section to the extent the withholding agent may treat the NFFE as the beneficial owner of the payment.

(i) *Publicly traded corporation.* A NFFE is described in this paragraph (c)(1)(i) if it is a corporation the stock of which is regularly traded on one or more established securities markets for the calendar year.

* * * * *

(ii) *Certain affiliated entities related to a publicly traded corporation.* A NFFE is described in this paragraph (c)(1)(ii) if it is a corporation that is a member of the same expanded affiliated group (as defined in § 1.1471–5(i)) as a corporation described in paragraph (c)(1)(i) of this section (without regard to whether such corporation is a NFFE).

(iii) *Certain territory entities.* A NFFE is described in this paragraph (c)(1)(iii) if it is a territory entity that is directly or indirectly wholly owned by one or more bona fide residents of the U.S. territory under the laws of which the entity is organized. The term *bona fide resident of a U.S. territory* means an individual who qualifies as a bona fide resident under section 937(a) and § 1.937–1.

(iv) *Active NFFEs.* A NFFE is described in this paragraph (c)(1)(iv) (and thus constitutes an active NFFE) if it is an entity and for the preceding calendar or fiscal year less than 50 percent of its gross income is passive income and the weighted average of the percentage of assets held by it that produce or are held for the production of passive income (weighted by total assets and measured quarterly) is less than 50 percent, as determined after the application of paragraph (c)(1)(iv)(B) of this section (passive assets). For purposes of the calculations described in the preceding sentence, a NFFE may use any accounting method permitted under paragraph (c)(1)(iv)(C) of this section but must apply a uniform method for measuring assets for the calendar or fiscal year.

* * * * *

(C) *Methods of measuring assets.* For purposes of this paragraph (c)(1)(iv), the value of a NFFE's assets is determined based on the fair market value or book value of the assets that is reflected on the NFFE's balance sheet (as determined under either a U.S. or an international financial accounting standard).

(v) *Excepted nonfinancial entities.* A NFFE is described in this paragraph (c)(1)(v) if it is an entity described in § 1.1471–5(e)(5) (referring to holding companies, treasury centers, and captive finance companies that are members of a nonfinancial group; start-up companies; entities that are liquidating or emerging from bankruptcy; and non-profit organizations).

(vi) *Direct reporting NFFEs.* A NFFE is described in this paragraph (c)(1)(vi) if it meets the requirements described in § 1.1472–1(c)(3) to be treated as a direct reporting NFFE.

(vii) *Sponsored direct reporting NFFEs.* A NFFE is described in this paragraph (c)(1)(vii) if it meets the requirements described in § 1.1472–1(c)(5) to be treated as a sponsored direct reporting NFFE.

(2) *Payments made to an exempt beneficial owner.* A withholding agent is not required to withhold on a withholdable payment (or portion thereof) under section 1472(a) and paragraph (b) of this section if the withholding agent may treat the payment as made to an exempt beneficial owner.

(3) *Definition of direct reporting NFFE.* A direct reporting NFFE means a NFFE that elects to report information about its direct or indirect substantial U.S. owners to the IRS and meets the following requirements—

(i) The NFFE must register on Form 8957, ''FATCA Registration,'' (or such other form as the IRS may prescribe) with the IRS to obtain a GIIN pursuant to the procedures prescribed by the IRS;

(ii) The NFFE must report directly to the IRS on Form 8966, ''FATCA Report,'' (or such other form as the IRS may prescribe) the following information for each calendar year (or, may be required by the IRS to certify on Form 8966, or in such other manner as the IRS may prescribe, that the NFFE has no substantial U.S. owners):

(A) The name, address, and TIN of each substantial U.S. owner (as defined in § 1.1473–1(b)) of such NFFE;

(B) The total of all payments made to each substantial U.S. owner (including the gross amounts paid or credited to the substantial U.S. owner with respect to such owner's equity interest in the NFFE during the calendar year, which include payments in redemption or liquidation (in whole or part) of the substantial U.S. owner's equity interest in the NFFE);

(C) The value of each substantial U.S. owner's equity interest in the NFFE determined by applying the rules described in § 1.1471–5(b)(4) (substituting the term *equity* for the terms *account* and *financial account*);

(D) The name, address, and GIIN of the NFFE; and

(E) Any other information as required by Form 8966 (or such other form as the IRS may prescribe) and its accompanying instructions;

(iii) The NFFE must obtain a written certification (contained on a withholding certificate or in a written statement) from each person that would be treated as a substantial U.S. owner of the NFFE if such person were a specified U.S. person. Such written certification must indicate whether the person is a substantial U.S. owner of the NFFE, and if so, the name, address and TIN of the person. If the NFFE has reason to know that such written certification is unreliable or incorrect, it must contact the person and request a revised written certification. If no revised written certification is received, the NFFE must treat the person as a substantial U.S. owner and report on Form 8966 the information required under paragraph (c)(3)(ii) of this section. The NFFE has reason to know that such a written certification is unreliable or incorrect if the certification is inconsistent with information in the NFFE's possession, including information that the NFFE provides to a financial institution in order for the financial institution to meet its AML or other account identification due diligence procedures with respect to the NFFE's account, information that is publicly available, or U.S. indicia as described in § 1.1441–7(b) for which appropriate documentation sufficient to cure the U.S. indicia in the manner set forth in § 1.1441–7(b)(8) has not been obtained;

(iv) The NFFE must keep records that it produces in the ordinary course of its business that summarize the activity (including the gross amounts described in paragraph (c)(3)(ii)(B) of this section that are paid or credited to each of its substantial U.S. owners) relating to its transactions with respect to the equity of the NFFE held by each of its substantial U.S. owners for any calendar year in which the owner was required to be reported under paragraph (c)(3)(ii)

of this section. The records must be retained for the longer of six years or the retention period under the NFFE's normal business procedures. A NFFE may be required to extend the six year retention period if the IRS requests such an extension prior to the expiration of the six year period;

(v) The NFFE must respond to requests made by the IRS for additional information with respect to any substantial U.S. owner that is subject to reporting by the NFFE or with respect to the records described in paragraph (c)(3)(iii) or (iv) of this section;

(vi) The NFFE must make a periodic certification to the IRS on or before July 1 of the calendar year following the end of each certification period relating to its compliance with respect to the election described in paragraphs (c)(3) and (4) of this section on the form and in the manner prescribed by the IRS. The first certification period begins on the later of the date a GIIN is issued or June 30, 2014, and ends at the close of the third full calendar year following that date. Each subsequent certification period is the three calendar year period following the close of the previous certification period. The certification will require an officer of the NFFE to certify to the following statements—

(A)(1) The NFFE has not had any events of default described in paragraph (c)(4)(v) of this section; or

(2) If there are any events of default, appropriate measures were taken to remediate such failures and to prevent such failures from recurring; and

(B) With respect to any failure to report to the extent required under paragraph (c)(3)(ii), the NFFE has corrected such failure by filing the appropriate information returns; and

(vii) The NFFE has not had its status as a direct reporting NFFE revoked by the IRS.

(4) *Election to be treated as a direct reporting NFFE*—(i) *Manner of making election.* A NFFE may elect to be treated as a direct reporting NFFE by registering on Form 8957 (or such other form as the IRS may prescribe) with the IRS to obtain a GIIN pursuant to the procedures prescribed by the IRS.

(ii) *Effective date of election.* The election is effective upon the issuance of a GIIN to the NFFE.

(iii) *Revocation of election by NFFE.* The election may be revoked by the NFFE by canceling its registration account on the FATCA registration Web site and notifying the IRS of its revocation in such manner as the IRS may prescribe in the Instructions for Form 8966, ''FATCA Report.'' The NFFE must also notify within 30 days its sponsoring entity (if applicable) and each withholding agent and financial institution from which it receives payments or with which it holds an account for which a withholding certificate or written statement prescribed in § 1.1471–3(d)(11)(x)(B) (as applicable) was provided on which the NFFE certified its status as a direct reporting NFFE if it revokes its election.

(iv) *Revocation of election by Commissioner.* The election may be revoked by the Commissioner upon an event of default described in paragraph (c)(4)(v) of this section and following the notice and remediation procedures described in paragraphs (vi) and (vii) of this section. If the Commissioner revokes the NFFE's status as a direct reporting NFFE, the NFFE must provide notification within 30 days of the revocation to each withholding agent and financial institution from which the NFFE receives payments or with which it holds an account for which a withholding certificate or written statement (as permitted for chapter 4 purposes) was provided by the NFFE to represent its status as a direct reporting NFFE.

(v) *Event of default.* An event of default occurs if a direct reporting NFFE fails to perform any of the obligations described in (c)(3)(i) through (vi) of this section. An event of default also includes any misrepresentation of a material fact to the IRS.

(vi) *Notice of event of default.* Following an event of default known by or disclosed to the IRS, the IRS will deliver to the NFFE a notice of default specifying the event of default. The IRS will request that the NFFE remediate the event of default within a specified time period. The NFFE must respond to the notice of default and provide information responsive to an IRS request for information or state the reasons why the NFFE does not agree that an event of default has occurred. If the NFFE does not provide a response within the specified time period, the IRS may, at its sole discretion, deliver a notice to the NFFE that its election to be treated as a direct reporting NFFE has been revoked. A NFFE may request, within 90 days of receipt, reconsideration of a notice of default or notice of revocation by written request to the IRS.

(vii) *Remediation of event of default.* A NFFE will be permitted to remediate an event of default to the extent it agrees with the IRS on a remediation plan. The IRS may, as part of a remediation plan, require additional information from the NFFE.

(5) *Election by a direct reporting NFFE to be treated as a sponsored direct reporting NFFE*—(i) *Definition of sponsored direct reporting NFFE.* A NFFE is a sponsored direct reporting NFFE if the NFFE is a direct reporting NFFE and if another entity, other than a nonparticipating FFI, has agreed with the NFFE to act as its sponsoring entity, as described in paragraph (c)(5)(ii) of this section.

(ii) *Requirements for sponsoring entity of a sponsored direct reporting NFFE.* A sponsoring entity meets the requirements of this paragraph (c)(5)(ii) if the sponsoring entity—

(A) Is authorized to act on behalf of the NFFE;

(B) Has registered with the IRS as a sponsoring entity;

(C) Has registered the NFFE with the IRS as a sponsored direct reporting NFFE by the later of January 1, 2017, or the date that the NFFE identifies itself to a withholding agent or financial institution as qualifying as a sponsored direct reporting NFFE under paragraph (c)(5) of this section;

(D) Agrees to perform, on behalf of the NFFE, all due diligence, reporting, and other requirements that the NFFE would have been required to perform as a direct reporting NFFE;

(E) Identifies the NFFE in all reporting completed on the NFFE's behalf;

(F) Complies with the certification and other requirements in paragraphs (f) and (g) of this section;

(G) Has not had its status as a sponsoring entity revoked; and

(H) Agrees to notify all relevant withholding agents and the IRS if its status as a sponsoring entity is revoked, if it otherwise ceases to be the sponsoring entity of any of its sponsored direct reporting NFFEs (for example, if the sponsored direct reporting NFFE changes sponsors), or if the status of any of its sponsored direct reporting NFFEs has been revoked.

(iii) *Revocation of status as sponsoring entity.* The IRS may revoke a sponsoring entity's status as a sponsoring entity with respect to all sponsored direct reporting NFFEs if there is a material failure by the sponsoring entity to comply with its obligations under paragraph (c)(5)(ii) of this section with respect to any sponsored direct reporting NFFE.

(iv) *Liability of sponsoring entity.* A sponsoring entity is not liable for any failure to comply with the obligations contained in paragraph (c)(5)(ii) of this section. A sponsored direct reporting NFFE will remain liable for all of its chapter 4 obligations without regard to any failure of its sponsoring entity to comply with the obligations contained in paragraph (c)(5)(ii) of this section that the sponsoring entity has agreed to undertake on behalf of the NFFE.

(d) * * *

(1) *In general.* For purposes of this section, except in the case of a payee that is a QI, WP, or WT, a withholding agent may treat a withholdable payment as beneficially owned by the payee as determined under § 1.1471–3. Thus, a withholding agent may treat a withholdable payment as beneficially owned by an excepted NFFE (other than a QI, WP, or WT) if the withholding agent can reliably associate the payment with valid documentation to determine the payee's status as an excepted NFFE under the rules of § 1.1471–3(d).

(2) *Payments made to a NFFE that is a QI, WP, or WT.* A withholding agent may treat the payee of a withholdable payment as a NFFE that is a QI, WP, or WT if the withholding agent can reliably associate the payment with valid documentation to determine the payee's status as such under the rules of § 1.1471–3(b)(3) and (d).

* * * * *

(f) *Sponsoring entity verification.* [Reserved]

(g) *Sponsoring entity event of default.* [Reserved]

(h) *Effective/applicability date.* This section applies on January 6, 2017. However, taxpayers may apply these provisions as of January 28, 2013. (For the rules that apply beginning on January 28, 2013, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2016.)

§ 1.1472–1T [Removed]

■ **Par. 16.** Section 1.1472–1T is removed.

■ **Par. 17.** Section 1.1473–1 is amended by revising paragraphs (a)(1)(ii), (a)(2)(vi), (a)(3)(iii)(B)(*4*), (a)(4)(vi) and (vii), (a)(5)(i) through (vi), (b)(2)(v), and (f) to read as follows:

§ 1.1473–1 Section 1473 definitions.

(a) * * *

(1) * * *

(ii) For any sales or other dispositions occurring after December 31, 2018, any gross proceeds from the sale or other disposition (as defined in paragraph (a)(3)(i) of this section) of any property of a type that can produce interest or dividends that are U.S. source FDAP income.

(2) * * *

(vi) *Special rule for sales of interest bearing debt obligations.* Income that is otherwise described as U.S. source FDAP income in paragraphs (a)(2)(i) through (v) of this section does not include an amount of interest accrued on the date of a sale or exchange of an interest bearing debt obligation if the sale occurs between two interest payment dates and is not part of a plan described in § 1.1441–3(b)(2)(ii).

* * * * *

(3) * * *

(iii) * * *

(B) * * *

(*4*) In the case of a sale of an obligation described in paragraph (a)(2)(vi), gross proceeds includes any interest accrued between interest payment dates other than an amount described in paragraph (a)(2)(vi) of this section that is treated as U.S. source FDAP income; and

* * * * *

(4) * * *

(vi) *Offshore payments of U.S. source FDAP income prior to 2017 (transitional).* A payment with respect to an offshore obligation (as defined in § 1.1471–1(b)(88)) made prior to January 1, 2017, if such payment is U.S. source FDAP income and made by a person that is not acting as an intermediary or as a WP or WT with respect to the payment. Additionally, a payment with respect to an account, obligation, contract, or other instrument that is issued or maintained by an entity other than a financial institution and that would be treated as an offshore obligation under § 1.6049–5(c)(1) (applied by substituting the term *entity* for the term *financial institution* (as defined in § 1.1471–5(e)) in each place that it appears), made prior to January 1, 2017, if such payment is U.S. source FDAP and made by a person that is not acting as an intermediary or as a WP or WT with respect to the payment is not a withholdable payment under paragraph (a)(1) of this section. The exception for offshore payments of U.S. source FDAP income provided in the preceding sentences shall not apply, however, in the case of a flow-through entity that has a residual withholding requirement with respect to its partners, owners, or beneficiaries under § 1.1471–2(a)(2)(ii), or in the case of payments made with respect to debt or equity issued by a U.S. person (excluding interest payments made by a foreign branch of a U.S. financial institution with respect to depository accounts it maintains). For purposes of this paragraph (a)(4)(vi), an intermediary includes a person that acts as a qualified securities lender as defined for purposes of chapter 3 and does not include a person acting as an insurance broker with respect to premiums.

(vii) *Collateral arrangements prior to 2017 (transitional).* A payment made prior to January 1, 2017, by a secured party, or to a secured party other than a nonparticipating FFI, with respect to collateral securing one or more transactions under a collateral arrangement, provided that only a commercially reasonable amount of collateral is held by the secured party (or by a third party for the benefit of the secured party) as part of the collateral arrangement. For purposes of this paragraph (a)(4)(vii), the term *transaction* generally includes a debt instrument, a derivative financial instrument (including a notional principal contract, future, forward, and option), and any securities lending transaction, sale-repurchase transaction, margin loan, or substantially similar transaction that is subject to a collateral arrangement. Solely for purposes of this paragraph (a)(4)(vii), a secured party may provide documentation to the withholding agent indicating that it is the beneficial owner of a payment described in this paragraph (a)(4)(vii), and a withholding agent may rely on such certification for purposes of its requirements under § 1.1471–3(d) for determining whether withholding under chapter 4 applies.

* * * * *

(5) * * *

(i) *In general.* This paragraph (a)(5) provides special rules for a flow-through entity, complex trust, or estate to determine when such entity must treat a payment of U.S. source FDAP income that is also a withholdable payment as having been paid by such entity to its partners, owners, or beneficiaries (as applicable depending on the type of entity).

(ii) *Partnerships.* An amount of U.S. source FDAP income that is also a withholdable payment is treated as being paid to a partner under rules similar to the rules prescribing when withholding is required for chapter 3 purposes as described in § 1.1441–5(b)(2)(i)(A).

(iii) *Simple trusts.* An amount of U.S. source FDAP income that is also a withholdable payment is treated as being paid to a beneficiary of a simple trust under rules similar to the rules prescribing when withholding is required for chapter 3 purposes as described in § 1.1441–5(b)(2)(ii).

(iv) *Complex trusts and estates.* An amount of U.S. source FDAP income that is also a withholdable payment is treated as being paid to a beneficiary of a complex trust or estate under rules similar to the rules prescribing when withholding is required for chapter 3 purposes as described in § 1.1441–5(b)(2)(iii).

(v) *Grantor trusts.* If an amount of U.S. source FDAP income that is also a withholdable payment is paid to a

grantor trust, a person treated as an owner of all or a portion of such trust is treated as having been paid such income by the trust at the time it is received by or credited to the trust or portion thereof.

(vi) *Special rule for an NWP or NWT.* In the case of a partnership, simple trust, or complex trust that is an NWP or NWT, the rules described in paragraphs (a)(5)(ii) and (iii) of this section shall not apply, and U.S. source FDAP income that is also a withholdable payment is treated as being paid to the partner or beneficiary at the time the income is paid to the partnership or trust, respectively.

* * * * *

(b) * * *

(2) * * *

(v) *Interests owned or held by a related person.* For purposes of determining whether a specified U.S. person is a substantial U.S. owner in a foreign entity described in paragraphs (b)(2)(i) through (iv) of this section, if a specified U.S. person owns or holds, directly or indirectly, any interest in the foreign entity, that interest must be aggregated with any such interest in the foreign entity owned or held, directly or indirectly, by a related person. For purposes of the preceding sentence, a related person is a person or spouse of a person described in § 1.267(c)–1(a)(4), determined by reference to such specified U.S. person.

* * * * *

(f) *Effective/applicability date.* This section generally applies on January 6, 2017. However, taxpayers may apply these provisions as of January 28, 2013. Paragraph (a)(4)(viii) of this section applies to payments made on or after September 18, 2015. (For the rules that apply beginning on January 28, 2013, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2016.)

§ 1.1473–1T [Removed]

■ **Par. 18.** Section 1.1473–1T is removed.

■ **Par. 19.** Section 1.1474–1 is amended by:

■ 1. Revising paragraphs (a)(3)(ii)(B), (d)(1)(i), (d)(1)(ii)(A)(*1*)(*iii*), (d)(1)(ii)(A)(*1*)(*vi*), (d)(1)(ii)(A)(*1*)(*viii*), (d)(1)(ii)(A)(*1*)(*ix*), (d)(1)(ii)(A)(*1*)(*xi*), (d)(1)(ii)(B)(*1*)(*i*), (d)(1)(ii)(B)(*1*)(*iii*) and (*iv*), (d)(1)(ii)(B)(*1*)(*vi*) and (*vii*), (d)(1)(ii)(B)(*1*)(*ix*), (d)(2)(i), (d)(3)(vii), (d)(4)(i)(B), (d)(4)(i)(C) introductory text, (d)(4)(i)(C)(*2*) and (*3*), (d)(4)(i)(E), (d)(4)(ii)(B) and (C), and (d)(4)(iii).

■ 2. Adding paragraph (d)(4)(vii).

■ 3. Revising paragraphs (i)(1), (i)(2), and (i)(2)(iii).

■ 2. Adding paragraphs (d)(4)(vii) and (i)(4).

■ 5. Revising paragraph (j).

The revisions and additions read as follows:

§ 1.1474–1 Liability for withheld tax and withholding agent reporting.

(a) * * *

(3) * * *

(ii) * * *

(B) A Form 8655, ''Reporting Agent Authorization,'' is filed with the IRS by a withholding agent if its agent (including any sub-agent) acts as a reporting agent for filing Form 1042 on behalf of the withholding agent and the agent (or sub-agent) identifies itself as the filer on the Form 1042;

* * * * *

(d) * * *

(1) * * *

(i) *In general.* Except as otherwise provided in paragraph (d)(4) of this section or in the instructions to Form 1042–S, every withholding agent must file an information return on Form 1042–S, ''Foreign Person's U.S. Source Income Subject to Withholding,'' (or such other form as the IRS may prescribe) to report to the IRS chapter 4 reportable amounts as described in paragraph (d)(2)(i) of this section that were paid to a recipient during the preceding calendar year. Except as otherwise provided in paragraphs (d)(4)(ii)(B) (certain unknown recipients) and (d)(4)(i)(B) and (d)(4)(iii)(A) of this section (describing payees includable in reporting pools of a participating FFI or registered deemed-compliant FFI), a separate Form 1042–S must be filed with the IRS for each recipient of an amount subject to reporting under paragraph (d)(2)(i) of this section and for each separate type of payment made to a single recipient in accordance with paragraph (d)(4)(i) of this section. The Form 1042–S shall be prepared in such manner as the form and its accompanying instructions prescribe. One copy of the Form 1042–S shall be filed with the IRS on or before March 15 of the calendar year following the year in which the amount subject to reporting was paid, with a transmittal form as provided in the instructions to the form. Withholding certificates, certifications, documentary evidence, or other statements or documentation provided to a withholding agent are not required to be attached to the form. A copy of the Form 1042–S must be furnished to the recipient for whom the form is prepared (or any other person, as required under this paragraph or the instructions to the form) and to any intermediary or flow-through entity described in paragraph (d)(3)(vii) of this section on or before March 15 of the calendar year following the year in which the amount subject to reporting was paid. A person required by this paragraph (d)(1)(i) to furnish a copy of Form 1042–S to the recipient for whom it is prepared may furnish the copy of Form 1042–S in an electronic format in lieu of a paper format provided it meets the requirements of § 1.1461–1(c)(1)(i)(A). The withholding agent must retain a copy of each Form 1042–S for the period of limitations on assessment and collection applicable to the tax reportable on the Form 1042 to which the Form 1042–S relates (determined as set forth in paragraph (c)(1) of this section). See paragraph (d)(4)(iii) of this section for the additional reporting requirements of participating FFIs and deemed-compliant FFIs.

(ii) * * *

(A) * * *

(*1*) * * *

(*iii*) A participating FFI or a registered deemed-compliant FFI that is an NQI, NWP, NWT, and a U.S. branch of an FFI that is not treated as a U.S. person that applies the rules described in § 1.1471–4(d)(2)(iii)(C) and that provides its withholding agent with sufficient information to determine the portion of the payment allocable to its reporting pools of recalcitrant account holders, payees that are nonparticipating FFIs, and payees that are U.S. persons described in paragraph (d)(4)(i)(B) of this section;

* * * * *

(*vi*) A U.S. branch of an FFI treated as a U.S. person;

* * * * *

(*viii*) An excepted NFFE and passive NFFE that also is not a flow-through entity and that is not acting as an agent or intermediary with respect to the payment;

(*ix*) A foreign person that is a partner or beneficiary in a flow-through entity that is a NFFE (looking through a partner or beneficiary that is a foreign intermediary or flow-through entity);

* * * * *

(*xi*) Any person (including a flow-through entity or U.S. branch) receiving such income that is (or is deemed to be) effectively connected with the conduct of its trade or business in the United States;

* * * * *

(B) * * *

(*1*) * * *

(*i*) A certified deemed-compliant FFI that is an NQI, NWP, or NWT and that fails to provide its withholding agent with sufficient information to allocate

the payment to its account holders and payees;

* * * * *

(*iii*) A participating FFI or a registered deemed-compliant FFI that is an NQI, NWP, or NWT, and a U.S. branch of an FFI that is not treated as a U.S. person that applies the rules described in § 1.1471–4(d)(2)(iii)(C) to the extent it provides its withholding agent with sufficient information to allocate the payment to its account holders and payees that are exempt from withholding under chapter 4;

(*iv*) An account holder or payee of a participating FFI or registered deemed-compliant FFI, and an account holder or payee of a U.S. branch of an FFI that is not treated as a U.S. person that applies the rules described in § 1.1471–4(d)(2)(iii)(C) that is included in the FFI's reporting pools described in paragraph (d)(4)(i)(B) of this section;

* * * * *

(*vi*) An account holder or payee of a nonparticipating FFI except to the extent described in paragraph (d)(1)(ii)(A)(*1*)(*x*) of this section for an exempt beneficial owner;

(*vii*) Except as provided in paragraph (d)(1)(ii)(A)(*1*) of this section, an entity that is disregarded under § 301.7701–2(c)(2) of this chapter as an entity separate from its owner;

* * * * *

(*ix*) A passive NFFE or an excepted NFFE that is a flow-through entity or acts as an intermediary;

* * * * *

(2) * * *

(i) *In general.* Subject to paragraph (d)(2)(iii) of this section, the term *chapter 4 reportable amount* means each of the following amounts reportable on a Form 1042–S for purposes of chapter 4—

(A) An amount of a withholdable payment that is subject to withholding under chapter 4 paid after June 30, 2014;

(B) An amount of a withholdable payment of U.S. source FDAP income (including an amount that would be a withholdable payment but for the fact that it is an amount effectively connected with a U.S. trade or business, as described in § 1.1471–3(a)(4)(ii)) that is also reportable on Form 1042–S under § 1.1461–1(c)(2)(i); or

(C) A foreign passthru payment subject to withholding under chapter 4.

* * * * *

(3) * * *

(vii) The EIN or GIIN (as applicable), status for chapter 3 and chapter 4 purposes (as required on the instructions to the form) of an entity reported under paragraph (d)(3)(vi) of this section;

* * * * *

(4) * * *

(i) * * *

(B) *Payments to participating FFIs, deemed-compliant FFIs, and certain QIs.* Except as otherwise provided in this paragraph (d)(4)(i)(B), a U.S. withholding agent that makes a payment of a chapter 4 reportable amount to a participating FFI or deemed-compliant FFI that is an NQI, NWP, or NWT must complete a Form 1042–S treating such FFI as the recipient. With respect to a payment of U.S. source FDAP income made to a participating FFI or registered deemed-compliant FFI that is an NQI, NWP, or NWT or QI that elects to be withheld upon under section 1471(b)(3) and from whom the withholding agent receives an FFI withholding statement allocating the payment (or portion of the payment) to a chapter 4 withholding rate pool, a U.S. withholding agent must complete a separate Form 1042–S issued to the participating FFI, registered deemed-compliant FFI, or QI (as applicable) as the recipient with respect to each such pool identified on an FFI withholding statement, described in § 1.1471–3(c)(3)(iii)(B)(*2*). If, however, a participating FFI, deemed-compliant FFI, or QI (as applicable) has made an election under § 1.1471–4(b)(3)(iii), for the portion of the payment that the FFI allocates to each recalcitrant account holder that is subject to backup withholding under section 3406, the withholding agent must report on Form 1099 the amount of the payment and tax withheld in accordance with the form's requirements and accompanying instructions. See § 1.1471–2(a)(2)(i) for the requirement of a withholding agent to withhold on payments of U.S. source FDAP income made to a participating FFI or registered deemed-compliant FFI that is an NQI, NWP, or NWT. See also § 1.1471–2(a)(2)(iii) in the case of payments made to a QI. See § 1.1461–1(c)(4)(A) for the extent to which reporting is required under that section for U.S. source FDAP income that is reportable on Form 1042–S under chapter 3 and not subject to withholding under chapter 4, in which case the U.S. withholding agent must report in the manner described under § 1.1461–1(c)(4)(ii) and paragraph (d)(4)(ii)(A) of this section. See paragraph (d)(4)(ii)(A) of this section for reporting rules applicable if participating FFIs or deemed-compliant FFIs provide specific payee information for reporting to the recipient of the payment for Form 1042–S reporting purposes. See paragraph (d)(4)(iii) of this section for the residual reporting responsibilities of an NQI, NWP, or NWT that is an FFI.

(C) *Amounts paid to a U.S. branch.* A U.S. withholding agent making a payment of U.S. source FDAP income to a U.S. branch shall complete Form 1042–S as follows—

* * * * *

(*2*) If the U.S. branch is not treated as a U.S. person and applies the rules described in § 1.1471–4(d)(2)(iii)(C) and provides the withholding agent with a withholding certificate that transmits information regarding its reporting pools referenced in paragraph (d)(4)(i)(B) of this section or information regarding each recipient that is an account holder or payee of the U.S. branch, the withholding agent must complete a separate Form 1042–S issued to the U.S. branch for each such pool to the extent required on the form and its accompanying instructions or must complete a separate Form 1042–S issued to each recipient whose documentation is associated with the U.S. branch's withholding certificate as described in paragraph (d)(4)(ii)(A) of this section and report the U.S. branch as an entity not treated as a recipient; or

(*3*) If the U.S. branch is not treated as a U.S. person and applies the rules described in § 1.1471–4(d)(2)(iii)(C) to the extent it fails to provide sufficient information regarding its account holders or payees, the withholding agent shall report the recipient of the payment as an unknown recipient to the extent recipient information is not provided and report the U.S. branch as provided in paragraph (d)(4)(ii)(A) of this section for an entity not treated as a recipient.

* * * * *

(E) *Amounts paid to NFFEs.* A U.S. withholding agent that makes payments of chapter 4 reportable amounts to an excepted or passive NFFE shall complete Forms 1042–S treating the NFFE as the recipient, except when the NFFE is a flow-through entity or acting as an intermediary and the partner or beneficiary is treated as the payee. In cases in which the chapter 4 reportable amount is also an amount of U.S. source FDAP income reportable on Form 1042–S (described in § 1.1441–2(a)), see also § 1.1461–1(c)(4)(ii)(A) for the extent to which reporting is required with respect to the partners, beneficiaries, or owners of such entities.

(ii) * * *

(B) *Nonparticipating FFI that is a flow-through entity or intermediary.* If a withholding agent makes a payment of a chapter 4 reportable amount to a nonparticipating FFI that it is required to treat as an intermediary with regard

to a payment or as a flow-through entity under rules described in § 1.1471–3(c)(3)(iii), and except as otherwise provided in paragraph (d)(1)(ii)(A)(*1*)(*x*) of this section (relating to an exempt beneficial owner), the withholding agent must report the recipient of the payment as an unknown recipient and report the nonparticipating FFI as provided in paragraph (d)(4)(ii)(A) of this section for an entity not treated as a recipient.

(C) *Disregarded entities.* If a U.S. withholding agent makes a payment to a disregarded entity and receives a valid withholding certificate or other documentary evidence from the person that is the single owner of such disregarded entity, the withholding agent must file a Form 1042–S treating the single owner as the recipient in accordance with the instructions to the Form 1042–S.

(iii) *Reporting by participating FFIs and deemed-compliant FFIs (including QIs, WPs, and WTs) and U.S. branches not treated as U.S. persons*—(A) *In general.* Except as otherwise provided in paragraph (d)(4)(iii)(B) (relating to NQIs, NWPs, NWTs, and FFIs electing under section 1471(b)(3)) and § 1.1471–4(d)(2)(ii)(F) (relating to transitional payee-specific reporting for payments to nonparticipating FFIs), a participating FFI or deemed-compliant FFI (including a QI, WP, or WT), and a U.S. branch that is not treated as a U.S. person that applies the rules described in § 1.1471–4(d)(2)(iii)(C) that makes a payment that is a chapter 4 reportable amount to a recalcitrant account holder or nonparticipating FFI must complete a Form 1042–S to report such payments. A participating FFI or registered deemed-compliant FFI (including a QI, WP, or WT), and a U.S. branch that is not treated as a U.S. person that applies the rules described in § 1.1471–4(d)(2)(iii)(C) may report in pools consisting of its recalcitrant account holders and payees that are nonparticipating FFIs. With respect to recalcitrant account holders, the FFI may report in pools consisting of recalcitrant account holders within a particular status described in § 1.1471–4(d)(6) and within a particular income code. Except as otherwise provided in § 1.1471–4(d)(2)(ii)(F), with respect to payees that are nonparticipating FFIs, the FFI may report in pools consisting of one or more nonparticipating FFIs that fall within a particular income code and within a particular status code described in the instructions to Form 1042–S. Alternatively, a participating FFI or registered deemed-compliant FFI (including a QI, WP, or WT) and a U.S. branch that is not treated as a U.S. person that applies the rules described in § 1.1471–4(d)(2)(iii)(C) may (and a certified deemed-compliant FFI is required to) perform payee-specific reporting to report a chapter 4 reportable amount paid to a recalcitrant account holder or a nonparticipating FFI when withholding was applied (or should have applied) to the payment.

(B) *Special reporting requirements of participating FFIs, deemed-compliant FFIs, FFIs that make an election under section 1471(b)(3), and U.S. branches not treated as U.S. persons.* Except as otherwise provided in § 1.1471–4(d)(2)(ii)(F), a participating FFI or deemed-compliant FFI that is an NQI, NWP, or NWT, and a U.S. branch that is not treated as a U.S. person that applies the rules described in § 1.1471–4(d)(2)(iii)(C) or an FFI that has made an election under section 1471(b)(3) and has provided sufficient information to its withholding agent to withhold and report the payment is not required to report the payment on Form 1042–S as described in paragraph (d)(4)(iii)(A) of this section if the payment is made to a nonparticipating FFI or recalcitrant account holder and its withholding agent has withheld the correct amount of tax on such payment and correctly reported the payment on a Form 1042–S. Such FFI or branch is required to report a payment, however, when the FFI knows, or has reason to know, that less than the required amount has been withheld by the withholding agent on the payment or the withholding agent has not correctly reported the payment on Form 1042–S. In such case, the FFI or branch must report on Form 1042–S to the extent required under paragraph (d)(4)(iii)(A) of this section. See, however, § 1.1471–4(d)(6) for the requirement to report certain aggregate information regarding accounts held by recalcitrant account holders on Form 8966, ''FATCA Report,'' regardless of whether withholdable payments are made to such accounts.

(C) *Reporting by a U.S. branch treated as a U.S. person.* A U.S. branch treated as a U.S. person (as defined in § 1.1471–1(b)(135)) must report amounts paid to recipients on Forms 1042–S in the same manner as a U.S. withholding agent under paragraph (d)(4)(i) of this section.

* * * * *

(vii) [Reserved]. For further guidance, see § 1.1474–1T(d)(4)(vii).

* * * * *

(i) * * *

(1) *Reporting by certain withholding agents with respect to owner-documented FFIs*—(i) Beginning on July 1, 2014, if a withholding agent (other than an FFI reporting accounts held by owner-documented FFIs under § 1.1471–4(d)) makes a withholdable payment to an entity account holder or payee of an obligation and the withholding agent treats the entity as an owner-documented FFI under § 1.1471–3(d)(6), the withholding agent is required to report for July 1 through December 31, 2014, with respect to each specified U.S. person identified in § 1.1471–3(d)(6)(iv)(A)(*1*) and (*2*) the information described in paragraph (i)(1)(iii) of this section.

(ii) Beginning in calendar year 2015, if a withholding agent (other than an FFI reporting accounts held by owner-documented FFIs under § 1.1471–4(d)) makes during a calendar year a withholdable payment to an entity account holder or payee of an obligation and the withholding agent treats the entity as an owner-documented FFI under § 1.1471–3(d)(6), the withholding agent is required to report for such calendar year with respect to each specified U.S. person identified in § 1.1471–3(d)(6)(iv)(A)(*1*) and (*2*) the information described in paragraph (i)(1)(iii) of this section.

(iii) The information that a withholding agent (other than an FFI reporting accounts held by owner-documented FFIs under § 1.1471–4(d)) is required to report under paragraphs (i)(1)(i) and (ii) of this section must be made on Form 8966 (or such other form as the IRS may prescribe) and filed on or before March 31 of the calendar year following the year in which the withholdable payment was made. A withholding agent is not required to report under paragraph (i)(1)(i) or (ii) of this section on a withholdable payment made to a participating FFI or reporting Model 1 FFI that is allocated to a payee that is an owner-documented FFI on an FFI withholding statement when the participating FFI or reporting Model 1 FFI includes on the statement the certification described in § 1.1471–3(c)(3)(iii)(B)(*2*)(*v*), provided that the withholding agent does not know or have reason to know that the certification is incorrect or unreliable. The report must contain the following information—

(A) The name of the owner-documented FFI;

(B) The name, address, and TIN of each specified U.S. person identified in § 1.1471–3(d)(6)(iv)(A)(*1*) and (*2*);

(C) For the period from July 1 through December 31, 2014, the total of all withholdable payments made to the owner-documented FFI, and with respect to payments made after the 2014 calendar year, the total of all withholdable payments made to the owner-documented FFI during the calendar year;

(D) The account balance or value of the account held by the owner-documented FFI; and

(E) Any other information required on Form 8966 and its accompanying instructions provided for purposes of such reporting.

(2) *Reporting by certain withholding agents with respect to U.S. owned foreign entities that are passive NFFEs.* Beginning on July 1, 2014, in addition to the reporting on Form 1042–S required under paragraph (d)(4)(i)(E) of this section, a withholding agent (other than an FFI reporting accounts held by NFFEs under § 1.1471–4(d)) that makes a withholdable payment to, and receives information about any substantial U.S. owners of, a passive NFFE that is not an excepted NFFE as defined in § 1.1472–1(c) shall file a report with the IRS for the period from July 1 through December 31, 2014, and in each subsequent calendar year in which a withholdable payment is made with respect to any substantial U.S. owners of such NFFE. Such report must be made on Form 8966 (or such other form as the IRS may prescribe) and filed on or before March 31 of the calendar year following the year in which the withholdable payment was made. A withholding agent is not required to report under this paragraph (i)(2) on a withholdable payment made to a participating FFI or a registered deemed-compliant FFI that is allocated to a payee that is a passive NFFE with one or more substantial U.S. owners on an FFI withholding statement when the participating FFI or registered deemed-compliant FFI includes on the statement the certification described in § 1.1471–3(c)(3)(iii)(B)(*2*)(*iv*), provided that the withholding agent does not know or have reason to know that the certification is incorrect or unreliable. In the case of an entity to which the preceding sentence does not apply that is a flow-through entity or is acting as an intermediary receiving a withholdable payment allocable to a passive NFFE with one or more substantial U.S. owners, the entity is not required to report with respect to the passive NFFE under this paragraph (i)(2) if it provides to the withholding agent from which it receives the payment documentation sufficient for the withholding agent to report information with respect to the passive NFFE under this paragraph (i)(2), provided that the intermediary or flow-through entity does not know or have reason to know that the withholding agent does not report with respect to the passive NFFE under this paragraph (i)(2). The report must contain the following information—

* * * * *

(iii) For the period from July 1, 2014 through December 31, 2014, the total of all withholdable payments made to the NFFE and, with respect to payments made after the 2014 calendar year, the total of all withholdable payments made to the NFFE during the calendar year; and

* * * * *

(4) *Extensions of time to file.* The IRS shall grant an automatic 90-day extension of time in which to file Form 8966 as required under paragraph (i)(1) or (i)(2) of this section. Form 8809–I, ''Application of Extension of Time to File FATCA Form 8966,'' (or such other form as the IRS may prescribe) must be used to request such extension of time and must be filed no later than the due date of Form 8966. Under certain hardship conditions, the IRS may grant an additional 90-day extension. A request for extension due to hardship must contain a statement of the reasons for requesting the extension and such other information as the form or instructions may require.

(j) *Effective/applicability date.* This section applies on January 6, 2017. However, taxpayers may apply these provisions as of January 28, 2013. (For the rules that apply beginning on January 28, 2013, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2016.)

■ **Par. 20.** Section 1.1474–1T is revised as follows:

§ 1.1474–1T Liability for withheld tax and withholding agent reporting (temporary).

(a) through (c) [Reserved]. For further guidance, see § 1.1474–1(a) through (c)(3).

(d) [Reserved]. For further guidance, see § 1.1474–1(d).

(1) through (3)(ix) [Reserved]. For further guidance, see § 1.1474–1(d)(1) through (3)(ix).

(4) [Reserved]. For further guidance, see § 1.1474–1(d)(4).

(i) through (vi) [Reserved]. For further guidance, see § 1.1474–1(d)(4)(i) through (vi).

(vii) *Combined Form 1042–S reporting.* A withholding agent required to report on Form 1042–S under paragraph (d)(4) of this section (other than a nonparticipating FFI reporting under paragraph (d)(4)(v) of this section) may rely on the procedures used for chapter 3 purposes (provided in published guidance) for reporting on Form 1042–S (even if the withholding agent is not required to report under chapter 3) for combined reporting following a merger or acquisition, provided that all of the requirements for such reporting provided in the Instructions for Form 1042–S are satisfied.

(e) through (j) [Reserved]. For further guidance, see § 1.1474–1(e) through (j).

(k) *Expiration date.* The applicability of this section expires on December 30, 2019.

■ **Par. 21.** Section 1.1474–6 is amended by revising paragraphs (b)(1), (f), and (g) to read as follows:

§ 1.1474–6 Coordination of chapter 4 with other withholding provisions.

* * * * *

(b) * * *

(1) *In general.* In the case of a withholdable payment that is both subject to withholding under chapter 4 and is an amount subject to withholding under § 1.1441–2(a), a withholding agent may credit the withholding applied under chapter 4 against its liability for any tax due under sections 1441, 1442, or 1443. See § 1.1474–1(c) and (d) for the income tax return and information return reporting requirements that apply in the case of a payment that is a withholdable payment subject to withholding under chapter 4 that is also an amount subject to withholding under § 1.1441–2(a).

* * * * *

(f) *Coordination with section 3406.* A participating FFI that makes a withholdable payment that is also a reportable payment (as defined in the relevant sections of chapter 61) to a recalcitrant account holder that is a U.S. non-exempt recipient is not required to withhold under section 3406 if it withholds on the payment at a 30-percent rate in accordance with its withholding obligations under chapter 4. See, however, § 1.1471–4(b)(3)(iii) for the election to withhold on recalcitrant account holders that are non-exempt U.S. recipients under section 3406 instead of withholding under chapter 4.

(g) *Effective/applicability date.* This section applies on January 6, 2017. However, taxpayers may apply these provisions as of January 28, 2013. (For the rules that apply beginning on January 28, 2013, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1 revised April 1, 2016.)

§ 1.1474–6T [Removed]

■ **Par. 22.** Section 1.1474–6T is removed.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 23.** Need Authority

■ **Par. 24.** Section 301.1474–1 is amended by revising paragraph (c) to read as follows:

§ 301.1474–1 Required use of magnetic media for financial institutions filing Form 1042–S or Form 8966.

* * * * *

(c) *Failure to file.* If a financial institution fails to file a Form 1042–S or a Form 8966 on magnetic media when required to do so by this section, the financial institution is deemed to have failed to comply with the information reporting requirements under section 6721 of the Code. See section 6724(c) for failure to meet magnetic media requirements. In determining whether there is reasonable cause for failure to file the return, § 301.6651–1(c) and rules similar to the rules in § 301.6724–1(c)(3) (undue economic hardship related to filing information returns on magnetic media) will apply.

* * * * *

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: December 22, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2016–31601 Filed 12–30–16; 4:15 pm]

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